NO PRIVACY FOR THE INTOLERANT: A REFLECTION ON USING AN ILLEGAL RECORDING OF DONALD STERLING TO SET NBA PRECEDENT

Zachary Stirparo

I. INTRODUCTION

No one was surprised, yet sports history will not forget the infuriating statements Donald Sterling made during a squabble with Ms. V. Stiviano.[1] While Sterling's conversation is contemptuous for a twenty-first century businessman, the NBA's use of an illegally recorded, private conversation to strip Mr. Sterling of his private property interest is suspect.[2] Possibly, the NBA was trying to show that the new commissioner, Adam Silver, was less tolerant of Sterling than his predecessor, David Stern.[3] However, there is more to being a strong leader than jumping on the bandwagon.[4] While Sterling's reputation may be forever tarnished, Silver hastily pitted the NBA in this debacle against every NBA owner, and his or her private life.[5] Adam Silver should have let the free-market and public opinion rip Sterling apart.[6]

Consequently, as is often done, the dividing line between legal and emotional issues is hard to erase.[7] For the sake of this article, whether Mr. Sterling made his statements out of jealousy or racism is

---

[1] *See* Chuck Klosterman, *What Exactly Was Donald Sterling's Offense?*, N.Y. TIMES (May 13, 2014), http://www.nytimes.com/2014/05/18/magazine/what-exactly-was-donald-sterlings-offense.html?_r=0 (noting that Donald Sterling was easily found "guilty" because he had insinuated racist thoughts previously and, thus, his thoughts were finally matched to reprehensible statements).

[2] *See infra* note 29 and accompanying text. Sterling agreed to sell the team, but his hand was certainly forced. *Attorney: Donald Sterling agrees to sell Clippers*, NBA.COM (Jun. 4, 2014, 6:42PM), http://www.nba.com/2014/news/06/04/sterling-agrees-to-sell-clippers.ap/.

[3] *See* Ian O'Connor, Commentary: *Shame on Stern for Sterling Silence*, ESPN N.Y. (April 30, 2014, 7:35AM), http://espn.go.com/new-york/nba/story/_/id/10857899/shame-david-stern-nba-letting-donald-sterling-stick-around ("Adam Silver just killed off the Frankenstein monster that his mentor David Stern helped create..."); *see also* Hunter Felt, *Farewell, Donald Sterling, the worst owner in US Sports*, THE GUARDIAN (July 29, 2014, 13:29 EDT), http://www.theguardian.com/sport/2014/jul/29/donald-sterling-la-clippers-worst-owner ("[s]o it was maybe a matter of bad timing on Sterling's part that Stern, his biggest enabler, stepped down before TMZ released audio tapes …").

[4] *See* Ira Kalab, *Donald Sterling's Ban From the NBA Could Make Him Some Serious Money*, BUS. INSIDER (April 30, 2014, 5:35PM), http://www.businessinsider.com/basketball-ban-could-have-donald-sterling-laughing-all-the-way-to-the-bank-2014-4 ("While just about everyone has been jumping on the 'bash Donald Sterling' bandwagon – including Clippers lovers, haters, sponsors, organizations, and the media, most have overlooked one important thing. Boycotting the Clippers will not financially hurt Sterling. It will hurt the players, the concession stand workers, and surrounding restaurants and shops that make their livelihood from the Clippers and their games.").

[5] *See* Peter Keating, Commentary: *NBA Spent Years Looking Other Way*, ESPN OUTSIDE THE LINES (May 1, 2014), http://espn.go.com/espn/otl/story/_/id/10859219/nba-commissioner-acted-la-clippers-donald-sterling-now-prior-regime-ignored-similar-racist-comments ("Give credit where it's due. In throwing Donald Sterling out of the NBA for life, commissioner Adam Silver is exercising his powers as broadly as his job description will allow … [t]here's a new commissioner in town … [i]n the end, Donald Sterling was his own worst enemy. Good thing for the NBA, because before now, hardly anybody else was willing to take him down.").

[6] See *infra* note 118 and accompanying text. The Commissioner argued that there is a lot of damage to the NBA's relationship with its fans and advertisements, insinuating that economic players have a reason to boycott because of Donald Sterling's remarks. *See also Id.*

[7] *See* Kathleen Parker, Opinion: *Cliven Bundy's and Donald Sterling's Sobering Message*, WASH. POST (Apr. 29, 2014), http://www.washingtonpost.com/opinions/kathleen-parker-cliven-bundys-and-donald-sterlings-sobering-message/2014/04/29/66863b9e-cfcf-11e3-a6b1-45c4dffb85a6_story.html ("First the practical: If you don't want your words broadcast in the public square, don't say them. The Orwellian taint to this advice is not meant to be

irrelevant to the underlying legal issues.[8] However, Sterling's racism is hard to ignore, as his later racist-laced interview with Anderson Cooper is telling.[9]

Regardless, Sterling's racism is irrelevant because his conversation was private, and the legal issues involved are not discriminatorily focused.[10] It is quite surprising that these two facts are so overlooked by the media.[11] Prior to this incident, one would have assumed that the right to argue privately was more absolute, especially since Mr. Sterling's racist comments were not professed publicly like Cliven Bundy.[12]

---

harsh but is offered in recognition of the world in which we live. We're not so much a global village as a small town of gossips. On a higher note, such potential exposure forces us to more carefully select our words and edit our thoughts. This isn't only a matter of survival but is essential to civilization. Speaking one's mind isn't really all it's cracked up to be, as any well-balanced person reading the comments section quickly concludes."). Interestingly, Parker argues that the public should just accept that they are being recording and alter thoughts and comments because of such knowledge. *Id.* ("Say what you will, but you'd best check for recording devices. Alternatively, you might check your thoughts.").

[8] The theory of jealousy was postulated by Mr. Sterling himself in a phone interview. See *Donald Sterling Tells Radar: 'I Intend On Giving An Interview' On Race Rant Scandal — 'Shortly!*,' RADAR ONLINE (May 9, 2014, 2:08PM), http://radaronline.com/exclusives/2014/05/donald-sterling-interview-exclusively-radaronline/ **(**Sterling trying to find a reason why Stiviano should stop posting Instagram pictures of herself with other gentlemen, as he is tired of hearing about her "outings" from his colleagues and friends). This jealousy position was confirmed by Anderson Cooper in Cooper's interview with Mr. Sterling. *See* Cathering E. Shoichet & Steve Almasy, *CNN Exclusive: Donald Sterling Insists He's No Racist, Still Slams Magic Johnson*, CNN (last updated May 13, 2014, 8:03AM), http://www.cnn.com/2014/05/12/us/donald-sterling-interview/index.html?iref=allsearch.

[9] *See* Shoichet & Almasy, *supra* note 8; *See also* Anderson Cooper, *AC360 Exclusive: Magic Johnson Responds to Donald Sterling's Insults*, ANDERSON COOPER 360° (May 13, 2014, 10:09PM), http://ac360.blogs.cnn.com/2014/05/13/ac360-exclusive-magic-johnson-responds-to-donald-sterlings-insults/?iref=allsearch (Magic Johnson's response to Mr. Sterling's comments about himself and Mr. Sterling's previous racist comments); *See also* Anderson Cooper, *AC360 Exclusive: Donald Sterling Talks About Racism, His Marriage and the Future Ownership of the Clippers*, ANDERSON COOPER 360° (May 14, 2014, 10:09PM), http://ac360.blogs.cnn.com/2014/05/14/ac360-exclusive-donald-sterling-talks-about-racism-his-marriage-and-the-future-ownership-of-the-clippers/?iref=allsearch (Sterling still trying to explain his situation and how he is not a racist). In Sterling's interview with Anderson Cooper, while Sterling was trying to apologize for his racist remarks, he ends up providing more racist remarks, especially in his criticism of Magic Johnson. *Id.* For instance, Sterling notes how all African Americans do not give back to their communities like he has. *Id.* He noted Magic Johnson is no role model for children because he slept all-over and got AIDS (even though Johnson does not have AIDS). *Id.* The importance of Anderson Cooper's interview is that Sterling made further racist comments in public, yet the NBA did not base its Charge against Sterling on the Anderson Interview. *See supra* note 120 and accompanying text.

[10] For cases involving discrimination, *see generally* Hous. Rights Ctr. v. Donald Sterling Corp., 274 F. Supp. 2d 1129, 1133-35 (C.D. Cal. 2003) (plaintiffs complained of numerous discrimination violations); *see also* Hous. Rights Ctr. v. Sterling, 2005 WL 3320739 *2 (C.D. Cal. March 2, 2005) (plaintiffs claimed that Sterling discriminated because of his preference for Korean tenants). Assumedly, discrimination in general would also involve Mr. Sterling's beliefs. *See generally Complaint for Plaintiff, Baylor v. NBA*, 2009 WL 380774 (Cal. Super. 2009) (No. BC407604) (complaint involving race discrimination).

[11] *See* Carol Hartsell, *Bill Maher Argues For Privacy, Free Speech in Wake of Donald Sterling Scandal*, HUFFINGTON POST (May 10, 2014, 11:23AM), http://www.huffingtonpost.com/2014/05/10/bill-maher-donald-sterling_n_5301576.html (noting Bill Maher drawing parallel between Sterling's right to privacy and Fourth Amendment protection).

[12] *See* Adam Nagourney, *A Defiant Rancher Savors the Audience that Rallied to His Side*, N.Y. TIMES, (Apr. 23, 2014), http://www.nytimes.com/2014/04/24/us/politics/rancher-proudly-breaks-the-law-becoming-a-hero-in-the-west.html?hpw&rref=us&_r=0 ("'They abort their young children, they put their young men in jail, because they never learned how to pick cotton. And I've often wondered, are they better off as slaves, picking cotton and having a family life and doing things, or are they better off under government subsidy? They didn't get no more freedom. They got less freedom.'"). It should be noted that Mr. Bundy's notoriety was based on him grazing his cattle on

Additionally, Sterling's conversation is not being used by the NBA for a discrimination suit, but to strip Sterling of his property in the form of ownership rights.[13]

Certainly, Donald Sterling's bizarre past is striking, but *he* is not the issue.[14] When all Sterling's racist thoughts and opinions are placed to the side, the only legal issue that remains is whether the NBA should hold Sterling legally accountable for a conversation that was illegally obtained and recorded in the private confines of a home.[15] The over-arching question is not whether someone *wants* a private conversation used against him or her, but whether the law *allows* a private conversation to be used against him or her.[16] Thus, regardless of whether the NBA Owner is a sinner or a saint, the NBA Owner should never have to worry that his or her private statements could be used to terminate his or her ownership.[17]

Part II of this article sets forth the facts surrounding the racist remarks that Donald Sterling made. Part III looks at the history of constitutional privacy in California (where the recording took place), the evolution of this constitutional privacy through the common law, and the statutory developments in California. Part IV discusses the legal battle between the NBA and Sterling, beginning with the NBA's Charge against Sterling. Part V discusses how the NBA should not be able to use an illegal recording to deprive Sterling of his ownership rights. Finally, Part VI concludes.

federal land without the government's permission, owing the government "more than $1 million in grazing fees," and still protesting a federal court's jurisdiction over himself. *See id.* While this fact should not be used to paint Mr. Bundy in even more of a negative light, these facts point out that he was not goaded on, but freely expressed his repulsive views when asked about his thoughts on the federal government. *See id*; *see also* Robert Mackey, *Video of Rancher Cliven Bundy's Remarks on Race*, THE LEDE: THE N.Y. TIMES NEWS BLOG (Apr. 24, 2014, 4:25PM), http://thelede.blogs.nytimes.com/2014/04/24/video-of-rancher-cliven-bundys-remarks-on-race/?module=Search&mabReward=relbias%3Ar (Bundy's original remarks found at approximately 17:50-19:10).

[13] *See infra* notes 103-128.

[14] *See generally* Nathan Fenno, Kim Christensen & James Rainey, *Donald Sterling Built an Empire and an Image; Words were His Undoing*, LA TIMES (Aug. 2, 2014, 6:52PM), http://www.latimes.com/local/la-me-donald-sterling-20140803-story.html#page=1 (overview of Sterling's history and background).

[15] *See infra* note 88 and accompanying text.

[16] Tung Yin, *Donald Sterling and Bad Things Said in "Private"* (Brent Nesbitt ed.), JURIST (June 30, 2014, 5:00PM), http://jurist.org/forum/2014/06/tung-yin-sterling-privacy.php (contrasting Bill Maher's point-of right to privately express opinions without public ramifications on employment or economics with a political analyst's broader argument that First Amendment is not involved here because First Amendment does not protect against private, non-government employment ramifications).

[17] Ironically, NBA owner Levenson was not afforded the same attention from the NBA, as Sterling, for similar racist comments, *see* Nathan Fenno, *Donald Sterling Attorney Blasts NBA After Hawks Owner's Email Surfaces*, LA TIMES (Sept. 8, 2014, 10:46AM), http://www.latimes.com/sports/sportsnow/la-sp-sn-donald-sterling-nba-hawks-20140908-story.html ("Samini, who claimed Levenson's email was brought to the NBA's attention by a third party, said he believes that further incriminating communications involving team owners will surface in the aftermath of Sterling's recorded comments … '[t]here's not a single owner in the NBA who is going to be able to withstand the scrutiny that's been established.").

II. FACTS

A. Sterling's Racist Remarks

Mr. Sterling was the owner of the Los Angeles Clippers (Clippers), stemming from a 1981 purchase when the team's home games were played in San Diego, California.[18] The firestorm began when, on approximately April 25, 2014, the gossip website TMZ posted an audiotape online of a private conversation between Donald Sterling and his companion Ms. V. Stiviano.[19] The audiotape captured a conversation that Ms. Stiviano and Mr. Sterling had in her living room, which she secretly recorded.[20]

The argument revolved around Mr. Sterling not wanting Ms. Stiviano to be seen with "'black people'" at a Clippers game or on her Instagram.[21] Specifically, Sterling inquired into why Stiviano was "taking pictures with minorities" ; Stiviano responded with, "[w]hat's wrong with minorities? What's wrong with black people?" Sterling responded, "[n]othing. Nothing."[22] Stiviano pressed on by asking why

---

[18] *See* Complaint for Plaintiff ¶7, at 2, Sterling v. NBA, No. CV14-4192 (C.D. Cal. filed May 30, 2014) [hereinafter May 30th Complaint]; *see also The World's Billionaires: #1007 Donald Sterling*, FORBES (last visited Sept. 4, 2014, 5:05PM), http://www.forbes.com/profile/donald-sterling/ (Donald Sterling's profile). Later in time, the Clippers franchise was moved to Los Angeles in 1984 and in 2005, the Clippers franchise was transferred to the Sterling Family Trust ("Trust"). *See* May 30th Complaint, *supra* note 18, ¶7, at 2. The LA Clippers is managed by the franchise and private corporation LAC Basketball Club, Inc. ("LAC"), which Mr. Sterling owns as the sole shareholder. *See* Complaint for Plaintiff, Sterling v. Sterling, No. BC552470 (Cal. App. Dep't Super Ct. filed July 22, 2014) [hereinafter July 22d Complaint].

[19] *See* May 30th Complaint, *supra* note 18, ¶8, at 2; *See Clippers Owner Donald Sterling to GF – Don't Bring Black People to My Games, Including Magic Johnson*, TMZ (last visited Sep. 4, 2014), http://www.tmz.com/videos/0_wkuhmkt8/ (for the original TMZ tape); See also Kyle Wagner, *Exclusive: The Extended Donald Sterling Tape*, DEADSPIN (April 27, 2014, 11:15AM), http://deadspin.com/exclusive-the-extended-donald-sterling-tape-1568291249 (including original TMZ tape plus extended footage). It should be noted that the NBA admitted prior knowledge of this audio recording (before it was released) on the evening of April 24, 2014. *See* Charge of Comm'r Adam Silver before National Basketball Association Board of Governors, In re LAC Basketball Club, Inc., In the Matter of the Termination of Membership ¶6, at 3 (May 18, 2014) [hereinafter Charge]. Noteworthy is that NBA Commissioner Adam Silver believed the TMZ tape to be placed online on Apr. 26, 2014 around 1:00 A.M. Eastern Time, which gives the NBA more than a days prior-notice about the recording. *Id.* ¶7, at 3.

For information concerning Mr. Sterling and Ms. Stiviano's relationship, see Notice of Demurrers and Demurrers to Plaintiff's Complaint; Memorandum of Points and Authorities in Support Thereof of the Defendant §18, Sterling v. Stiviano, No. BC 538659 (Cal. App. Dep't Super. Ct. filed April 21, 2014). And while Mr. Sterling has indicated a desire, Ms. Stiviano has alleged that Mr. Sterling desires men. *See Donald Sterling Tells Radar*, *supra* note 8; *See* Ron Dicker, *Donald Sterling is Gay, V. Stiviano Claims in Lawsuit*, HUFFINGTON POST (Aug. 22, 2014, 9:57AM), http://www.huffingtonpost.com/2014/08/22/donald-sterling-gay_n_5698987.html. Also, while Mrs. Sterling was suing Ms. Stiviano for Donald Sterling's transfer of [marital] community property to Stiviano, *see generally* Verified Complaint for Plaintiff, Sterling v. Stiviano, No. BC538659 (Cal. App. Dep't Super. Ct. filed Mar. 7, 2014), it is unclear what the relationship was and how much Mrs. Sterling knew, as Mrs. Sterling claims Stiviano "seduced" her husband as a "target." *See id.* ¶5, at 2-3. Thus, the relationship is far from clear.

[20] *See* May 30th Complaint, *supra* note 18, ¶9, at 2. It should be noted that the full recording was separated into two parts, *see* Charge, *supra* note 19, ¶7, at 3, TMZ acquired approximately the beginning two-thirds of the recording, while DeadSpin acquired the ending one-third of the recording. *See supra* note 19 and accompanying text. Likewise, it is Mrs. Sterling's belief that Ms. Stiviano's releasing of the tape was "retaliation" for Mrs. Sterling's suit against Ms. Stiviano. *See* July 22d Complaint, *supra* note 18, ¶5(a), at 8 ("In apparent retaliation by the defendant in the suit, audio recordings of Donald expressing racially offensive remarks … became public.").

[21] *See* May 30th Complaint, *supra* note 18, ¶10, at 2; *See also* Charge, *supra* note 19, ¶¶8-13, at 3-5 (agreeing while providing a further written transcript of parts of the conversation).

[22] *See* Charge, *supra* note 19, ¶9, at 3 (quoting specific lines from Sterling and Stiviano's recordings).

Sterling had a problem with Hispanics.[23] Sterling said it was like "talking to an enemy" and stated minorities were "fabulous."[24] In another retort to whether skin color mattered, Sterling responded by calling Stiviano "stupid" and telling her that people think ill of her because of her "Instagrams" in which she is "walking with black people."[25] In a harsher statement, Sterling tells Stiviano that "[she can] sleep with them, [she can] bring them in, [she] can do whatever [she] want[s]. The little [he] ask[s] [is she] … not bring them to [his] games."[26] Sterling further reprimands Stiviano for "broadcast[ing] that [she is] associating with black people."[27] Sterling not only criticized her for taking pictures with Magic Johnson, even though Sterling thinks Johnson "should be admired" and despite "allowing" her to "admire him, bring him [to her home], feed him, [and] f*** him," but also states that he knows his whole team is black because Sterling states "I support them and give them food, and clothes, and cars, and houses. Who gives it to them? Does someone else give it to them?"[28]

A "public backlash" ensued, and on April 29, 2014, NBA Commissioner Adam Silver issued sanctions against Sterling; a 2.5 million dollar fine, a life-time ban from Clippers' "operation or involvement" and all other NBA games; and set up a June 3, 2014 NBA Board of Governors meeting to force Sterling to sell the Clippers.[29] Initially it was unknown whether the recordings were authentic, and Sterling denied the recording's authenticity noting that he believed his statements had been altered and words added in after-the-fact.[30] However, the recordings were determined to be authentic, and Sterling admitted to their authenticity as well.[31]

---

[23] *See id.* (quoting specific lines from Sterling and Stiviano's recordings).
[24] *See id.* (quoting specific lines from Sterling and Stiviano's recordings).
[25] *See id.* ¶9, at 4 (quoting specific lines from Sterling and Stiviano's recordings).
[26] *See id.* ¶10, at 4 (quoting specific lines from Sterling and Stiviano's recordings).
[27] *See id.* ¶11, at 4 (quoting specific lines from Sterling and Stiviano's recordings).
[28] *See id.* ¶¶112-13, at 4-5 (quoting specific lines from Sterling and Stiviano's recordings).
[29] *See* May 30th Complaint, *supra* note 18, ¶11, at 3 (noting that Commissioner Silver only investigated for three-days); *See also* Charge, *supra* note 19, ¶21, at 6 (noting that the banning of Sterling was publicly announced and that Silver "would urge" the Board to "terminate Mr. Sterling's ownership"). Commissioner Silver admits that the investigation was only three days. *See id.* ¶¶15-20, at 5-6. However, Silver focuses on all the research that went into those three days, including: an interview with Donald Sterling over the telephone, face-to-face interview with V. Stiviano, face-to-face interview with the Clippers President, interview with Mrs. Sterling over the telephone, interview with Stiviano's sister (who was present for the conversation) over the telephone, and an audio expert's analysis of the audio recordings. *See id.* ¶15. Also, the Commissioner Silver allowed Sterling to present evidence to the NBA, and then, after Sterling decline this interview, the NBA's general counsel informed Sterling that Silver "was willing to speak" with Sterling about the recordings before the investigation into the recordings authenticity was completed; however, Sterling refused. *Id.* ¶¶18-19, at 6.

Commissioner Silver also spills a lot of ink harping on general harms that occurred between the NBA and its professed values, owners, fans, players, Clippers personnel, sponsors, licensees, community, and government leaders. *See* Charge, *supra* note 19, ¶¶27-54, at 8-16 (establishing generalities with phrases like "number of fans," "thousands of NBA fans," "many players," "upset many," "across the country," etc.). In fairness, besides specifically pointing to President Barack Obama, *see id.* ¶50, the Charge's focus on Sponsors and licensees was specific-naming Adidas, American Express, Disney, ESPN, Turner Broadcasting, Samsung, State Farm, Sprint, Kia, Coca-Cola, Anheuser-Busch InBev, Gatorade, Diageo, Cisco, SAP, BBVA, AquaHydrate, CarMax, Chumash Casino, Commerce Casino and Hotel, LoanMart, Lumber Liquidators, Mandalay Bay Hotel, Mercedes, Red Bull, Southern California Ford, Virgin America, and Yokohama Tires-most of which either expressed strong concern about continuing on as sponsors or licensees, or "terminated or suspended" relationship ties. *See id.* ¶¶45-48, at 13-15.
[30] *See* Charge, *supra* note 19, ¶¶16-17, at 5-6.
[31] *Id.* ¶20, at 6; For discussion on the recordings, *see infra* notes 129-134 and accompanying text.

B. The NBA Charge's Aftermath

The NBA continued their investigation into Mr. Sterling from May 5, 2014 through May 15, 2014; however, this ten-day investigation is hotly disputed by both sides.[32] On May 20, 2014, Commissioner Silver stated during a press conference that he would rather Mr. Sterling sell the team than force Sterling to sell the team, but Silver noted that Mrs. Sterling owned fifty-percent of the team because the team was owned through the Sterling Family Trust.[33] On May 22, 2014, Mr. Sterling's lawyer wrote to the NBA affirming that Mr. Sterling "agree[d] to the sale of his interest," and "authorize[d] [his wife] to negotiate with the [NBA]."[34] Mrs. Sterling began taking steps and meeting with "potential buyers."[35] Likewise, on May 27, 2014, both Mr. and Mrs. Sterling filed separate answers to the Commissioner's charge; however, the NBA affirmed that the Board of Governors meeting would continue as scheduled.[36] With Mr. Sterling expecting the Board's meeting to commence on June 3, 2014, Mrs. Sterling claimed that she reached a $2 billion sales agreement with former Microsoft Chief Executive Officer Steve Ballmer.[37] On May 30, 2014, Mrs. Sterling told Mr. Sterling that the Board meeting was "cancelled or was going to be cancelled," which was verified by the NBA.[38]

C. Sale to Former Microsoft CEO Ballmer

Based on the forth-coming sale of LAC to Steve Ballmer, the NBA withdrew its Charge on May 30, 2014, but stated a right to "renew [or] file a new or amended" charge at a later date.[39] Furthermore, the NBA and Mrs. Sterling entered into a settlement agreement that required Mrs. Sterling to complete the sale to Ballmer before September 15, 2014.[40] While Mr. Sterling consented to the transaction in writing on May 22, 2014,[41] Mr. Sterling undermined this writing by revoking the Trust completely on June 9, 2014,[42] before

[32] *See* Charge, *supra* note 19, ¶¶22-26, at 7-8.
[33] *See* May 30th Complaint, *supra* note 18, ¶14, at 3.
[34] *Id*. ¶15, at 4.
[35] *Id*. ¶16, at 4.
[36] *Id*. ¶¶17-21, at 4-5.
[37] *Id*. ¶¶22-23, at 5.
[38] *Id*. ¶24, at 5; *See* Ex Parte Petition (1) for Confirmation of Trustee's Acts and Instructing Trustee and (2) for Order Directing Trustee Under Probate Code §1310(b) to Prevent Injury or Loss to Trust, 114 ex. 18, *In re* The Sterling Family Trust, No. BP152858 (Cal. App. Dep't Super Ct. filed June 11, 2014) [hereinafter June 11th Ex Parte Petition] ("Consistent with the foregoing, the Board of Governors hearing that was scheduled for June 3, 2014 is hereby canceled.").
[39] *See* June 11th Ex Parte Petition, *supra* note 38 ("You have advised the NBA that your client, Shelly Sterling, as sole trustee of the Sterling Family Trust, has executed a binding term sheet to sell LAC Basketball Club, Inc. to Steve Ballmer, and that it is the intention of those parties to proceed promptly to a closing of the transaction. As a result, the Commissioner is hereby withdrawing the Charge dated May 19, 2014, in the Matter of the Termination of the NBA membership of LAC Basketball Club, Inc. (the 'Charge'). The withdrawal of the Charge is made without prejudice and the NBA reserves all of its rights, *including* the right to renew the Charge or file a new or amended charge at a later date."). While this case note will not specifically address the sale, subsequent developments about the LA Clippers are important in showing that while the NBA did not "force" Mr. Sterling to sell per se, the NBA's actions-including meetings with Mrs. Sterling alone, *see* July 22d Complaint, *supra* note 18, ¶14, at 3-directly affected Mr. Sterling's property rights in the Clippers. *See generally id.* (describing details of LA Clippers sale at $2 billion).
[40] *See id.* ¶5(e), at 11.
[41] *See id.* 103 ex. 16.
[42] *See* July 22d Complaint, *supra* note 18, ¶25, at 5; *See also* June 11th Ex Parte Petition, *supra* note 38, ¶5(h), at 13 ("Although, at times, Donald has consented to a sale, he has repeatedly changed his mind."). Mrs. Sterling noted that Donald Sterling changed his mind multiple times from May 22, 2014 through the final June 9, 2014 change.

Mrs. Sterling filed her confirmation petition with the probate court.[43] Mrs. Sterling requested a speedier determination and resolution by the probate court because she was concerned with the lengthy appellate process and Mr. Sterling's revocation of the trust halting the sale.[44] In an oral decision, the California Probate Court affirmed Mrs. Sterling sale and denied the right for Donald Sterling to halt the sale.[45] After a California Appellate Court denied Mr. Sterling's appeal to stay the sale, it seems unlikely Donald Sterling will appeal the decision to the California Supreme Court.[46]

See id. One can only assume that this final change in heart for Mr. Sterling was based on his belief that his wife had tricked him into doctor's visits in order for him to be deemed unable to be a co-trustee of the Trust. *See* July 22d Complaint, *supra* note 18, ¶¶15-18, at 3-4; *See also* June 11th Ex Parte Petition, *supra* note 38, at 73-102 exs. 9-15 (showing included and additional: doctor's credentials, reports on Mr. Sterling, and the doctor's prognosis that Donald Sterling is unfit).

[43] *See* June 11th Ex Parte Petition, *supra* note 38, ¶5(g), at 12.

[44] See id. ¶¶5(h)-6, at 13-16 (stating "[p]etitioner requests that this Court direct Petitioner under Probate Code §1310(b) to consummate the sale of the Clippers as provided … notwithstanding any appeal that may be taken" and "[p]etitioner does not believe that Donald had capacity on June 9, 2014 to execute the June Revocation").

[45] *See* Transcript of Oral Decision at 39, *In re* The Sterling Family Trust, No. BP152858 (Cal. App. Dep't Super Ct. July 28, 2014, 1:40PM), *available at* http://www.jdsupra.com/legalnews/transciript-of-proceedings-re-closing-ar-13541/. In evaluating credibility, Judge Levanas held Rochelle (Shelley) Sterling to be more credible, noting that Donald himself told her that he was consenting to the sale of the Clippers because he wanted "to make [Rochelle] happy." *See id.* at 27, ll. 6-7. The judge also found that Donald Sterling's refusal to sign for sale to Ballmer was not based on "the best interest of the trust," and neither were the doctoral examinations of Donald Sterling based on fraud, undue influence, or unclean hands, as Donald Sterling was legally required to submit to these evaluations. *See id.* at 28-29. This was especially supported by Donald Sterling's "voluntar[y] participat[ion]" with the doctors' examinations. *See id.* at 28, ll. 20-22 (noting no requirement that [Donald Sterling] be advised about the purpose of an examination").

Likewise, while there was no case on point for the issue of whether Mrs. Sterling's sale of the team could occur, even though Mr. Sterling revoked the trust before the sale was complete, the probate court determined that Mrs. Sterling was allowed to do so because sec. 15407(b) of the California Probate Code allows a trustee to "wind up the affairs of the trust" after the termination of the trust. *See id.* at 29-31 (internal quotation marks omitted). Concurrently, the judge also noted that Mrs. Sterling could transfer the shares of LAC, as Rochelle Sterling was chairman of the board of LAC when she entered into the contract to sell and, at that time, the Trust owned one-hundred percent of LAC's stock and all transactions were prior to Donald Sterling revoking of the Trust. *See id.* at 31-32. Lastly, the court approved the sale for completion based on the California Probate Code sec. 1310(b), which allows the court to "direct a trustee to take actions as if no appeal were pending for the purposes of preventing injury or loss to a person or property." *See id.* at 32-39; *See also Judge Oks Record-Setting $2B Sale of Clippers*, NBA NEWS (July 28, 2014, 5:54PM), http://www.nba.com/2014/news/07/28/judge-oks-clippers-sale.ap/index.html?ls=iref:nbahpt3a (last updated July 28, 2014, 11:59PM).

[46] Nathan Fenno, *'No Final Decision' from Donald Sterling on State Supreme Court Appeal*, LATIMES (Aug. 15, 2014, 12:25PM), http://www.latimes.com/sports/sportsnow/la-sp-sn-no-final-decision-from-donald-sterling-on-appealing-clippers-sale-to-state-supreme-court-20140815-story.html.

III. BACKGROUND

A. California and Privacy[47]

1. California's Constitutional Privacy

[47] As Commissioner Silver denied doing business with the Central District of California, and re-asserted that the NBA League's office is located in New York, if there were a suit against the NBA, the NBA would most likely argue for New York law to apply to the legality of the recording. *See* NBA Answer and Counterclaim, *infra* note 175, ¶3, at 2 (denying Complaint for Plaintiff ¶3, at 1, Sterling v. NBA, No. CV14-4192 (C.D. Cal. filed May 30, 2014) (while the NBA is not the one who recorded the conversation, the NBA Constitution requires New York law to apply when violations of the NBA Constitution occur; therefore, it is likely Commissioner Silver would want New York law to be applied.)) New York law also holds "eavesdropping," with a "mechanical overhearing" device, to be unlawful. *See* N.Y. PENAL LAW § 250.05 (McKinney 2014) ("A person is guilty of eavesdropping when he unlawfully engages in wiretapping, mechanical overhearing of a conversation, or intercepting or accessing of an electronic communication."). Mechanically overhearing a conversation, as defined by New York law, includes "recording [] a conversation or discussion, without the consent of at least one party …." *See* N.Y. PENAL LAW § 250.00 (McKinney 2003) ("'Mechanical overhearing of a conversation' means the intentional overhearing or recording of a conversation or discussion, without the consent of at least one party thereto, by a person not present thereat, by means of any instrument, device or equipment."); *see also* Flagler v. Trainor, 663 F.3d 543, 550 n.13 (2d Cir. 2011) ("In general, so long as one party to a conversation consents to its recording, the recording is lawful under both New York and federal law."). While the New York Code requires the eavesdropping party not to be present, present recording has been found to constitute eavesdropping. *See* §250.00; *see also* People v. Powers, 839 N.Y.S.2d 865, 866 (N.Y. App. Div. 2007); *but see* People v. Gibson, 246 N.E.2d 349, 350 (N.Y. 1969) ("The use of a tape recorder by a party to a conversation to preserve the exact conversation and provide for its re-enactment, rather than a contemporaneous transmittal, has likewise been held not to violate the constitutional rights of the accused.").

However, the Southern District of New York has decided that a conflict of laws issue will be decided in favor of where the recording occurred. *See* Golden Archer Invs., LLC v. Skynet Fin. Sys., 908 F. Supp. 2d 526, 530, 539 (S.D.N.Y. 2012) (noting that while New York only required one person involved in a recorded telephone call to consent, Illinois law did not, and since the tort was done to an Illinois company and was done in Illinois, New York law would bow to Illinois privacy law on the matter); *see also* Reporters Committee for Freedom of the Press, *Reporter's Recording Guide: A State-by-State Guide to Taping Phone Calls and In-Person Conversations* 12, 19 (2012) (discussing New York's laws on recording and wiretapping); *Golden Archer*, 908 F. Supp. 2d at 539 (in regards to the conflict of laws, the court noted that the New York Court of Appeals should resolve the issue of whether New York would "always apply the law of [other] states," however, the court found that because the recording party knew the other party was specifically in Illinois, applying Illinois law was appropriate). Alternatively, if New York law applied, New York excludes the use of eavesdropping evidence in court, or related proceedings, but it is unclear whether that would encompass an NBA Board of Governors meeting. *See* N.Y. C.P.L.R. 4506 (McKinney 2014) ("The contents of any overheard or recorded communication, conversation or discussion, or evidence derived therefrom, which has been obtained by conduct constituting the crime of eavesdropping, as defined by section 250.05 of the penal law, may not be received in evidence in any trial, hearing or proceeding before any court or grand jury, or before any legislative committee, department, officer, agency, regulatory body, or other authority of the state, or a political subdivision thereof; provided, however, that such communication, conversation, discussion or evidence, shall be admissible in any civil or criminal trial, hearing or proceeding against a person who has, or is alleged to have, committed such crime of eavesdropping."); *see also* People v. Park, 855 N.Y.S. 2d 809, 811 (N.Y. App. Div. 2008) (supporting the barring of illegally recorded conversation by C.P.L.R. 4506 as evidence); *but see* People v. Qike, 700 N.Y.S.2d 640, 744 (N.Y. App. Div. 1999) (noting that although there is no statutory authority for excluding evidence in a criminal trial, the state was allowed to because of New York's "'strong public policy of protecting citizens against the insidiousness of electronic surveillance by both governmental agents *and private individuals*.'" (emphasis added)).

Prior to 1972, California did not have a constitutional protection of privacy for individuals.[48] However, the protection of privacy was read into the "happiness clause" of the California Constitution prior to 1972.[49] The California Supreme Court has noted that this privacy protection is broader than the U.S. Constitution's privacy right.[50] Notably, the California Supreme Court has not allowed the U.S. Constitution's narrower privacy protections to encroach on the broader privacy rights afforded Californians.[51] The broader California privacy right has been stated as protecting " our homes, our families, our thoughts, our emotions, our expressions, our personalities, our freedom of communion and our freedom to associate . . . ."[52]

[48] See J. Clark Kelso, *California's Constitutional Right to Privacy*, 19 PEPP. L. REV. 327, 328 (1992) (noting that the people of California, at the legislature's behest, added privacy as an "inalienable right[]" under the California Constitution's article 1, section 1). The privacy section has been used to limit the funding of abortion, stop police officers from "posing as college students" to acquire information which is not related to illegal activity, allow more than five people (not from the same family) to live in one house, and limit discovery of bank financial information and sexual history and preferences. *See id.* at 328-29.

[49] *See id.* at 393 (noting Melvin v. Reid as the case that included privacy protection in the happiness clause); *accord* Melvin v. Reid, 297 P. 91, 93 (Cal. Dist. Ct. App. 1931) ("In the absence of any provision of law, we would be loath to conclude that the right of privacy as the foundation for an action in tort, in the form known and recognized in other jurisdictions, exists in California. We find, however, that the fundamental law of our state contains provisions which, we believe, permit us to recognize the right to pursue and obtain safety and happiness without improper infringements thereon by others.").

[50] *See id.* at 329 (noting that the California Supreme Court's cases indicate a similar broad right); *see also* Committee to Defend Reproductive Rights v. Myers, 625 P.2d 779, 784 (Cal. 1981) ("The federal right, we noted, 'appears to be narrower than what the voters approved in 1972 when they added privacy to the California Constitution.'" (internal quotation marks omitted)).

[51] *See Myers*, 625 P.2d at 784 (citing City of Santa Barbara v. Adamson, 610 P.2d 436, 439 (Cal. 1980)). *Myers* involved the question of whether California, which provides the poor with "medical services," is required to fund abortions. *See id.* at 780-81. While not similar, *Myers* involves the question of California's ability to deny, an individual, a California constitutional right of "procreative choice," and, therefore, involves an interpretation of California's privacy right. *See id.* at 81.

[52] *See* White v. Davis, 533 P.2d 222, 233 (Cal. 1975) (internal quotation marks omitted) ("The right of privacy is the right to be left alone. It is a fundamental and compelling interest." (internal quotation marks omitted)). It is unclear why an implicit privacy right (the U.S. Constitution) should be narrower than an expressed privacy right (the California Constitution) just because the expressed privacy right has the *future*-ability to encompass more situations and is not limited by any enacting constitutional provisions. *See* Kelso, *supra* note 48, at 329-31 (noting that the Supreme Court of California, on a criminal defendant privacy issue, stated that the California privacy right and Fourth Amendment privacy right were "'coextensive.'") Most likely the expressed is broader because it was added to the constitution based on ballot votes, thus, allowing the courts to broaden the scope, as if the people were voting for an expansive right of privacy for themselves. *See id.* at 331-32 (noting that, although the California Supreme Court does refer the "ballot argument," the court mainly plays "lip service" to it and simply uses the argument to broaden when the court wants to broaden). The court's "lip service" does not especially make sense since most voters did not pay attention to the arguments made on the ballot. *See id.* at 331 ("contrary to recent empirical studies which demonstrate that ballot arguments play a relatively minor role in influencing voters"). Ballot analysis is based on "voter participation" in the passing of laws. *See id.* at 340. A ballot argument is simply an argument for the proposed "initiative," in other words, "a campaign statement which is intended to influence voters in favor of a particular constitutional or statutory change," here the inclusion of privacy in the California Constitution. *See id.* at 417, 429. The thought is that Voters validate the amendment by having say in (a) whether the "ballot argument" for a proposed bill is included on the ballet, and (b) whether it passes through voting. *See id.* The argument is based on the assumption that democracy rules in establishing one's constitution; however, this has been argued not to be the case. *See id.* at 426-30.

The California privacy right has been defined as an "individual's reasonable expectation of privacy against a serious invasion."[53] Proving a violation of a privacy right requires a showing of "(1) a legally protected privacy interest, (2) a reasonable expectation of privacy under the circumstances, and (3) a serious invasion of the privacy interest."[54] The violated person's privacy interest can be combatted by the opposing side establishing "'protective measures, safeguards, and alternatives'" that the defendant could have taken advantage of or which would have "minimize[d] the intrusion."[55] Nevertheless, the context of the privacy and defenses are "critical."[56] However these factors do not prevent the balancing of privacy interests and the conduct's "justification."[57]

Sheehan v. San Francisco 49ers, Ltd. expanded on past California Supreme Court cases by prohibiting prior case law from applying the privacy right in every situation.[58] *Sheehan* involved the question of whether the 49ers requiring a NFL policy of "patdown searchers" of all people who enter the 49ers' stadium, violated a person's constitutional right to privacy under California's Constitution.[59] In asking whether NFL team "patdown searches" invaded privacy, *Sheehan* ignored the first protected privacy interest that is part of the California constitutional privacy right, the right for one's private information not to be "disseminat[ed]," and applied the second assumed right under the California Constitution, the ability for a California resident to be secure in their personal autonomy.[60] The case was remanded because the court did not have enough facts to know if an expectation of privacy was "reasonable" in the setting of "patdown searches" in the first place.[61] Importantly, however, the court found that pat down searches fit the second protected privacy interest, and that the question of whether spectators had a reasonable expectation of privacy should be buttressed by whether there was a possibility of alternative privacy "invasions" (i.e. something other than patdown searches to determine safety) that did less damage to the spectators' privacy rights.[62]

[53] *See* Sheehan v. San Francisco 49ers, Ltd., 201 P.3d 472, 477 (Cal. 2009) (internal quotation marks omitted) (citing Pioneer Electronics, Inc. v. Superior Court, 150 P.3d 198 (Cal. 2007)).
[54] *See id.* (internal quotation marks omitted) (citing Intern. Federation of Professional and Technical Engineers v. Superior Court, 165 P.3d 488 (Cal. 2007)).
[55] *See id.*
[56] *See id.*
[57] *See id.* ("These elements do not eliminate the necessity for weighing and balancing the justification for the conduct in question against the intrusion on privacy resulting from the conduct in any case that raises a genuine, nontrivial invasion of a protected privacy interest.").
[58] *See id.* at 477-78 (not allowing *Hill* to apply to private entities for every privacy claim); *but see* Hill v. NCAA, 865 P.2d 633, 656 (Cal. 1994) ("Legitimate interests derive from the legally authorized and socially beneficial activities of government and private entities. Their relative importance is determined by their proximity to the central functions of a particular public or private enterprise. Conduct alleged to be an invasion of privacy is to be evaluated based on the extent to which it furthers legitimate and important competing interests.").
[59] *See Sheehan*, 201 P.3d at 475.
[60] *See id.* at 478 (labeling the first protected interest "'informational privacy'" and the second "'autonomy privacy,'" which stated one's "interests in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference"; the former being noted as the cornerstone of the privacy right).
[61] *See id.* at 478-79 (noting the record was only the complaint).
[62] *See id.* at 478-80 (noting the added implication of a private entity analysis).

2. A Privacy Right in the California Code

Beyond California constitutional privacy, the common law has also evolved.[63] In the common law, "'invasion of privacy'" was a tort with narrow implications.[64] Following the common law's concern with balancing on a case-by-case basis, the invasion tort also was a balancing procedure.[65] While the invasion tort was not always singled-out as such, a landmark Harvard Law Review article by Warren and Brandeis, concerning privacy and the press, created such a label.[66] Initially, invasion was a "catch-all" provision for plaintiffs who could not satisfy other tort elements.[67] Eventually, Dean Prosser classified invasion of privacy as "(1) intrusion into private matters; (2) public disclosure of private facts; (3) false light; and (4) misappropriation of name or picture."[68] The first classification, which invasion stems from, is based on the combination of the idea that everyone has a "right to be let alone" and a "'man's home is his castle.'"[69] Likewise, the common law's "zone of privacy" is limited, focusing on restricting "private conduct" when it encroaches on "health, safety and morals," as the tort must be (a) intentional and (b) based on a reasonable person standard.[70] Thus, courts can limit the tort based on what it finds "offensive" or what it finds to be "reasonable."[71]

[63] *See* Kelso, *supra* note 48, at 375 (noting that privacy was protected before being expressly placed in the California Constitution).
[64] *See id.* at 375-76 (describing common law as mainly concerned with private parties and justice). For the philosophical reasoning behind the common law protection of privacy, see generally Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CALIF. L. REV. 957 (1989).
[65] *See id.* at 376 ("The common law action for invasion of privacy follows this pattern.").
[66] *See id.* at 376-77 ("The inspiration for the article came from Warren's own personal annoyance at the press, which with some regularity reported on Warren's private life, newsworthy due, in part, to Warren's marriage to the daughter of a prominent politican."); *see also* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890) ("For years there has been a feeling that the law must afford some remedy for the … evil of the invasion of privacy by the newspapers …."). Specifically, Warren and Brandeis noted "It *is not however necessary*, in order to sustain the view that the common law recognizes and upholds a principle applicable to cases of invasion of privacy, *to invoke the analogy*, which is but superficial, to injuries sustained, either by an attack upon reputation or by what the civilians called a violation of honor; *for the legal doctrines relating to infractions of what is ordinarily termed the common-law right to intellectual and artistic property are, it is believed, but instances and applications of a general right to privacy*, which properly understood afford a remedy for the evils under consideration….If we are correct in this conclusion, *the existing law affords a principle which may be invoked to protect the privacy of the individual from invasion* either by the too enterprising press, the photographer, or the possessor of any other modern device for recording or reproducing scenes or sounds." *See id.* at 198, 206 (emphasis added).
[67] *See* Kelso, *supra* note 48, at 377 ("Because the word 'privacy' is so ill-defined, it is not surprising that an action for invasion of privacy has been the refuge of plaintiffs who have been, for one reason or another, unable to satisfy the technical requirements for other torts causes of actions such as defamation, intentional or negligent infliction of mental distress, trespass, conversion, or misrepresentation ….").
[68] *See id.* (noting a lot of jurisdictions adopting Prosser's four categories).
[69] *See id.* at 378 ("The American concept of personal dignity and worth includes a sphere of private thoughts and conduct that we should all reasonably be able to expect will be held inviolate.").
[70] *See id.* (noting that "[n]egligently invading another's seclusion does not give rise to a cause of action").
[71] *See id.* ("[W]hether an intrusion is actionable depends upon whether the reasonable person would find the intrusion objectionable or offensive. Courts thus can exercise some control over the cause of action by declaring what is offensive or not offensive and what is reasonable or unreasonable in the circumstances." (footnote omitted)).

This common law tort of invasion was detailed in The Restatement.[72] California has adopted The Restatement and Prosser's analysis.[73] Although, originally the tort of invasion focused on intrusions into the home, the tort was extended in the California Code to include wiretapping, eavesdropping, "voice stress analyzer without consent," and "recording the conversation without consent."[74]

3. California's Common Law & Code Privacy Application to Private Actors

Controversy surrounds the application of the privacy provisions against actors that are not governmental.[75] The first case to apply privacy against a private actor was *Porten v. University of San Francisco*, which looked to the "ballot argument," as supporting privacy's application to the private university.[76] While Kelso believes that *Porten*'s decision to extend the privacy right is not founded on *Porten*'s proffered evidence, subsequent decisions have supported *Porten*.[77] *Hill v. NCAA* is such a case that also applied the privacy right against the private entity of the NCAA.[78] Subsequently, it seems that privacy continues to apply to private entities.[79]

B. California and Secret Recordings

In discussing newsgathering and the First Amendment, privacy is concerned with "whether that person has a reasonable expectation of privacy" in the area recorded.[80] Obviously, public places are not afforded privacy guarantees because few expect to assume the right to privately discuss in public.[81] Likewise, sharing files over the Internet, and using company provided phones or computers do not provide

[72] *See id.* at 378-79 (The Restatement (Second) of Torts section 652B); *see also* RESTATEMENT (SECOND) OF TORTS § 652B (1977) ("One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.").

[73] *See* Miller v. Nat'l Broad. Co. 232 Cal. Rptr. 668, 678 (Cal. Ct. App. 1986) (noting that the intrusion tort is limited by what is considered "highly offensive to a reasonable person" (emphasis omitted) (internal quotation marks omitted)).

[74] *See* Kelso, *supra* note 48, at 379-80 (noting that there are "statutory exceptions" for law enforcement); *compare* People v. Wyrick, 144 Cal. Rptr. 38, 41 (Cal. Ct. App. 1978) (applying to recording telephone conversations), *with* Forest E. Olson, Inc. v. Superior Court, 133 Cal. Rptr. 573, 574 (Cal. Ct. App. 1976) (applying recording to conversations in which the recording party is present by noting that the language "not a party to the communication" is not present in CAL. PENAL CODE §632, (internal quotation marks omitted)).

[75] *See* Kelso, *supra* note 48, at 443 (noting how California courts differ vastly with one another in applying privacy to private actors). For a discussion of what constitutes "state action," see *id.* at 405-443.

[76] *See id.* at 444-46; *accord* Porten v. Univ. of San Francisco, 134 Cal. Rptr. 839, 842 (Cal. Ct. App. 1976) ("Privacy is protected not merely against state action; it is considered an inalienable right which may not be violated by anyone.").

[77] *See* Kelso, *supra* note 48, at 446-48 (noting *Porten*'s improper reliance on cases and the "ballot argument," which are unfounded).

[78] See *supra* note 58 and accompanying text.

[79] See *infra* section III.B.

[80] *See* Reporters Committee for Freedom of the Press, Essay: *Liability for Intrusive or Harassing Newsgathering Activities*, http://www.rcfp.org/browse-media-law-resources/digital-journalists-legal-guide/liability-intrusive-or-harassing-newsgath (last visited September 26, 2014).

[81] *See id.* ("If you are unsure whether a particular place would be considered public -- a restaurant, for example -- ask yourself if it is the type of place where you, if you were there, would reasonably assume that secret photographs would not be taken or secret recordings made. The answer may be different for a private dining room reserved for one diner and his or her guests and a large dining room in which customers that enter off the street and ask to be seated are served.").

protection, as, although discussion in reference to these devices may occur in private, the devices are not privately owned.[82] Referencing First Amendment concerns for journalists, the Reporters Committee for Freedom of the Press has noted, "public figures have a reasonable expectation of privacy when they speak in their homes or other private retreats."[83]

Contrary to the First Amendment of the United States Constitution, California has expressly put a right to privacy in its constitution.[84] The California legislature stated its intent to protect the residents of California from invasions into their privacy, which has become a more serious problem with the advancement of technology.[85] Accordingly, this California Constitutional right to privacy has been applied to personal conversations between one or more individuals employed by the government.[86] Additionally, this right to privacy has been extended to private entities.[87] In reference to non-employees, California has expressly made it a crime for an individual to secretly record a private conversation, or to use that conversation in a legal proceeding.[88] Notably, the California constitutional right to privacy has been

[82] *See id.* (noting, however, that "[o]verzealous surveillance, even if it occurs in public, may give rise to intrusion claims …").

[83] *See* Reporters Committee for Freedom of the Press, Essay: *The legal limits of recording conduct and conversations*, http://www.rcfp.org/browse-media-law-resources/digital-journalists-legal-guide/legal-limits-recording-conduct-and-conver (last visited September 26, 2014).

[84] *Compare* CAL. CONST. art. I, § 1 ("All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and **privacy**." (emphasis added)), *with* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."), *and* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."), *and* Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965) (establishing a "zone of privacy" created by "emanations" from the First, Third, Fourth, Fifth, and Ninth Amendments). *See* Margaret Betzel, *Privacy Law Developments in California*, 2 I/S: J.L. & POL'Y for Info. Soc'y. 831, 833 (2006), noting that Griswold established the right to privacy.

[85] *See* CAL. PENAL CODE § 630 (West 1967) ("The Legislature hereby declares that advances in science and technology have led to the development of new devices and techniques for the purpose of eavesdropping upon private communications and that the invasion of privacy resulting from the continual and increasing use of such devices and techniques has created a serious threat to the free exercise of personal liberties and cannot be tolerated in a free and civilized society. The Legislature by this chapter intends to protect the right of privacy of the people of this state….").

[86] *See* Rattray v. Nat'l City, 51 F.3d 793, 797 (9th Cir. 1994) ("may well infringe upon the right to privacy guaranteed by the California Constitution"). *Rattray* involved a police officer that was accused of sexual harassment of a female coworker who recorded the conversation in question. *See id.* at 795-96. *See also* Roberts v. Americable Int'l Inc., 883 F. Supp. 499, 506 (E.D. Cal. 1995) ("the surreptitious recording of the conversation of her supervisor … and other employees, which certainly impinges upon *their* privacy rights …"). *Roberts* involved an office manager, claiming verbal and physical sexual harassment and unlawful discrimination because of her refusal, who recorded various interactions between her, her supervisor, and other employees "at her work station via a voice activated recorder without the other individuals' knowledge." *See id.* at 500-01.

[87] *See* Pettus v. Cole, 57 Cal. Rptr. 2d 46, 70-71 (Cal. Ct. App. 1996) (quoting Hill v. NCAA, 865 P.2d 633, 641 (Cal. 1994) (noting that the non-definitive nature of just the California legislature's use of "privacy" is telling of a broad right to privacy versus a narrow right only to governmental agencies).

[88] *See* CAL. PENAL CODE § 632(a) (West 1994) ("Every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio, shall be punished by a fine not exceeding two thousand five hundred dollars ($2,500), or imprisonment in the county jail not exceeding one

extended to encompass the California Penal Code's stance, which excludes an illegally recorded conversation as permissible evidence.[89]

1. California Penal Code Section 632: Eavesdropping on or Recording Confidential Communications

California Penal Code section 632 has been applied in situations where one of the parties to a private conversation records the conversation without consent of other conversational participants.[90] The penal code provision requires the conversation be "confidential communication," which is a conversation where "circumstances . . . reasonably indicate that any party to the communication desires it to be confined to the parties thereto . . . or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded."[91] In *Coulter v. Bank of America National Trust and Savings Association*, to determine whether a "material issue of fact" was present, the court turned to the circumstances surrounding the conversations that Coulter recorded while a Bank of America employee.[92] The court noted that the test is objective, and whether Coulter believed the conversations were intended to be confidential was not at issue.[93] Yet, the court set a low objective bar, as it only required that each employee submit to a "declaration stating he or she believed the conversations to be private," and gave deference to the conversations being held in "private offices," and with "no one [else]

year, or in the state prison, or by both that fine and imprisonment."); *See also* CAL. PENAL CODE § 632(d) (West 1994) *invalidated in certain circumstances by* People v. Algire, 165 Cal. Rptr. 3d 650 (Cal. Ct. App. 2013) ("In the published portion of this opinion, we reject appellant's contention that the trial court contravened the exclusionary rule in Penal Code section 632, subdivision (d), in admitting an audio recording of a conversation between appellant and his victim. We conclude that the "Right to Truth–in–Evidence" provision of the California Constitution (Cal. Const., art. I, §28, subd. (f), par. (2)), as enacted by the passage of Proposition 8 in 1982, abrogated that exclusionary rule."). For the reasoning underlying the invalidation of the provision in certain circumstances, see *infra* note 131.

[89] *See* Feldman v. Allstate Ins. Co., 322 F.3d 660, 667 (9th Cir. 2003) (noting that while the recording cannot be submitted into evidence, recollection of the conversation is admissible, i.e. testimony); *see also* Rodney A. Smolla, *Qualified Intimacy, Celebrity, and the Case for a Newsgathering Privilege*, 33 U. RICH. L. REV. 1233, 1243-47 (2000) (noting how the human psyche places more concrete weight on recorded conversation versus a restatement of the conversation because of the added inability for a recorded person to deceive another by denying the conversation's existence, or substance).

[90] *See* Coulter v. Bank of America Nat'l Trust & Savings Assoc., 33 Cal. Rptr. 2d 766, 770-71 (Cal. App. Dep't Super. Ct. 4th 1994). (The court noted that Coulter, an automatic teller machine technician employee for Bank of America, would hide "two small tape recorders in his pockets … [and] covertly recorded over 160 private conversations with his supervisors and coworkers at Bank of America, where he was employed," including face-to-face conversation and phone conversations. *See id.* at 767-68. Ultimately, the court found against Coulter, as the opposing side did prove that his recorded conversation was meant to be "confidential." *See id.* at 768.

[91] *See* CAL. PENAL CODE §632(c) (West 1994) ("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 proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded.").

[92] *See* Coulter, 33 Cal. Rptr. 2d at 770 ("Each employee submitted declarations detailing the circumstances surrounding the conversations, the topics discussed and their own belief and expectation that the conversations were confidential. Coulter contends since he never intended the conversations to be confidential, they were not. He also contends it was expected that the subject matter of the conversations would be repeated to other bank employees, which removed them from any statutory protection.").

[93] *See id.* at 770-71 (quoting Frio v. Superior Ct. for Cal., 250 Cal. Rptr. 819 (Cal. Ct. App. 1988) ("'a communication must be protected if *either* party reasonably expects the communication to be confined to the parties'").

present."[94] However, it has been noted that other people can be present and those involved in the conversation could still have an objective expectation of privacy.[95] Additionally, there does not have to be "proof of actual damages" to argue for a breach of privacy.[96]

2. Common Law Intrusion

Distinct from a California constitutional right to privacy and right not to be recorded, there is an invasion of privacy tort through "intrusion."[97] Statutory and common law intrusion both require the action to be committed intentionally.[98] "Intentional" has been defined various ways; however, intent is often defined when the person recording "does so with the purpose or desire of recording a confidential conversation, or with the knowledge to a substantial certainty that his use of the equipment will result in the recordation of a confidential conversation."[99] The California common law requires two elements to be met for intrusion: "[intentional] intrusion into a private place, conversation or matter … [and] in a manner highly offensive to a reasonable person."[100] Applying the above definition of intent—which was based on section 632's statutory definition—the court does not limit intent to only that which is "desire[d]" by the

[94] *See id.* at 771 (noting an objective standard, but stating "[i]t is sufficient that the bank employees who were secretly recorded expected the conversations to be private," therefore, insinuating still a subjective test, just not of the recorder's belief, but the recorded). Also, the court noted that the recorder does not need to intend to "later discuss[]" his recorded information for there to be a violation of section 632. *See id.*; *see also* Flanagan v. Flanagan, 41 P.3d 575, 579-80 (Cal. 2002) (noting that later "disseminat[ion]" is not required to prove conversation was confidential). The California Supreme Court reversed the California Court of Appeal because of the latter court's application of the weaker dissemination test. *See id.* at 581-82 ("[The Supreme Court's broader test] protects against intentional, nonconsensual recording of telephone conversations regardless of the content of the conversation or the type of telephone involved.").

[95] *See* Lieberman v. KCOP Television, Inc., 1 Cal. Rptr. 3d 536, 544 (Cal. App. Dep't Super. Ct. 2003) ("The presence of others does not necessarily make an expectation of privacy objectively unreasonable, but presents a question of fact for the jury to resolve."). The court sided with Lieberman based on his provided evidence that KCOP "undercover" employees had come to his medical clinic posing as patients seeking treatment from Lieberman, but once behind the closed door of an examination room in Lieberman's office, and on two separate occasions, two different "partners" recorded Lieberman audibly and visually. *See id.* at 539, 545. The recordings were then "broadcast on KCOP's evening television news program … during a segment entitled, 'Caught in the Act,' in which it was asserted that Lieberman prescribed Vicodin, a controlled substance, without proper medical examinations, and in which Lieberman was labeled a 'drug dealer' and 'candy doctor.'" *See id.*

[96] *See* CAL. PENAL CODE § 637.2(c) (West 1992) ("It is not a necessary prerequisite to an action pursuant to this section that the plaintiff has suffered, or be threatened with, actual damages."); *see also* Betzel, *supra* note 84, at 870 (supporting the same); *see also* Lieberman, 1 Cal. Rptr. 3d at 543 (holding the harm to "occur[] the moment the surreptitious recording is made"). However, the court required that the damage amount not include harm resulting from the release of the recording to the public, but, rather, was limited to the person's reaction on finding out about being unknowingly recording. *See id.*

[97] *See* Marich v. MGM/UA Telecomm., Inc., 7 Cal. Rptr. 3d 60, 63 (Cal. Ct. App. 2003) (noting the statutory and common law doctrine of intrusion).

[98] *See id.*

[99] *See id.* at 64.

[100] *See id.* at 63-64 (quoting Shulman v. Grp. W. Prods., Inc., 955 P.2d 469, 490 (Cal. 1998) (internal quotation marks omitted).

recording party.[101] Moreover, the court allows an analysis into the subjective intent of the party (who was unknowingly recorded).[102]

IV. NARRATIVE ANALYSIS: COMMISSIONER SILVER'S CHARGE, DONALD STERLING'S ANSWER

A. NBA Charge from Commissioner Adam Silver

While NBA Commissioner Silver agreed to forego bringing the NBA's Charge against Sterling, the Commissioner's actions are extremely concerning for NBA Owners generally.[103] When Mr. Sterling acquired the Clippers, he agreed to be subservient to the NBA's Board of Governors, the NBA's Constitution and By-Laws, and various NBA "rules, regulations, resolutions, and agreements."[104] The accompanying agreements which Sterling was required to sign include: "July 26, 2005 Agreement and Undertaking with the NBA made in favor of the NBA and its [m]embers (the 'A&U')," "the Amended and Restated Joint Venture Agreement entered into . . . on January 1, 1989 (the 'JVA')," and a "contractual obligation under New York law, which governs the Constitution, A&U, and the JVA, and which imposes on LAC a contractual duty of loyalty to support the [a]ssociation in the attainment of its proper purposes."[105]

By signing the A&U, Sterling agreed, "to perform and discharge all obligations of the [t]eam 'however arising' to any of the NBA [t]eams and to the NBA and its affiliated entities."[106] Further, Sterling agreed to "be bound by and conduct [himself] in accordance with . . . the Constitution and By-Laws of the NBA," and "not to take or support . . . any position or action that would violate or be inconsistent with any NBA [r]ule or any right of any NBA [e]ntity or NBA [t]eam, or which may have a material adverse impact on any of the NBA [e]ntities or NBA [t]eams."[107] The A&U stated that if Sterling was to breach the A&U, Sterling would have committed a "contractual obligation" breach, falling under NBA Constitution Article 13(d).[108]

The signing of the JVA required Sterling to exert his "best efforts to see to it that the sport of professional basketball is conducted according to the highest moral and ethical standards."[109] And contract law of New York requires "governing membership associations" to be "loyally support[ed] . . . in the attainment of its proper purposes" by its members.[110] The Charge states that this "duty of loyalty is, in and of itself, sufficient grounds for termination of a membership in the NBA."[111]

---

[101] *See id.* at 64. (invalidating the respondents argument that common law intrusion's intent differs from the statutory tort).
[102] *See id.* at 67 (noting that it does not matter if the recorder of the conversation "disclose[s]" the recording, or that the recorded intended to have the same conversation with another third party; all that matters is that the confidential conversation was recorded).
[103] See *infra* note 39, 204 and accompanying text.
[104] *See* Charge, *supra* note 19, ¶62, at 18 (quoting article two of NBA Constitution and By-laws). The Charge notes that the constitution's definition of "'[m]ember,'" encompasses an "[e]ntity," which, thus, includes Sterling's LAC. *See id.* at ¶63, at 18.
[105] *See id.* at ¶70, at 20-21 (internal quotation marks omitted).
[106] *See id.* at ¶73, at 21.
[107] *See id.* at ¶¶74-75, at 21-22 (emphasis omitted) (internal quotation marks omitted).
[108] *See id.* at ¶76, at 22.
[109] *See id.* at ¶77, at 22 (internal quotation marks omitted).
[110] *See id.* at ¶79, at 23.
[111] *See id.*

The relevant portions (according to the NBA) quoted in the Charge from the NBA Constitution and By-Laws, are Article 13 "Termination of Ownership or Membership," Article 14 "Procedure for Termination," Article 24 "Authority and Duties of the Commissioner," and Article 35A "Misconduct of Persons other than Players."[112] Relevant to the Charge, Article 13 allows termination by a three fourths vote of the Board of Governors if the owner (or member) "(a) willfully violates any provisions of the Constitution and By-Laws, resolutions, or agreements of the [a]ssociation," "(c) [f]ail[s] to pay any dues … ow[ed] to the [a]ssociation within thirty (30) days," and "(d) [f]ail[s] or refuse[s] to fulfill its contractual obligations to the [a]ssociation, its [m]embers, [p]layers, or any other third party in such a way as to affect the [a]ssociation or its [m]embers adversely."[113]

Article 14 defines the procedure that must be followed to terminate the owner's interest.[114] As Article 24 defines the NBA Commissioner's position, section (e) gives the commissioner the "right to investigate all charges, accusations, or other matters that may adversely affect the [a]ssociation or its [m]embers," and section (h) allows the commissioner to "interpret and from time to time establish policy and procedure in respect to the provisions of the Constitution and By-Laws, rules, regulations, resolutions, and agreements of the [a]ssociation and any enforcement thereof, and any decision emanating therefrom shall be final, binding, conclusive, and unappealable."[115] Finally, applying to non-players, Article 35A section (c) allows a fine of up to $1,000,000 for "any statement" that is, or was intended to be, harmful to the NBA,[116] and section (d) allows a fine of up to $1,000,000 against "any person" who the NBA Commissioner believes is "guilty of conduct" that is harmful to the NBA.[117]

The Charge argued that if Sterling's ownership of the Clippers was not terminated, there would be an "incalculable material adverse impact on the NBA and its member teams."[118]

---

[112] *See id.* at ¶¶64-68, at 19-20 (internal quotation marks omitted); *See also Constitution and By-Laws of The National Basketball Association* at 26-27, 37-38, 46-47 (May 29, 2012) [hereinafter NBA Constitution].

[113] *See* Charge, *supra* note 19, ¶64, at 19; *See also* NBA Constitution, *supra* note 112, at 26.

[114] *See* Charge, *supra* note 19, ¶65, at 19 (noting that the NBA Commissioner must serve the intended owner three "business days after the charges are filed"); *See also* NBA Constitution, *supra* note 112, at 27-29.

[115] *See* NBA Constitution, *supra* note 112, at 36-37 ("The Commissioner shall serve as the Chief Executive Officer of the League and shall be charged with protecting the integrity of the game of professional basketball and preserving public confidence in the League."); *See also* Charge, *supra* note 19, ¶¶66-67, at 19-20 (omitting a few important words from section (h)).

[116] *See* NBA Constitution, *supra* note 112, at 47 ("Any person who gives, makes, issues, authorizes or endorses any statement having, or designed to have, an effect prejudicial or detrimental to the best interests of basketball or of the [a]ssociation or of a [m]ember or its [t]eam, shall be liable to a fine not exceeding $1,000,000 to be imposed by the Commissioner."); *See also* Charge, *supra* note 19, ¶68, at 20 (NBA's quoted language).

[117] *See* NBA Constitution, *supra* note 112, at 37 ("The Commissioner shall have the power to suspend for a definite or indefinite period, or to impose a fine not exceeding $1,000,000, or inflict both such suspension and fine upon any person who, in his opinion, shall have been guilty of conduct prejudicial or detrimental to the [a]ssociation."); *see also* Charge, *supra* note 19, ¶68, at 20 (NBA's quoted language).

[118] *See* Charge, *supra* note 19, ¶80, at 23. Commissioner Silver argued that the recording had damaged fans' loyalty to the LA Clippers based on a five-hundred Clippers fan survey, season ticket sales based on cancellations of ticket renewals, and thousands of fans voicing outrage to the NBA "directly" against Sterling. *See id.* ¶¶32-37, at 10-11. Commissioner Silver also argued that the NBA's revenues from advertisements and endorsements were damaged. *See id.* ¶¶44-48, at 13-15. Interestingly, the Charge also calls for the termination of Mrs. Sterling's rights as well because of her "inextricably intertwined" relationship with her husband, Donald Sterling. *See id.* ¶83, at 24.

1. Charge Counts

Charge count one is supported under NBA Constitution and By-Laws Article 13(d), and holds that Sterling's "discriminatory actions and supported discriminatory positions," have negatively affected the NBA, hence Sterling has violated his obligations under A&U not to negatively impact the NBA.[119] The NBA defined Sterling's "material adverse impact," "position or action," under the A&U as

> Disparag[ing] African Americans and "minorities"; denigrated the contribution of NBA players to the success and popularity of the NBA; directed a female acquaintance not to associate publicly with African Americans; admonished that acquaintance for posting pictures of herself with African Americans on social media; directed that acquaintance not to bring African Americans to Clippers games; criticized African Americans for not supporting their communities; and publicly disparaged NBA legend Magic Johnson.[120]

Count two involved, under NBA Constitution and By-Laws Article 13(d), Sterling's "fail[ure] to adhere to the basic principles of diversity, inclusion, and respect for others," is in opposition to the JVA's required "best efforts . . . conduct," and the U&A, which binds Sterling to the JVA.[121] The NBA considers Sterling's failures to have, "undermined and called into question the NBA's commitment to diversity and inclusion; damaged the NBA's relationship with its fans; harmed NBA players and Clippers team personnel; and impaired the NBA's relationship with sponsors and licensees, and with government and community leaders."[122]

Count three is supported under NBA Constitution and By-Laws Article 13(d), and holds that Sterling's conduct has violated New York law, the A&U, and JVA.[123] As Sterling is required to "perform all obligations . . . 'however so arising,'" under the A&U, Sterling's "espoused views . . . are contrary to and wholly inconsistent with the NBA's commitment to diversity and inclusion."[124]

---

[119] *See id.* ¶¶87-90, at 25-26. Note that a charge is not defined in the NBA constitution, but is insinuating in Article 14 to simply be defined plainly as a writing that lists accusations against the member or owner which the NBA board has to affirm in order to terminate the parties' ownership rights. *See* NBA Constitution, *supra* note 112, at 27-29.

[120] *See* Charge, *supra* note 19, ¶87-88, at 25-26 (internal quotation marks omitted). Importantly, the NBA Charge's last two noted abuses cannot be based on Anderson Cooper's interview, but must be based solely on Stiviano's private recording of Sterling, as the NBA's general counsel specifically stated as such in a May 19, 2014 letter to Maxwell M. Blecher denying Sterling a three-month extension to answer the NBA's Charge. *See* May 30th Complaint, *supra* note 18, ¶28, at 6; *See also id.* at 79 ex. 4 ("The Charge is based solely on a recording that Mr. Sterling admits is authentic and events directly related thereto. The NBA's authority to act is clearly set forth in the NBA Constitution."). The NBA also does not include Donald Sterling's interview with Anderson Cooper under the Charge's "Events Giving Rise to the Charge" section, *see id.* ¶¶6-13, at 3-5, but places the Cooper interview under a separate section, "Mr. Sterling's Belated and Ineffectual Attempts to Ameliorate the Harms He Created", in which no violation is mentioned or imposed against Sterling. *See id.* ¶¶57-58, at 16-17. The latter section only indicates that Sterling's comments in his Cooper interview "inflicted further damage," and does not include NBA constitutional violations in reference to those harms. *See id.*

[121] *See* Charge, *supra* note 19, ¶¶92-93, at 26-27.

[122] *See id.* ¶94, at 27.

[123] *See id.* ¶¶97-99, at 27-28.

[124] *See id.* ¶¶98-99, at 27-28.

Count four is supported by New York law and holds that Sterling "has breached [his] duty of loyalty to support the [a]ssociation in the attainment of its proper purposes" by engaging in racist "esouse[ment]" and conduct.[125]

Count five holds that Sterling was willful in "destroying evidence relating to the [r]ecording[s], providing false and misleading information . . . in connection with the Commissioner's investigation of the [r]ecording[s], and issuing a false and misleading public statement on April 26 regarding the authenticity of the [recordings]."[126] These violations are supported by NBA Constitution and By-Laws Articles 24(m), 35A(c), and 35A(d).[127]

Finally, count six involved Sterling violated Article 13(c) of the NBA Constitution and By-Laws when he was notified on April 29, 2014, by Commissioner Silver, that Sterling had until May 12, 2014 to pay the $2.5 million fine and Sterling not paying the fine, despite a notice of default reaching him on May 14, 2014.[128]

B. Donald Sterling's Answer to NBA Charge

Underlying every page of Sterling's Answer ("Answer") is his outrage that the NBA Charge does not address that his recorded conversation with V. Stiviano was recorded without his knowledge and in a private setting.[129] The Answer notes that the California Penal Code holds a person who records another person's "confidential communication without [his or her] consent" criminally liable.[130] The California Penal Code also does not allow the use of that recording as evidence in "any judicial, administrative, legislative, or other proceeding."[131] The Answer considers the NBA Board of Governors' hearing to be

[125] *See id.* ¶¶102-04, at 28-29.
[126] *See id.* ¶109, at 29.
[127] *See id.* ¶¶106-08, at 29-30.
[128] *See id.* ¶¶112-114, at 30.
[129] *See* Donald Sterling's Answer to Charge by Donald Sterling before National Basketball Association Board of Governors, *In re* LAC Basketball Club, Inc., In the Matter of the Termination of Membership, at 1 (May 27, 2014) [hereinafter Sterling Answer] ("The authors of the charge did not have the courage, decency, or honesty to acknowledge the circumstances surrounding Mr. Sterling's jealous rant or even that the source of their information was borne from the 'fruit of the poisonous tree.'").
[130] *See id.* at 2; *See also* CAL. PENAL CODE §632(a) (West 1994) ("Every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio, shall be punished by a fine not exceeding two thousand five hundred dollars ($2,500), or imprisonment in the county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment."), §632(d) *invalidated by* People v. Algire, 165 Cal. Rptr. 3d 650 (Cal. Ct. App. 2013) ("Accordingly, the audio recording of Stevie and appellant's conversation could be excluded only under the federal exclusionary rule applicable to evidence seized in violations of the Fourth Amendment….As Stevie did not record the conversation while acting as a government officer or agent, the recording does not implicate appellant's interests under the Fourth Amendment of the United States Constitution.") (citations omitted).
[131] *See* Sterling Answer, *supra* note 129, at 2 (emphasis omitted); *See also* CAL. PENAL CODE §632(d) (West 1994) *invalidated in certain circumstances by* People v. Algire, 165 Cal. Rptr. 3d 650 (Cal. Ct. App. 2013) ("In the published portion of this opinion, we reject appellant's contention that the trial court contravened the exclusionary rule in Penal Code section 632, subdivision (d), in admitting an audio recording of a conversation between appellant and his victim. We conclude that the "Right to Truth–in–Evidence" provision of the California Constitution (Cal. Const., art. I, §28, subd. (f), par. (2)), as enacted by the passage of Proposition 8 in 1982, abrogated that exclusionary rule."). *Algire*'s circumstances involved the continuing criminal act of sexual abuse and an adopted

included in "other proceeding."[132] Furthermore, Ms. Stiviano was supposedly under criminal investigation for the private recording.[133] Thus, Sterling's Answer asserts that his "jealous rant to a lover . . . cannot offend the NBA rules."[134]

1. Sterling's Answer: Addressing Art. 13(d) of Counts I, II, and III

Sterling takes issue with Commissioner Silver's use of NBA Constitution Article 13(d) as a "'catch-all' provision."[135] Sterling believes that based on how the NBA Constitution is written, 13(d) was meant only to apply to the "contractual obligations" found in the NBA Constitution and not to other agreements with the NBA.[136] The Answer states that making 13(d) a catch-all provision would not make sense because, first, 13(d) does not address other agreements with the NBA, and, second, 13(d) would be redundant when Article 13(a) is already a catch all provision that allows termination for violating other agreements with the NBA.[137] The Answer postulates that the NBA Charge did not agree with this "plain reading" because Article 13(a) requires the violation of other agreements with the NBA to be "willful[]," which is arguably not involved here, as Sterling did not know he was being recorded.[138]

Yet, Sterling throws the NBA a bone through a second-line of argumentation in which Sterling assumes Article 13(d) does apply.[139] Even if 13(d) applies, Sterling argues that 13(d) would not allow termination of his ownership because: (a) Sterling did not violate the A&U's requirement that he "'take or support, and to cause their respective affiliates not to take or support, any position or action that may violate or be inconsistent with any NBA [r]ule … or which may have a material adverse impact on any of the NBA [e]ntities or NBA [t]eams'" because Sterling's opinions did not "take or support" "any position or action."[140] Essentially, the Answer believes that taking or supporting requires intent, and a position or

Chinese teen who often recorded conversations to help her learn the English language, and who recorded an inappropriate conversation, her abuser initiated, because he used the word "'orgasm,'" which she did not understand. *See id.* at 652, 655. Sterling's situation is not analogous because there is no felony involved and his conversation with Stiviano was a purely private conversation about opinions and thoughts. *See id.* at 655.

[132] *See* Sterling Answer, *supra* note 132, at 2. Sterling Answer notes that while the NBA Constitution states, "'[s]trict rules of evidence shall not apply, and all relevant and material evidence submitted prior to and at the hearing may be received and considered,'" §632(d) is held by California case-law to involve a "state substantive interest," and grounded in "California Constitution's right-to-privacy guarantee." *See id.* (emphasis omitted) (internal quotation marks omitted). Therefore, Sterling had a constitutional expectation not to be recorded. *See id.* at 3 (noting the California Supreme Court's protection of telephone calls in the same context).

[133] *See id.*

[134] *See id.*

[135] *See id.* at 4; *See supra* text accompanying note 113.

[136] *See* Sterling Answer, *supra* note 132, at 4.

[137] *See id.* at 4; *See supra* text accompanying note 113.

[138] *See* Sterling Answer, *supra* note 132, at 4.

[139] *See id.* at 5.

[140] *See id.* at 5 (internal quotation marks omitted); *See supra* note 107 and accompanying text.

action cannot be based on a conversation between a "couple," even one that involves racist opinions.[141] This belief is also applied to Sterling's opinions as expressed during the Anderson Cooper interview.[142]

Sterling shifts gears in arguing that even if he did take a "position or action" in his expressed views, the NBA cannot expect him to rely solely on NBA evidence to support his Answer's argument against the NBA.[143] Likewise, Sterling notes concerns about the extent of the "'material adverse impact'" that the NBA is arguing Sterling's actions caused.[144] Evidence is even offered that Sterling has been deeply involved in fostering the diversity of the NBA.[145] Sterling continues by arguing that he did not violate the JV either because the JV requires Mr. Sterling to use his "'best efforts to see to it that the sport of professional basketball is conducted according to the highest moral and ethical standards,'" and even ignoring the fact that Sterling must have done this willfully, a plain reading of the NBA Constitution requires Sterling to be involved in conducting the sport of basketball, which he is not doing when having a private conversation.[146]

Furthermore, Sterling did not violate a breach of his duty of loyalty to the NBA because the obligations under a duty of loyalty are focused on business matters of self-dealing and decisions intended to better serve the interest of the individual (Sterling); however, Sterling is not being charged for these crimes, and one can hardly argue this tape recording better served Sterling in any business dealings with the NBA.[147] While the NBA has argued that Sterling's views are at the heart of the breach of the duty of

[141] *See id.* at 5-8 ("Mr. Sterling was engaged in a lovers' tiff stemming from his jealous reaction to Ms. Stiviano's statement that she was going to 'bring four gorgeous black guys to the game'….Mr. Sterling's ego was obviously bruised by this remark."). The Answer also believes Sterling's "distraught" nature should be a "mitigating factor," as well as the fact that "Ms. Stiviano baited Mr. Sterling." *See id.* at 6-7. The Answer insinuates that Ms. Stiviano's love of the spotlight was her reason for goading Sterling on in the conversation recording. *See id.* at 6-7.
[142] *See id.* at 8-9; *See supra* note 8 and accompanying text.
[143] *See* Sterling Answer, *supra* note 132, at 9-11. Sterling argues that this would require him to trust solely the NBA's officers, employees, expert Sara Parikh, and a "neutral" report from Richard Lapchick whose boss owns the Orlando Magic, which has announced how it will vote, for Sterling's own evidence. *See id.* at 9. Sterling would also not be able to "verify" the damages to the NBA, team, and players because he was not allowed to enter his Staples Center office or garner information from the Clippers. *See id.*
[144] *See id.* at 10.
[145] *See id.* at 11-12, ("As the longest-tenured owners in the NBA, the Sterlings have employed five African American coaches, scores of African American players, an African American general manager who held that job for 22 years, and staff who helped the NBA receive a laudable 'A+' in racial hiring practices. Indeed, Mr. Sterling recently terminated a Caucasian head coach and traded for an African American head coach who is now among the most highly paid and respected in the league. Mr. Sterling was also active in the African American community….Mr. Sterling was set to receive his second lifetime achievement award from the NAACP for plans to create a multimillion-dollar endowment at Los Angeles Southwest College, which has a predominantly African American student body. Mr. Sterling similarly received an award from the NAACP in 2009 because of his 'unique history of giving to the children of L.A.' and for being 'very kind to the minority youth community,' donating 2,000 to 3,000 tickets *a game* to youth groups….Over the Sterlings' 30-year ownership, there has been only a single accusation of race discrimination involving the Clippers, and that was resolved in Mr. Sterling's favor.").
[146] *See id.* at 12-13 ("Under the Commissioner's interpretation of Article II, any immoral or unethical comment-even a private one-could become the basis for a forced termination."). The Answer argues further that when Mr. Sterling was "*actually* conduct[ing] the sport of professional basketball," he did use his best efforts to follow the NBA's "basic principles of diversity, inclusion, and respect …." *See id.* (internal quotation marks omitted).
[147] *See id.* at 13-14 (describing the fiduciary duty of loyalty as including: "[a]n obligation not to favor one's interests over those of the joint venture; [a]n obligation not to unfairly manipulate or control corporate processes; [a]n obligation not to retain control or to appropriate for oneself and opportunity that belongs to the joint venture").

loyalty, there is no breach for stating one's views, even if those views harm the association in "attaining its 'proper purposes'" as this latter phrase is not considered a duty of loyalty issue.[148]

2. Sterling's Answer: Addressing Art. 13(a) of Count V

Finally addressing the NBA Constitution's catch-all, willful provision, the NBA argues that Sterling willfully violated Art. 24(m), Art. 35A(c) and (d).[149] While Art. 24(m) of the NBA Constitution does require an owner to hand over evidence or testimony at the Commissioner's request, Mr. Sterling did not violate that provision here because this requirement only exists "'in connection with all actions, hearings, or investigations'"; however, the Commissioner did not begin the investigation until April 26, 2014 and the alleged acts of Sterling occurred between April 9 and April 25, which are before the investigation began.[150] Also, Mr. Sterling was not asked to hand over any information by Commissioner Silver, and neither was Sterling notified of any proceedings or investigations.[151]

Article 35A(c) and (d) prohibit a statement or conduct, respectively, from harming the NBA, its members, or its teams.[152] Sterling denies violating this provision because the Commissioner does not argue that Sterling's statement or act was found in the recording or Anderson Cooper interview, but argues Sterling's violations were his "false and misleading information" about the Commissioner's investigation into the recording, and Sterling's "public statement on April 26" about the truthfulness of the TMZ recording.[153] However, with these allegations, the Commissioner does not "identify" the harmful effects of these statements, nor were all of Sterling's comments public.[154] These issues create a position that is hard to support for the NBA, let alone proving that Sterling committed these private acts willfully.[155]

3. Sterling's Answer: Art. 13(c) of Count VI

Finally, in regards to the NBA's Charge, Mr. Sterling denied Article 13(c)'s application because he had thirty days to pay his fine; therefore, at the time of the Charge, Mr. Sterling had not defaulted because he had until June 13, 2014.[156] Despite the issue not being ripe, the Commissioner's fine cannot exceed $1 million, except when there is no "rule for which no *penalty is specifically fixed*." However, Article 35A(c)

[148] *See id.* at 14-15.
[149] *See id.* at 15-18; *See also supra* notes 126-127 and accompanying text.
[150] *See* Sterling Answer, *supra* note 132, at 15-16. The Answer notes that the connection between the deleting of information and Mr. Sterling is based on the one who deleted the information getting off the phone with Sterling and then deleting the information. *See id.* at 15. Thus, the Commissioner's support is an "anonymous source" who heard the one who deleted the information getting off the phone with Mr. Sterling and assuming Mr. Sterling gave the order. *See id.* at 16 (calling it "*triple* hearsay").
[151] *See id.*
[152] *See id.* at 16-17 (both sections allowing a fine up to $1,000,000).
[153] *See id.* at 17 (internal quotation marks omitted).
[154] *See id.* at 17. Sterling argues for other issues involved here, noting that if he was required to admit guilt as soon as he was questioned about the illegal recording or be terminated, an owner would not be able to look into allegations before admitting guilt, even if untrue. *See id.* This would create self-incriminating concerns for owners. Likewise, there is the simple reality that Sterling may have simply forgotten about "precise details" of a conversation that was months old. *See id.*
[155] *See* Sterling Answer, *supra* note 132, at 17-18.
[156] *See id.* at 18.

and (d) provide a "specifically fixed penalty" of $1 million, and as a result, the Article 24 provision does not apply.[157]

4. Sterling's Answer: The NBA Unfair & Unreasonable Punishment

Sterling vehemently argues that there is no precedent in the NBA's history that would warrant such a drastic punishment.[158] Sterling points to "*publicly available* examples" of "past *public* acts" related to the NBA, including an incident involving a player who called a referee a "f****** fag***" during a televised game, who was only fined $100,000, and other similar homosexual slurs or statements in which nothing was done by the NBA.[159] The Answer also notes that there were Jewish, Asian, Chinese, and Caucasian statements in the media, and the NBA did not impose any punishments or fines.[160] Also, Sterling points to a secret contract signing, a conviction of drunk driving, inappropriate language toward a referee, public Twitter statements against the NBA's collective bargaining agreements, all with fines ranging from $0 (approximately one year suspension) to $500,000, the largest being for the Twitter comments.[161] Sterling argues that the fine, ban, and forced sale has no precedent in NBA history; the only "permanent bans" in NBA history were for gambling and substance-abuse violations.[162]

5. Sterling's Answer: NBA Constitution is Unfair Facially and As Applied

Sterling takes issue with the NBA only allowing answers to its charge to be filed within five business days and not allowing any "internal avenue for review or appeal" by expressly prohibiting such "recourse to any court of law to review."[163] As applied here, Sterling was not allowed into his office to assist his own counsel, the Commissioner denied any extension of time to respond to such an important

[157] *See id.* The Answer notes that the NBA is only charging Sterling under Art. 35(c) and (d) because of the recordings, so the Commissioner could not be following Art. 24 in Sterling's violation of Art. 13 for Sterling's failure to pay the fine. *See id.* at 18-19.
[158] *See id.* at 19 ("In the past, the NBA has either punished offensive speech with a modest fine or ignored it.").
[159] *See id.* at 20. Jason Collins was one of the victims of similar homosexual slurs, for information regarding anti-gay statements in professional sports as a whole and the NBA specifically, see Timothy A. Galáz, *Bargaining for the Next Gay Player: How Can Jason Collins Help to Develop the National Basketball Association Into a More Inclusive Workplace*, 21 MOORAD SPORTS L.J. 461, 478-81 (2014). The Answer also noted that Jason Collins was very gracious in his reply to the anti-gay comments. *See* Sterling Answer, *supra* note 132, at 20 n. 4 ("It is worth noting that Mr. Collins admirably stated the following in reaction to these comments" 'We're all human. Everyone is entitled to their own opinions. You hope that if someone has a negative opinion, that they would keep it to themselves. But at the same time, I understand that in the NBA, we're a bunch of individuals and this is America and everyone's entitled to their opinion.'").
[160] Sterling Answer, *supra* note 132, at 20-21. The Jewish slurs: referring to someone as "'big-time Jew lawyers'" and to Jewish people as "'some crafty people' because 'they are hated all over the world'"; Asian slur: "[i]n response to an Asian player's 'tweet' asking to guess where he ate a meal, another player responded 'Panda Express'"; Chinese slur: "[r]eferring to Yao Ming, a player stated (on a television show): 'Tell Yao Ming, 'ching chong yang wah ah soh'"; Caucasian slurs: " 'Black people your Focusing on the wrong thing. We should be focusing on having our own, Own team own League! To For Self!!'" *See id.* (internal quotation marks omitted).
[161] *See id.* at 21. Sterling also noted suspensions and one low-sum fine ($20,000) that originated from "Non-Speech-Related Player Punishments," such as punching a fan (suspended 72 games and playoffs), domestic violence (suspended 7 games), choking a coach and "threatening to kill him" (suspended 82 games-arbitrator reduced to 68), "kicking a cameraman in the groin" (suspended 11 games), "head-butting a referee" (suspended 6 games and fined $20,000), and "reckless driving charge that resulted in the death of a passenger" (suspended for 7 games). *See id.* at 21-22.
[162] *See id.* at 22.
[163] *See id.*Sterling Answer at 22 (internal quotation marks omitted).

matter and copious amounts of documentation.[164] Likewise, Sterling's hearing will not be impartial because many team owners have already supported the Commissioner publicly.[165]

C. Sterling's Federal Suit for Damages Against the NBA and Commissioner Adam Silver[166]

After the NBA and Donald Sterling exchanged the Charge and Answer, Sterling initiated a Complaint for Damages against the NBA and Commissioner Adam Silver.[167]

1. California Constitutional Privacy Rights

First, Donald Sterling believes the NBA should not be able to act based on the recordings because the recordings violate California law.[168] Sterling argues that California Penal Code section 632(a) prohibits one person to record another without both persons' consent, and California Penal Code section 632(d) does not allow the illegally recorded conversation to be used in "judicial, administrative, legislative or other proceeding."[169] This privacy right has evolved from a mere procedural right to a substantive California constitutional right.[170] Thus, because the NBA is basing its charge only on the illegal recording, Commissioner Silver has violated Sterling's California Constitutional right.[171]

2. The NBA Breached its Contract with Sterling

Second, Sterling believes the NBA violated its own NBA Constitution when it fined, banned, and "initiated the process to force Plaintiffs to sell the Los Angeles Clippers," because Sterling did not violate any provision of the NBA Constitution. [172] Further, even if Sterling violated the NBA Constitution, Commissioner Silver exceeded NBA Constitutional limits of punishment by banning, fining, and forcing

[164] *See id.* at 23 ("The charge is 30 pages long, contains 15 statements and declarations, an expert report, survey evidence, and what appears to be approximately 1,000 pages of exhibits. Despite the extent and magnitude of the charges, the NBA refused to provide Mr. Sterling with more than five business days to respond.").
[165] *See id.* at 24-25 ("Chicago Bulls: … and we will support [Silver's] recommendation to [sic] press for Mr. Sterling to relinquish his ownership of the Los Angeles Clippers franchise …Cleveland Cavaliers: … [we] are unified in encouraging Commissioner Silver and the NBA to respond with swift and appropriate action consistent with a strong zero tolerance approach to this type of reprehensible behavior … Detroit Pistons: … [Silver] has my full support … Golden State Warriors: … [we] applaud the firm punishment handed out today by NBA Commissioner Adam Silver … we anticipate that the NBA Board of Governors will act promptly … Houston Rockets: … [Sterling] has no place in the family of the NBA … Miami Heat: … [Silver] ha[s] my full support, New Orleans Pelicans: … will fully support [Silver's] recommendations moving forward, Orlando Magic: [w] are whole-heartedly behind Adam's recommendation and plan to vote accordingly, Phoenix Suns: … [t]he Commissioner has my full support, Sacramento Kings: 'Great leadership today from @NBA Adam Silver" (emphasis omitted) (internal quotation marks omitted)). Sterling's Answer also notes how forcing him to sell the LA Clippers would entail Sterling paying "capital gains tax of approximately 33 percent." *See id.* at 25.
[166] The United States District Court for the Central District of California dismissed Mr. Sterling's federal claims with prejudice. *See* Sterling v. Nat'l Basketball Ass'n, 2016 WL 1204471, CV 14-4192, at *8-9 (C.D. Cal. Mar. 22, 2016). The court also did not re-assert supplemental jurisdiction over the state law claims. *See id.*
[167] *See generally* May 30th Complaint, Sterling v. NBA, No. CV14-4192 (C.D. Cal. filed May 30, 2014).
[168] *See id.* ¶¶26-28, at 6-7.
[169] *See id.* ¶27, at 6. For the exact wording of the California Penal Code section 632, see *supra* notes 130-131.
[170] *See id.* ¶27, at 6.
[171] *See id.* ¶¶27-28, at 6-7.
[172] *See id.* ¶¶29-32, at 7-9.

Sterling to sell the team.[173] Thus, since Sterling did not violate any sections of the NBA Constitution's Article 13, his termination violates the NBA's contractual duties under its own constitution.[174]

D. The NBA and Adam Silver's Answer and Counterclaim

1. NBA and Silver's Answer

The NBA denies needing to make an argument or statement to support its use of the recording of Donald Sterling against him.[175] In response to allegations of breach of contract, the NBA simply retorts that it was within its own constitutional bounds.[176] The NBA also denies needing to make an argument or statement to argue against Sterling's assertions that the NBA violated the Sherman Act.[177]

2. NBA and Silver's Counterclaim

The NBA's counterclaim argues that Sterling's damaging remarks about African Americans and "'minorities'" were harmful to the NBA's "most basic values, principles, and purposes."[178] And while the NBA "took reasonable actions to attempt to stem and repair the damage" of Sterling's remarks, Sterling was found to be in violation of the NBA Constitution and subsequent agreements.[179] Based on the NBA Constitution and subsequent agreements, Sterling (and the Sterling Family Trust) is required to pay for the NBA's "damages, fees, and costs arising out of the statements and actions reflected on the [r]ecording[s], the NBA's investigation of his statements and actions related to the [r]ecording[s], the NBA's efforts to prepare the Charge against LAC and Mr. Sterling, and the defense of this lawsuit."[180]

---

[173] *See id.* ¶31, at 7-8.

[174] *See id.* ¶31(b), at 8. Sterling's suit also argues third, fourth, and fifth points that the NBA violated antitrust laws by trying to terminate Sterling's ownership rights, s*ee id.* ¶¶34-39, at 9-10, violated Sterling's property rights by converting his interest in the team for the NBA's own use and breach their fiduciary duties, respectively, *see id.* ¶¶40-46, at 10-11; however, these issues are most likely moot based on Mr. Sterling being removed as trustee and Mrs. Sterling selling the team lawfully to Steve Ballmer. *See supra* section II.C and *infra* note 175, ¶20, at 5-6. Likewise, the latter point will not be addressed in this article. Note also that Mr. Sterling's July 22nd complaint against his wife, LAC Basketball Club, Inc, Commissioner Silver, and the NBA are not relevant to the purposes of this article. *See generally* July 22 Complaint, Sterling v. Sterling, No. BC552470 (Cal. App. Dep't Super Ct. filed July 22, 2014). Additionally, Mr. Sterling's removal was deemed valid by the California courts. *See* Sterling v. Sterling, 194 Cal. Rptr. 3d 867, 876 (Cal. Dist. Ct. App. 2015) (noting that Sterling's arguments and factual assertions diverge from the probate court's factual findings).

[175] *See* Answer and Counterclaim of National Basketball Association and Adam Silver for Damages ¶¶13, 26-28, at 4, 7, Sterling v. NBA, No. CV14-4192 (C.D. Cal. filed August 11, 2014) [hereinafter NBA Answer and Counterclaim].

[176] *See id.* ¶¶29-32, at 7-8 (giving no reason why they will not give an explanation).

[177] *See id.* ¶¶33-39, at 8-9. The NBA also states twelve affirmative defenses. *See id.* ¶¶47-58, at 11-12 (failure to state a claim, violated Fed. R. Civ. P. 11, lacked standing, doctrine of unclean hands, doctrine of laches, doctrine of waiver, lack of legal capacity, Fed. R. Civ. P. 19, contributory liability, "released in whole or in part," mootness, and ripeness); *see also* FED. R. CIV. P. 8(c).

[178] *See id.* ¶1, at 12-13.

[179] *See id.* ¶¶2-3 at 13. Subsequent agreements refer to the A&U, JVA, and laws of New York which bound Sterling by the NBA Constitution, noted previously, see *supra* notes 105-111 and accompanying text. However, the NBA also points to Sterling's transfer of ownership document when he acquired the LA Clippers, *see* NBA Answer and Counterclaim, *supra* note 175, ¶15, at 16; and the settlement and release agreement in regards to the recording. *See id.* ¶¶18-19, at 17-18.

[180] *See id.* ¶¶8-31, at 15-20.

E. Sterling's Answer to Counterclaim

Sterling counters the NBA by arguing that he cannot indemnify the NBA based solely on an illegal recording.[181] Sterling argues against Commissioner Silver pointing generally to his agreement with the NBA Constitution since Sterling has a legal "*substantive interest*" in his California privacy right.[182] Further, Sterling chooses not to respond to the NBA counterclaim, besides raising his own affirmative defenses.[183]

V. CRITICAL ANALYSIS: THE PRIVATE & PERSONAL

Donald Sterling's privacy right argument has been ignored as a non-starter,[184] yet the NBA is not completely safe because California has applied privacy rights against a private entity.[185] Likewise, California's application of "informational privacy" can also lead back to the NBA.[186] Additionally, the Supreme Court of California has found that the state has a clear "interest in protecting the privacy of . . . California residents."[187] Assumedly, this would apply to Donald Sterling's in-state position.[188]

Originally, there was a split as how to apply California Penal Code section 632 to private conversations.[189] The question is how to integrate confidential with an objectively reasonable expectation; is a conversation confidential because the parties involved do not believe the conversation is being overheard or recorded (*Frio* analysis), or is the conversation confidential because the parties believe what they say will later not "be divulged to third parties," (*O'Laskey* analysis), and does either scenario involve an objectively reasonable belief?[190] The California Supreme Court sided with applying a *Frio* analysis by arguing that latter dissemination is not relevant to a plain reading of section 632.[191]

Subsequently, California's low bar has allowed a party's belief that the conversations were confidential and room's private setting to allow the conversation to be confidential despite other people

[181] *See* Donald T. Sterling's Answer to Counterclaim ¶12, at 5, Sterling v. NBA, No. CV14-4192 (C.D. Cal. filed August 11, 2014) [hereinafter Sterling's Answer to Counterclaim].
[182] *See id.* ¶16, at 6.
[183] *See id.* ¶¶20-23, at 7, 8-11 (arguing for statute of limitation, failure to state a claim, laches, waiver, estoppel, failure to mitigate, unclean hands, comparative fault, accord and satisfaction, constitutional rights violation, unjust enrichment, speculative damages, lack of causation, intervening or superseding causes, and First Amendment activity protection defenses).
[184] *See Sterling Will Argue Privacy, Breach of Contract in lawsuit vs. NBA*, SPORTS ILLUSTRATED, http://www.si.com/nba/2014/05/31/donald-sterling-nba-legal-strategy-recording-antitrust (last visited September 27, 2014) ("First, the NBA was a third party to the recording and California privacy law only contemplates parties to a recording. The league obviously had no role in the creation or distribution of the recording. The NBA's use of the recording, the league would argue, should fall outside the scope of California privacy law.").
[185] *See* Hill v. NCAA, 865 P.2d 633, 641 (Cal. 1994) (applying California privacy right to the private entity of the NCAA); see also *supra* note 87 and accompanying text.
[186] *See* Betzel, *supra* note 84, at 837-838 ("Corporations may be especially vulnerable under the realm of informational privacy (which the California Supreme Court defined as protecting interests in 'precluding the dissemination or misuse of sensitive and confidential information.')").
[187] *See* Kearney v. Salomon Smith Barney, Inc., 137 P.3d 914, 917, 920 (Cal. 2006) (noting this state interest in reference to preventing telephone calls from being recorded by out of state residents).
[188] *See id.*
[189] *See* CLIFFORD S. FISHMAN & ANNE T. MCKENNA, WIRETAPPING AND EAVESDROPPING § 5:111 (2013) (discussing "*Frio*" vs. "*O'Laskey*" analyses).
[190] *See id.*
[191] *See id*; *accord supra* note 94 and accompanying text.

being present.[192] As Sterling's situation involved himself, V. Stiviano, Stiviano's private living room, and (possibly) another person in the room, it seems likely that Sterling has met this low bar test for a statutory violation.[193] Likewise, even if Sterling knew about the recording, "confidential" could apply to his conversation based on the *Frio* doctrine.[194] Sterling certainly has met the intentional and high offensive prongs of the common law tort of intrusion since it is hard to turn on a recording device without intent and, based on the nature of Sterling's opinion, the release of the recording was highly offensive.[195]

Unless, Sterling consented and stated that he did not have an expectation of confidentiality, Stiviano is most likely liable for violation of section 632 of the California Penal Code or the common law.[196] Yet, the more difficult question is whether Stiviano's guilt precludes the NBA from using the recording.[197] A murky question because the NBA is a private entity.[198] And nearly irrelevant when the entity (here the NBA) did not itself record anyone, and did not release the recording.[199] Sterling did not win in a suit against TMZ for this very reason since TMZ was not involved in recording the conversation.[200] In dicta, federal California Judge Olguin agreed that the NBA did not violate section 632 for the same reason.[201] Importantly, this article is not arguing that section 632 should allow criminal prosecution against the NBA.[202]

---

[192] *See supra* note 94-95 and accompanying text.
[193] *See supra* note 19 and accompanying text.
[194] *See* Gary L. Bostwick & Jean-Paul Jassy, *Flanagan's Wake: Newsgatherers Navigate uncertain Waters Following Flanagan v. Flanagan*, 23 LOY. L.A. ENT. L. REV. 1, 33 (2002) (citing Deteresa v. Am. Broad. Co., 121 F.3d 460 (9th Cir. 1997)) (noting that *Detersa* followed *Frio*'s logic in not holding a conversation confidential if "neither party reasonably expects the communication to be confined to the parties" (internal quotation marks omitted)). Notably, however, Deteresa, does not hold all confidential conversations to be non-recordable. *See* Bostwick & Jassy, *supra* note 194, at 34-35.
[195] *See supra* note 100 and accompanying text; *see generally* Taus v. Loftus, 151 P.3d 1185 (Cal. 2007) (acquiring information through deception satisfied intrusion); *see generally* Sanders v. ABC, 978 P.2d 67 (Cal. 1999) (an employee can expect privacy in office); *see generally* Shulman v. Grp. W. Productions, Inc., 955 P.2d 469 (Cal. 1998) (expectation of privacy in helicopter, ambulance, and when conversing with nurse against recording); *see generally* Miller v. Nat'l Broad. Co., 232 Cal. Rptr 668 (Cal. Ct. App. 1986) (determination to be made by jury whether a television camera crews' invasion into a woman's home, while her husband was having a heart attack and paramedics were working, was highly offensive).
[196] *See supra* note 184-194 and accompanying text; *see also* Nancy Dillon, TMZ dismissed from lawsuit filed by disgraced ex-Clipper's owner Donald Sterling over leak of his racist rant, DAILYNEWS (Nov. 6, 2015, 6:21 PM), http://www.nydailynews.com/entertainment/tmz-dismissed-donald-sterling-lawsuit-article-1.2426409 (Sterling cannot continue its suit against TMZ for posting the recording because of TMZ's first amendment rights), *and* Sterling v. TMZ Productions, BC590575, at 7 (Cal. App. Ct. Nov. 6, 2015) (TMZ is not accountable for actually recording the conversation).
[197] *See supra* note 184 and accompanying text.
[198] *See supra* note 87 and accompanying text.
[199] *See supra* note 19, 87 and accompanying text.
[200] *See* Sterling v. Nat'l Basketball Ass'n, *NBA Parties and Mr. Stern's Notice of Supplemental Authority*, CV14-4192, Ex. A, at 12 (Nov. 16, 2015) [Sterling v. TMZ Prods., Inc., BC590575 (Cal. App. Dep't Super. Ct. Nov. 06, 2015)] (noting TMZ is not legally liable unless they recorded the conversation).
[201] *See* Sterling v. Nat'l Basketball Ass'n, 2016 WL 1204471, CV 14-4192, at *8 n.10 (C.D. Cal. Mar. 22, 2016) (noting that the NBA simply used "public materials" when it relied on the recording since TMZ had already published it on its website at that time).
[202] This article's focus is on the definition of "proceeding" in section 632. *See* CAL. PENAL CODE § 632(d) (West 1994); *contra* Lieberman v. KCOP Television, Inc., 1 Cal. Rptr. 3d 536, 543 (Cal. App. Dep't Super. Ct. 2003) ("Penal Code section 632 does not prohibit the disclosure of information gathered in violation of its terms.").

However, even if there is no criminal recourse for Sterling against the NBA, there is certainly vast policy implications—not to mention ethical—that surround section 632.[203] The ability for the NBA to later use such private recordings, regardless of how the NBA acquired the recording, is not an ethical precedent which a private entity should establish.[204] While the NBA Constitution and By-laws do not state what evidence the NBA may base its decision on, there is precedent for section 632(d) to apply to any proceeding, as long as the conversation meets the standards of section 632.[205] Here, the conversation meets those standards and, thus, should not be used to set precedent.[206]

When considering privacy concerns, public policy requests a distinction between public and private spheres.[207] However, the distinction is far from clear.[208] The reason for this lack of clarity is that there is an expectation of privacy, a requirement that the expectation be valid and violated, and the harm must flow from releasing the information gathered in violation of the privacy.[209] All of these requirements create a blur that has to be evaluated case-by-case and no bright line rule is available.[210] For example, the privacy one expects with one's significant other is not the same one expects with an acquaintance.[211] These distinctions allow for three clear categories: "actors, attributes, and transmission principles."[212] These categories allow public policy to apply a clear distinction.[213] The distinction would draw a line between the public's reaction to an illegally obtained video and a private entities'' use of that recording to strong arm its own member draw.[214] Obviously the private entity could show its disapproval for the recording and

[203] *See* Nissan Motor Co. v. Nissan Computer Corp., 180 F.Supp.2d 1089, 1097 (C.D. Cal. 2002) (noting that certain professions accord a high level of ethical considerations, such as the legal profession).
[204] *See id.* (noting the damage of "the ordinary level of trust that should exist").
[205] *See generally* NBA Constitution, *supra* note 112; *compare* Evens v. Superior Court, 91 Cal. Rptr. 2d 497, 499-500 (Cal. Ct. App. 1999) (secretly recorded videotape of teacher was able to be used in Board disciplinary proceeding against the teacher because the teacher's statements in the classroom were not considered confidential under Penal Code 632, and the Education Code did not prevent such use), *and* De la Cerra v. Molina, 2011 WL 6187168 *7 (Cal Ct. App. Dec. 14, 2011) (holding illegally recording a conversation to not be barred as evidence, unless the conversation was not confidential), *with* People v. Crow, 33 Cal. Rptr. 2d 624, 631 (Cal. Ct. App. 1994) (Evidence of confidential conversations obtained by eavesdropping or recording in violation of section 632 is generally inadmissible in any proceeding.").
[206] *See id.*
[207] *See* Andrew D. Selbst, *Contextual Expectations of Privacy*, 35 CARDOZO L. REV. 643, 650 (2013) (defining a concept known as "[c]ontextual integrity," which, while referring to Fourth Amendment jurisprudence, is applicable to privacy generally because it is concerned with how everyday people view their own right to privacy).
[208] *See id.* (noting that there is "no single concept of private and public").
[209] *See id.* (referring to the sharing determination as "[a]ppropriateness").
[210] *See id.*
[211] *See id.* (noting differing "'social contexts'" (internal quotation marks omitted)).
[212] *See id.* at 651 ("Actors are the people or institutions involved. They can be the subjects, senders, or receivers of the information. Attributes are what the information is about--whether it is a health record, name of an associate, a location, or a piece of gossip, for example. Transmission principles are restrictions placed upon the flow of information between the actors by the particular context: the 'rule' part of the norm. Common transmission principles include control over information or withholding information, … information shared in confidence, obtained with authorization, obtained under compulsion ….").
[213] *See id.* at 650-51.
[214] *See* Shaun B. Spencer, *The Surveillance Society and the Third-Party Privacy Problem*, 65 S.C. L. REV. 373, 380-90 (2013) (noting the case-by-case definitions of privacy); *see also id.* at 655-656 (noting in Fourth Amendment privacy jurisprudence that once public, the information is free to be used by the Government). The argument that Sterling should sue TMZ has been noted as weak. *See* Lewis Kurlantzick, *Donald Sterling and the National Basketball Association: The Matter of Privacy*, 32 SPG ENT. & SPORTS LAW 27, 32 (2015).

reprimand the member, but the recording could not form the basis for a severe deprivation of the member's ownership rights.[215]

VI. CONCLUSION

The law is unclear on Sterling's case, and California precedent has not been extended to this specific situation. Case law is definitely needed to establish clear precedent, but the current public policy implications of the NBA's decision in Sterling's case is strong enough to warrant an extension of California code to the exclusion of Sterling's recording in private proceedings. There is a strong policy concern for other owners and citizens that their private recordings not be available as evidence against them in private proceedings.

No one disagrees that the content of those recordings was horrid; yet, if Sterling is not entitled to privacy in a personal fight with a significant other than California does not view privacy as a vital right. In the end, one man, Adam Silver, decided on his own sentiment that his private entity's financial portfolio was more important that a member's privacy. A number of the public supported Silver's decision because they viewed his sentiments as correct, but when the day comes that another commissioner's sentiments are not correct—the precedent has been set.

[215] At the very least, the NBA should be consistent in its punishments. See *supra* note 158 and accompanying text. Of course, this argument is not meant to involve criminal acts done by members.