

The prosecution of people like Linda Tripp for secretly taping phone calls is said to be necessary to protect privacy. But what aspect of privacy is being protected? Linda Tripp could go on Hard Copy tomorrow and tell the world what Monica Lewinsky told her on the phone, but that would not be a crime.

In fact, Tripp could have hired a court stenographer to listen in on Lewinsky's phone conversations and transcribe them verbatim. And that would not be a crime. When you break down our wiretapping laws, what seems to be the crime is creating an unimpeachable record of conversations. Since the substance of the late-night Lewinsky-Tripp chat sessions is not protected, the only thing that is, if you think about it, is Monica Lewinsky's ability to lie about what was said.

Without the recording, Lewinsky can undermine the credibility of Tripp's disclosure by (falsely) claiming that Tripp was lying. So at most, the law indirectly protects the privacy of the conversations by giving Lewinsky "plausible deniability."

But it is bizarre to outlaw recordings so that that speakers can protect themselves is by lying. Maybe that's why secretly taping calls is legal in 38 states.

It is reasonable to prohibit Tripp or anyone else from selling secret recordings. It might be legal for Lewinsky to write a book saying that she had sex with the President, but it would be illegal for her to surreptitiously videotape one of their encounters and then sell the rights to Barbara Walters. The broadcast itself would be an invasion of privacy – which went beyond the mere kiss-and-tell description.

But if Lewinsky denies that she told Trip about her affair, Tripp should be allowed to use the tape to prove what was actually said. Lewinsky's denial should be considered as giving consent to at least a limited dissemination.

Tripp should have been able to use the tapes as a kind of self-defense if Lewinsky denied that she had ever mentioned her affair. This self-defense exception would mean that some recordings of intimate interactions would receive limited broadcast. But this would represent only a marginal burden on the speaker's privacy – both because Tripp can already disclose what Lewinsky said and because the limited broadcast would only occur when the speaker contests the accuracy of the report.

Even the venerable exclusionary rule allows prosecutors to use illegally obtained evidence to rebut a defendant's false denials. If a criminal defendant testifies that he has never seen the murder weapon, the prosecution can admit a gun bearing his fingerprints to impeach the defendant's false testimony. This is true -- even if the gun was obtained by an illegal search and would be otherwise inadmissible.

And if we do want to criminalize Tripp's recording, why not criminalize Lewinsky's "recording" of the infamous stained dress. Tripp preserved a recording of her conversations with Lewinsky to prevent Lewinsky from falsely claiming that the conversations never took place. So too Lewinsky preserved the President's genetic material to prevent the President from falsely denying that they had an affair. If anything, the privacy interest in one's semen might be greater than the privacy interest in one's confidential remarks. Not only did the dress incontrovertibly establish an illicit affair, but it has subsequently subjected our

Commander in Chief to an unrelated paternity test.

It is no small irony that Tripp counseled Lewinsky to save the dress to prevent a subsequent Presidential denial in a conversation which she was recording to prevent Lewinsky's subsequent denial. Both Lewinsky and Tripp could reasonably worry that they would be in a world of trouble if they made an accusation that they could not back up. But Tripp is now under indictment while Lewinsky poses for Vanity Fair and parties at the Oscars.

Our moral reaction to whistleblowing is conflicted. Disclosing a private conversation is an unworthy act -- except when it's not. Tripp is castigated for taping discussions of an affair (and Lewinsky's perjury). But a few years ago, the public hailed as heroic an employee who surreptitiously recorded racist remarks of Texaco executives.

Our wiretapping laws need to be rewritten. Criminality should not turn on the act of recording but on whether the use was appropriate. As currently drafted, these laws can chill credible whistleblowing and encourage speakers to lie about what they previously said. Indeed, the focus on recording makes the current law under- as well as overinclusive. Simultaneous rebroadcasts of intimate acts -- featured in both the movies M.A.S.H. and American Pie -- would not be criminal in some states because no recording was made.

Even though the President can't pardon state crimes, both he and candidate Clinton should publicly ask the Maryland Governor to pardon Tripp. If Clinton wants to be forgiven for "misleading" us, he should forgive Tripp for leading us toward the truth.

Ian Ayres is the Townsend Professor of Law at Yale University.