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From “He Said, She Said” to “He Said, She-and-Her iPhone-Said”: Florida’s All-Party Consent Requirement Needs an Update

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FROM “HE SAID, SHE SAID” TO “HE SAID, SHE-AND-HER-IPHONE-SAID”: FLORIDA’S ALL-PARTY CONSENT REQUIREMENT NEEDS AN UPDATE

*Sarah Morgado**

ABSTRACT

Wiretap laws have an important place in protecting privacy interests by preventing eavesdropping, but some states have taken privacy protections too far. Florida stands with a minority of states that impose a harsh “all-party consent” requirement, only permitting secret recording of a private conversation where all parties to a communication consent. The majority of states only impose a “single-party consent” requirement, which allows a person to secretly record any conversation he or she is a party to. Under the Florida Supreme Court’s interpretation of Florida’s wiretap law, application of the stringent all-party consent requirement harms victims of crime, results in the suppression of highly probative evidence, hampers social exchange, and prevents the public from exposing private and state misconduct. In comparison, single-party consent serves valid privacy interests but recognizes the benefits that secret recording can provide to society. This article explores why Florida needs to change its wiretap statute to single-party consent.

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I. INTRODUCTION

Anna and Jonathan are in a serious relationship and have been dating for six months. Everything was great. But then Jonathan lost his job, and the relationship began to unravel. Jonathan began acting erratic, resentful, and controlling. He demanded Anna share her location with him on her smartphone. He drove by the restaurant she worked at to “check in” on her. When her shifts ran late, he accused her of sleeping with other men for money. He slapped her in the face when she stood up to him but then immediately begged for forgiveness and promised, fervently, that it would never happen again. A week later, in another confrontation, he wrapped his hand around her throat. Anna knew then that she needed help. With no idea what to do or where to turn, she sought out the Internet for advice. There, she found websites urging her to document the abuse for legal purposes, so she downloaded an application on her phone to record their next conversation, where she planned to confront him about the abuse and catch an admission.

Ivan works as a ridesharing¹ driver, where he often deals with intoxicated and belligerent passengers. Passengers had gone so far as to urinate in his car, steal his cash tips, and break parts inside his vehicle. Fortunately, the ridesharing companies permit reporting of such instances and will charge a fee to the offending customer and reimburse the driver. But where customers deny the occurrence and the driver possesses no documentation, refunds are not guaranteed. Ivan has paid for detail cleaning and repairs from his own pocket more than once. As a solution, he installed a hidden camera, with audio and video capabilities, inside his vehicle, with the intention to document any future incidents.

The instant that Anna and Ivan capture a conversation on their recording devices, they each have likely committed a felony under Florida’s wiretap law, which bars a person from secretly recording a private conversation

¹ Syed I. Ajmal, *The Ultimate Guide to Ridesharing: How it Works and What the Future Holds*, RIDESTER, <https://www.ridester.com/ridesharing-guide/> (last updated Nov. 8, 2018).

unless all parties to the conversation consent—often called an “all-party consent requirement.” This minority rule creates unreasonable and unjust outcomes. The all-party consent requirement is unreasonable because it defies a basic premise of privacy: when a person conveys information to someone else, they assume the risk that the recipient may be untrustworthy and could share the information. No law would ban a person from immediately writing down something someone told them, but yet recording the same is illegal. The all-party consent requirement also results in injustice. It prevents victims of crime from documenting evidence of criminal activity. And if they violate the law, in a twisted turn of events, they are subject to criminal prosecution and can even be sued by the person whose “privacy” they violated. Further, the consent requirement harms the truth-finding process in courts by suppressing reliable evidence. It hampers technology use by exposing violators to criminal and civil liability for using widely accessible and commonly used technology. And finally, it prevents citizens from employing technology to expose private and public misconduct. All this is in the name of a privacy interest in information a person already freely communicated to another. Florida should instead adopt the majority rule of single-party consent, which permits a person to record a conversation he or she is a party to—a rule that benefits justice and society, and also aligns with basic social norms.

In Section II, this comment will explore the background of wiretap law, including its history and purpose. In Section III, this comment will explain the pros and cons of an all-party consent requirement. Finally, in Section IV, this comment will discuss Florida’s wiretap law and examine the important concerns implicated by an all-party consent requirement.

II. BACKGROUND

Wiretapping is a form of surveillance, defined as “electronic or mechanical eavesdropping.”² Quintessential wiretapping takes the form of listening to a telephone conversation,³ but the modern definition more broadly includes even electronic surveillance of in-person conversations.⁴ Traditionally used in police investigations, wiretaps are an important part of the police investigative process, especially when investigating large-scale

² *Wiretapping*, BLACK’S LAW DICTIONARY (11th ed. 2019).

³ Christopher Woolf, *The History of Electronic Surveillance, from Abraham Lincoln’s Wiretaps to Operation Shamrock*, PUB. RADIO INT’L (Nov. 17, 2013, 9:30 PM), <https://www.pri.org/stories/2013-11-07/history-electronic-surveillance-abraham-lincolns-wiretaps-operation-shamrock/>.

⁴ See 18 U.S.C. § 2511(1) (2018).

criminal operations.⁵ To understand state wiretap laws—and consequently, the problems with Florida’s wiretap law—it is necessary to understand the purpose and history of the federal wiretap laws.

A. History of Wiretap Legislation

Federal wiretap legislation evolved as a response to rampant warrantless police wiretapping. During Prohibition, the rise in organized crime prompted increased police wiretap use.⁶ In response to the privacy concerns provoked by warrantless wiretapping—police officers listening in on private conversations—Congress enacted the Federal Communications Act of 1934,⁷ which imposed evidentiary limits on evidence resulting from a warrantless wiretap.⁸

Thirty years later, however, *Katz v. United States* shifted Fourth Amendment search jurisprudence, and the Court held that warrantless police interception of private communications constituted a Fourth Amendment “search,” provided that the speaker exhibited a “reasonable expectation of privacy.”⁹

In response to *Katz*, Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act of 1968, an overhaul of wiretap laws that comprehensively regulated all electronic surveillance of conversations.¹⁰ Title III increased communication protections and imposed a warrant requirement on all wiretaps.¹¹ Most importantly, Title III barred intentional interceptions of oral or telephone communications by *any* person, not just

⁵ See generally Hugh Scott, *Wiretapping and Organized Crime*, 14 HOW. L.J. 1 (1968); see also Jordan Maglich, *Once Reserved for Drug Crimes, Wiretapping Takes Center Stage in White Collar Prosecutions*, FORBES (May 21, 2019, 11:32 AM), <https://www.forbes.com/sites/jordanmaglich/2013/05/21/once-reserved-for-drug-crimes-wiretapping-takes-center-stage-in-white-collar-prosecutions/#1bc1f6119691>.

⁶ See Karen Abbott, *The Bootlegger, the Wiretap, and the Beginning of Privacy*, NEW YORKER (July 5, 2017), <https://www.newyorker.com/culture/culture-desk/the-bootlegger-the-wiretap-and-the-beginning-of-privacy>; see also Alex Gauthier, *History of Wiretapping: from Prohibition to Patriot Act*, INDEP. VOTER NETWORK (June 21, 2013), <https://ivn.us/2013/06/21/the-history-of-wiretapping-from-prohibition-to-the-patriot-act/>. See generally *Olmstead v. United States*, 277 U.S. 438 (1928).

⁷ See Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (1934) (codified as amended at 47 U.S.C. § 151 (1982)).

⁸ *Id.*

⁹ *Katz v. United States*, 389 U.S. 347, 353, 358 (1967); see also *Berger v. New York*, 388 U.S. 41, 63 (1967).

¹⁰ See Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (codified as amended at 18 U.S.C. § 2510 (1994)).

¹¹ *Id.*; see also *Katz*, 389 U.S. at 357.

police but private individuals—an unprecedented step in federal wiretap legislation.¹²

Rapid technological advancements soon rendered Title III “hopelessly out of date.”¹³ Congress amended it with the Electronic Communications Privacy Act. Its predecessor only covered oral or telephone communications, and with a rise in e-mail, cell phone, cordless phone, pager, and video conference use, Title III’s scope no longer furthered its purpose.¹⁴ Title III’s amended version now covers all wire, oral, or electronic communication.¹⁵

1. Title III

a. Important Title III Provisions

Two parts of Title III are important to understand: the bar against wiretapping and the single-party consent exception. First, Title III generally bars the intentional interception of communications:

(1) Except as otherwise specifically provided in this chapter any person who—

(a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;
¹⁶

This definition requires unpacking. “Intercept” means “the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device.”¹⁷ “Aural” means “of or relating to the ear or to the sense of hearing.”¹⁸ Put simply, there must be an audio component to the communication—silent video does not fall under the purview of Title III.¹⁹ “Wire communication” covers

¹² See Omnibus Crime Control and Safe Streets Act.

¹³ S. REP. NO. 99-541, at 2 (1986).

¹⁴ *Id.*

¹⁵ Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 (codified as amended at 18 U.S.C. §§ 2510–22, 2701–11, 3121–26).

¹⁶ 18 U.S.C. § 2511 (2018).

¹⁷ 18 U.S.C. § 2510 (2002) (“‘intercept’ means the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device.”).

¹⁸ *Definition of Aural*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/aural?utm_campaign=sd&utm_medium=serp&utm_source=jsonld (last visited Apr. 7, 2019).

¹⁹ 18 U.S.C. § 2510 (“‘wire communication’ means any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like

transmission through telephone lines or other similar connections, and “electronic communication” broadly covers “any transfer of signs, signals, writing, images, sounds, data, or intelligence” transmitted through various electronic processes.²⁰ “Oral communication” means a non-electronic oral communication, uttered by a person exhibiting a reasonable expectation of privacy.²¹

Finally, the statute excepts the interception of communications where one party to the conversation consents:

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception²²

The consenting party can be, and often is, the party who is intercepting the conversation. For example, a person could secretly record a meeting they were present at and not violate Title III. This exception greatly limits the scope of Title III and makes Title III a “single-party consent” law.²³ In single-party consent jurisdictions, prototypical eavesdropping is all that is prohibited: listening in on a private conversation a person is not a party to (think hiding a “bug” in someone’s home or a housekeeper tiptoeing up to listen in on a private conversation in a bedroom).²⁴

connection between the point of origin and the point of reception (including the use of such connection in a switching station) furnished or operated by any person engaged in providing or operating such facilities for the transmission of interstate or foreign communications or communications affecting interstate or foreign commerce;”); *see also* *Smith v. Wunker*, 356 F. Supp. 44, 46 (S.D. Ohio 1972) (citing to WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1967)) (“The words ‘aural acquisition’ literally translated mean to come into possession through the sense of hearing.”). *See, e.g., id.* (holding that recording surveillance that uses the sense of sight rather than hearing to apprehend the contents of the recording does not fall within the purview of Title III); *United States v. Gregg*, 829 F.2d 1430, 1434 (8th Cir. 1987).

²⁰ 18 U.S.C. § 2510 (“‘electronic communication’ means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system”).

²¹ *Id.* (“‘oral communication’ means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but such term does not include any electronic communication;”); *see also infra* Section II.A.1.b.

²² 18 U.S.C. § 2511 (2018); *see also* *United States v. Kahn*, 415 U.S. 143, 151 (1974) (noting Title III is a balance between individual privacy concerns and the need to secure evidence of a violation of the criminal laws).

²³ *See infra* Section II.B.

²⁴ *See* FLA. STAT. § 934.03 (2015).

b. Reasonable Expectation of Privacy

The reasonable expectation of privacy requirement exacts another important limit on the scope of Title III.²⁵ In *Katz v. United States*, the Court held that a speaker exhibits a reasonable expectation of privacy if (1) the speaker has an actual, subjective expectation of privacy in the communication, and (2) society is prepared to recognize that expectation as reasonable.²⁶ Much of the Court’s reasonable expectation of privacy jurisprudence arises, like *Katz*, in Fourth Amendment search cases. The *Katz* definition, and later jurisprudence further interpreting it, has been incorporated into Title III.²⁷

A person’s reasonable expectation of privacy is context-specific and depends on the location of the conversation, its volume, and the parties present, among other factors.²⁸ The fact-specific nature of the reasonable expectation of privacy inquiry makes predictions about any given circumstance difficult. It is clear, however, that pure eavesdropping into a private conversation, by someone who is not a party to that communication and where neither party has consented to the eavesdropping, infringes on a person’s reasonable expectation of privacy.²⁹ The question is not so clear when the communication takes place in a less “private” context, such as where someone is in a group of people, at a meeting at work, or in an automobile.³⁰

When one party to a conversation secretly records or later divulges the information to law enforcement, the Court has held that a person’s reasonable expectation of privacy is not violated.³¹ In that context, although a person exhibits a subjective expectation that the information conveyed will be kept private, that expectation is not reasonable.³² The unreasonableness is based on the premise that a speaker, when communicating information to another,

²⁵ § 2511.

²⁶ *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

²⁷ *See, e.g.*, *United States v. McKinnon*, 985 F.2d 525, 527–28 (11th Cir. 1993).

²⁸ *See United States v. Jones*, 565 U.S. 400, 405–13 (2012) (discussing several cases and their various results when interpreting persons’ reasonable expectation of privacy).

²⁹ *See, e.g.*, *Katz*, 389 U.S. at 352.

³⁰ *Compare Minnesota v. Olson*, 495 U.S. 91, 91 (1990) (holding an overnight guest held a reasonable expectation of privacy in his host’s home), *with Minnesota v. Carter*, 525 U.S. 83, 83–84 (1998) (holding that guests at a home that were only present for commercial transactions could not hold a reasonable expectation of privacy in the host’s home).

³¹ *See, e.g.*, *Hoffa v. United States*, 385 U.S. 293, 303 (1966) (“The risk of being . . . betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we speak.”) (quoting *Lopez v. United States*, 373 U.S. 427, 465 (1963)).

³² *Id.*

always assumes the risk that the person they are confiding in will not keep the communicated information private.³³ This theory is called the “false-friend doctrine.”³⁴

Thus, an undercover police officer could record a conversation without a warrant,³⁵ and so could a government informant,³⁶ even in a person’s private home,³⁷ as long as he or she is actually part of the conversation. The single-party consent exception in Title III acknowledges the false-friend doctrine’s premise by permitting a person to record a conversation he or she is a party to.³⁸

B. State Wiretap Laws

Congress intended Title III to provide a floor for privacy protections with regard to electronic surveillance, but Title III does not preempt more restrictive state wiretap provisions.³⁹

Most states either adopted the federal statute into their state codes or modified the statute only slightly to serve certain state interests.⁴⁰ At the time of this comment, fifteen states provided more rigorous privacy protections than Title III.⁴¹

All states have consent exceptions. These exceptions can fall into any of four categories: (1) pure single-party consent; (2) default single-party consent; (3) pure all-party consent; and (4) default all-party consent.⁴² States that are pure single-party consent track the federal statute’s consent exception: the statute is not implicated provided one party to the communication consents.

But the more restrictive states impose more rigorous consent exceptions, some type of all-party consent requirement. Instead of requiring only *one party* to consent before intercepting a communication, those states require *all*

³³ *Id.*; *On Lee v. United States*, 343 U.S. 747, 751–52 (1952).

³⁴ Donald L. Doernberg, “Can You Hear Me Now?”: *Expectations of Privacy, False Friends, and the Perils of Speaking Under the Supreme Court’s Fourth Amendment Jurisprudence*, 39 IND. L. REV. 253, 275 (2006).

³⁵ *Lopez*, 373 U.S. at 437–39.

³⁶ *On Lee*, 343 U.S. at 754.

³⁷ *Lewis v. United States*, 385 U.S. 206, 211 (1966); *United States v. White*, 401 U.S. 745, 749 (1971).

³⁸ See 18 U.S.C. § 2511(2)(d) (2018).

³⁹ See, e.g., *United States v. Hall*, 543 F.2d 1229, 1232 (9th Cir. 1976).

⁴⁰ Carol M. Bast, *What’s Bugging You? Inconsistencies and Irrationalities of the Law of Eavesdropping*, 47 DEPAUL L. REV. 837, 851 (1998).

⁴¹ Michael D. White & Henry F. Fradella, *The Intersection of Law, Policy, and Police Body-Worn Cameras: An Exploration of Critical Issues*, 96 N.C. L. REV. 1579, 1608 (2018).

⁴² *Id.* at 1607–611.

parties to consent before interception, unless the speakers do *not* exhibit a reasonable expectation of privacy.

Consider two examples emphasizing the effect of the reasonable expectation of privacy interaction with all-party consent requirements. A and B are having coffee together in A’s kitchen, discussing A’s divorce. B surreptitiously records the conversation. In an all-party consent jurisdiction, B has committed a violation because A exhibits a reasonable expectation of privacy in a private conversation taking place in her own kitchen. In contrast, if A and B are having the same conversation in a busy coffee shop, where anyone could hear it, and B surreptitiously records the conversation, an all-party consent jurisdiction would not bar this action because A does not have a reasonable expectation of privacy in a public communication, where anyone could hear it. Thus, the communication falls outside the scope of most statutes.⁴³

States in the second category, default single-party consent jurisdictions, generally permit single-party consent but also provide exceptions to that rule for specific types of communications. Those exceptions require all-party consent only in certain situations. For instance, some states impose all-party consent requirements only when intercepting telephone conversations.⁴⁴ States that fall into the third category, pure all-party consent jurisdictions, always require all parties to a conversation to consent before the communication can be recorded; that is, unless the speakers do not exhibit a reasonable expectation of privacy. Finally, some states are default all-party consent but have crafted exceptions where single-party consent is permitted. For example, some states permit only one party to consent where they are in fear of harm. All-party consent jurisdictions—including Florida—are the subject of criticism.⁴⁵

C. *Florida’s Wiretap Law*

Florida’s wiretap law closely tracks the federal statute.⁴⁶ Florida is a default all-party consent jurisdiction with very limited exceptions to its consent requirement.⁴⁷ Florida incorporates the same definitions and

⁴³ See *McDonough v. Fernandez-Rundle*, 862 F.3d 1314, 1321 (11th Cir. 2017). *But see* MASS. GEN. LAWS ANN. ch. 272, § 99 (West 2020).

⁴⁴ See, e.g., CONN. GEN. STAT. ANN. § 52-570d(a) (West 2019) (permitting one-party consent for in-person conversations but requiring all-party consent for recording telephone conversations).

⁴⁵ Rauvin Johl, *Reassessing Wiretap and Eavesdropping Statutes: Making One-Party Consent the Default*, 12 HARV. L. & POL’Y REV. 177, 184 (2018); David K. Warren, *A Man’s Home Is His Castle, but It Has a Secret Dungeon: Domestic Violence Victims Need an Amendment to Florida’s All-Party Consent Law*, 69 FLA. L. REV. 223, 226–27 (2017).

⁴⁶ FLA. STAT. § 934.03 (2020).

⁴⁷ *Id.*

reasonable expectation of privacy requirement as Title III, including the *Katz* standard.⁴⁸ Florida's all-party consent exception reads:

(d) It is lawful under this section . . . for a person to intercept a wire, oral, or electronic communication when *all* of the parties to the communication have given prior consent to such interception.⁴⁹

This one-word deviation from Title III places Florida among the minority jurisdictions that chose to heavily restrict the interception of communications.

Florida's remedies for a violation of the statute are similar to those in the federal system.⁵⁰ A violation of the statute is a felony in the third-degree,⁵¹ a violating party is open to civil suit by the person whose communication was intercepted (damages are case-specific),⁵² and any evidence obtained in violation of the statute is inadmissible in court proceedings.⁵³

III. PROS AND CONS OF CONSENT EXCEPTION-TYPES

The pros and cons of the different exception-types are often two sides of the same coin. The question, as with all legislation, is which countervailing interest is more important. Most all-party consent states have not provided rationales for their decision to impose the burdensome restriction. But those that have justified their determination to impose all-party consent requirements voiced concern with stunting social exchange and interest in promoting general privacy protections.⁵⁴ Pennsylvania, for example, determined that the value of encouraging social exchange, free from worry about eavesdropping, outweighed the beneficial interests served by permitting eavesdropping.⁵⁵ Massachusetts, in changing from a one-party consent scheme to an all-party consent scheme, noted that "the uncontrolled development and unrestricted use of modern electronic surveillance devices pose[d] grave dangers to the privacy of all citizens of the commonwealth."⁵⁶

⁴⁸ See *State v. Inciarrano*, 473 So. 2d 1272, 1277 (Fla. 1985); see also *Smith v. State*, 261 So. 3d 714 (Fla. Dist. Ct. App. 2018); *McDade v. State*, 154 So. 3d 292, 299 (Fla. 2014).

⁴⁹ § 934.03(2)(d) (emphasis added).

⁵⁰ § 934.03.

⁵¹ § 934.03(4)(a).

⁵² § 934.10.

⁵³ § 934.06.

⁵⁴ Alan F. Westin, *Science, Privacy, and Freedom: Issues and Proposals for the 1970's: Part II: Balancing the Conflicting Demands of Privacy, Disclosure, and Surveillance*, 66 COLUM. L. REV. 1205, 1205 (1966).

⁵⁵ *Commonwealth v. Papszycki*, 275 A.2d 28, 30–31 (Pa. 1971).

⁵⁶ *Commonwealth v. Hyde*, 750 N.E.2d 963, 967 (Mass. 2001).

The common thread between state rationales is a concern with hampering social exchange and general privacy interests.⁵⁷

Like all-party consent schemes, single-party consent schemes are also not always justified by the legislature. Even without explicit justification, however, single-party consent jurisdictions determined that increasingly stringent privacy protections are unjustified in light of the important interests that interceptions of communications can serve.⁵⁸

Moreover, basic social exchange norms align with single-party consent. The false friend doctrine provides an excellent example of this. As recognized by the Supreme Court, sharing information with others in the form of conversation involves a certain level of risk.⁵⁹ Any person who exposes information to another always assumes the risk that the person they are conversing with is not trustworthy but instead is a false friend.⁶⁰ States that choose to enact single-party consent schemes recognize that “false friends” are not only commonplace in society but can benefit society.⁶¹

Importantly, single-party consent does not implicate valid concerns about eavesdropping that stem from bedrock principles of privacy.⁶² Even in single-party consent jurisdictions, listening in on private conversations remains illegal.⁶³ Spying spouses may not record phone calls in a home.⁶⁴ Curious houseguests may not listen in on conversations.⁶⁵ Installation of spying devices is still illegal.⁶⁶

This is not to say that there are no cons to single-party consent. A person does give up limited privacy interests when in single-party consent jurisdictions. Because someone can record a perfect replica of a conversation, any he-said-she-said situations are minimized.⁶⁷ But even in all-party consent jurisdictions, a person may typically share any information they are conveyed by another. For example, if A tells B, “I hid the gun under my couch,” then B can testify (within evidentiary parameters) to this conversation or tell others about it; B just could not *record* the communication in an all-party consent jurisdiction. So, the only real difference is in the quality of the captured idea, not its substance. But single-party consent jurisdictions

⁵⁷ Johl, *supra* note 45, at 177.

⁵⁸ *See* *United States v. Kahn*, 415 U.S. 143, 151 (1974).

⁵⁹ *Hoffa v. United States*, 385 U.S. 293, 303 (1966).

⁶⁰ *Id.*

⁶¹ *See infra* Section IV.B.4.

⁶² Johl, *supra* note 45, at 182.

⁶³ *See* 18 U.S.C. § 2511 (2018).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *See infra* Section IV.B.1.

determined that that limited privacy interest is far outweighed by the many benefits that intercepting communications provides.

One benefit of single-party consent is the introduction of reliable evidence, aiding the court in the truth-finding process.⁶⁸ Subject to hearsay rules, a person may testify to the contents of a conversation he or she is a party to.⁶⁹ But a recording of a conversation, where a person can hear the exact words a person uttered, with inflection, tone, and volume, is much more reliable and compelling evidence.⁷⁰ A recording of a conversation is far more reliable than the testimony and/or notes of a conversation participant.⁷¹ Thus, the effect of single-party consent is to promote the truth-finding process generally and also encourage sound justice.

Single-party consent also serves societal goals, such as catching workplace misconduct, bullying, or deception. Further, single-party consent results in less inhibited social interaction. As technology develops, recording device use increases, including devices that surreptitiously record. Single-party consent permits people to employ new technology, technology that is rapidly integrating with how humans interact. Thus, single-party consent benefits social exchange.

IV. FLORIDA'S NEED FOR AN UPDATE TO SINGLE-PARTY CONSENT

Although there are limited benefits to all-party consent, further examination into real-world application of all-party consent statutes reveals that they pose real, important problems. They harm more than they help. Florida's all-party consent requirement harms victims by exposing them to criminal and civil liability. It harms the justice system by preventing the introduction of reliable evidence. It harms social exchange by chilling technology use. And it harms citizens by limiting private and public accountability.

A. *Florida's Take on the Reasonable Expectation of Privacy*

Although the Supreme Court has incorporated the false-friend theory into its interpretation of the reasonable expectation of privacy, Florida has not. Florida courts have, however, attempted to limit the definition of the reasonable expectation of privacy as much as Chapter 934 permits.

⁶⁸ See *Lopez v. United States*, 373 U.S. 427, 439 (1963).

⁶⁹ See *id.*

⁷⁰ See *id.*

⁷¹ See *id.*

Florida courts began chipping away at the breadth of the reasonable expectation of privacy in *State v. Inciarrano*.⁷² There, the defendant went to the victim’s office and murdered him by shooting him five times.⁷³ The victim surreptitiously recorded the shooting and captured the defendant and victim’s conversation regarding a business deal the victim wanted out of.⁷⁴ Then, the recording captured the sounds of a gun being cocked, five gunshots, moaning, the victim falling to the floor, blood gushing, and after all fell silent, footsteps and the sound of the defendant leaving.⁷⁵ Although the conversation took place in a private place of business, during a private conversation, the Florida Supreme Court surprisingly held that the conversation did not fall within the purview of section 934.03, because the defendant lost his reasonable expectation of privacy when he entered the victim’s office for the purpose of inflicting harm on him.⁷⁶ When he entered the office not as a patient, but as a trespassing wrongdoer, he lost all privacy interests, and any later, surreptitiously recorded conversations were admissible against him.⁷⁷ The major takeaway from *Inciarrano* is that a person who trespasses has no reasonable expectation of privacy in his conversations.⁷⁸

Florida courts extended the principles of *Inciarrano* in *Jatar v. Lamaletto*.⁷⁹ There, Lamaletto feared his attorney, Jatar, would seek to extort money from him.⁸⁰ Lamaletto secretly recorded a conversation with Jatar when Jatar came to visit Lamaletto at Lamaletto’s office.⁸¹ As Lamaletto suspected, Jatar did seek to extort him, and the recording captured incriminating statements.⁸² The Third District Court of Appeals held the recording was not barred by Chapter 934 because of where it was conducted: in the victim’s business office.⁸³ Because the recording was in a place of business, the court held Jatar did not have a reasonable expectation of privacy, and, thus, the recording was not within the scope of Chapter 934.⁸⁴

The Eleventh Circuit Court of Appeals followed Florida’s lead when it was required to analyze Chapter 934. In *McDonough v. Fernandez-Rundle*,

⁷² See generally *State v. Inciarrano*, 473 So. 2d 1272 (Fla. 1985).

⁷³ *Id.* at 1274.

⁷⁴ See *id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 1276.

⁷⁷ *Id.* at 1275–76.

⁷⁸ *Id.*

⁷⁹ See generally *Jatar v. Lamaletto*, 758 So. 2d 1167 (Fla. Dist. Ct. App. 2000).

⁸⁰ *Id.* at 1168.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 1169.

⁸⁴ *Id.*

the Homestead Chief of Police invited McDonough to discuss a series of complaints McDonough had lodged against a Homestead police officer.⁸⁵ McDonough secretly recorded the meeting with the Chief, which took place in the Chief's office with a friend of McDonough's and a Homestead Police Department Internal Affairs detective.⁸⁶ The Eleventh Circuit held the conduct did not implicate section 934.03.⁸⁷ The court reasoned that, based on the number of participants in the meeting, the topic of discussion, and because the Chief did not "exhibit"—that is, demonstrate externally—any sort of expectation that the meeting was private or confidential, the officers did not exhibit a reasonable expectation of privacy in the recorded communication.⁸⁸ Therefore, McDonough did not violate Chapter 934.

While Florida's interpretations of the reasonable expectation of privacy seem hopeful in ensuring justice is done, Florida courts draw the line at communications in the home. *McDade v. State* emphasizes the major flaw in Chapter 934, and the resulting effect it has on victims.⁸⁹ In *McDade*, the defendant was accused of committing sexual battery upon a child under twelve years of age.⁹⁰ The victim, stepdaughter to the defendant, reported the abuse to her mother and to a doctor, but neither believed her.⁹¹ After several years of abuse, at the behest of the victim's new boyfriend, the victim and her boyfriend concocted a plan to catch her stepfather admitting to the sexual abuse.⁹² She used her boyfriend's MP3 player, hidden under her shirt, and recorded her stepfather making incriminating statements regarding the abuse.⁹³ The evidence was admitted at trial, and the jury found the stepfather guilty.⁹⁴ The Florida Supreme Court held that Chapter 934 barred admission of the evidence.⁹⁵ The court noted that the situation presented compelling reasons to justify the inclusion of the evidence and called for the legislature to craft an exception to permit the admission of surreptitious recordings when the purpose of the recording is to gather evidence of criminal activity.⁹⁶

After *McDade*, the stance of the Florida courts shows there can be no reasonable expectation of privacy held by a trespasser, and likely not in a

⁸⁵ *McDonough v. Fernandez-Rundle*, 862 F.3d 1314, 1316 (11th Cir. 2017).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 1319.

⁸⁹ *See generally* *McDade v. State*, 154 So. 3d 292 (Fla. 2014).

⁹⁰ *Id.* at 294.

⁹¹ *Id.*

⁹² *Id.* at 295.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 300.

⁹⁶ *Id.* at 299.

place of business, but Chapter 934 bars any surreptitious recording within a private residence without the consent of all parties.⁹⁷ The home is one place where a person nearly always exhibits a reasonable expectation of privacy. Although Florida courts succeeded in restricting the statute’s application to achieve just outcomes, it is clear that a person exhibits a reasonable expectation of privacy in their in-home communications.⁹⁸ As a result, victims are left in a bind: the Florida legislature has deemed the privacy interests of the home more important than a person’s ability to feel safe.

B. *The Harms of Florida’s All-Party Consent Requirement*

Florida’s all-party consent requirement imposes burdens and restricts benefits that flow from the use of surreptitious recordings. As explained in this section, all-party consent burdens victims, harms the justice system, stifles social exchange, impedes the use of modern technology, and punishes those who seek to uncover misconduct.

1. Burdens on Victims

As emphasized by *McDade*, the most worrisome flaw with Chapter 934 is how it can be applied to victims of crime. If the recording happens in a home, the evidence must be suppressed. And to add insult to injury, the perpetrator of the crime can sue the victim. Moreover, the victim is also open to criminal prosecution, all because of his or her effort to capture evidence of a crime.

a. *Domestic Violence Victims*

Domestic violence victims are the most vulnerable subset of victims under Chapter 934. To understand why, it is important to understand common features of domestic violence situations. First, domestic violence commonly results in a he-said-she-said scenario.⁹⁹ When this situation arises, corroboration is necessary to proceed. Absent physical injury, corroboration is much more difficult.¹⁰⁰ Sadly, severe, life-threatening acts—or even death—are often necessary for prosecution to occur.¹⁰¹ When these he-said-

⁹⁷ *See id.* at 297–98.

⁹⁸ *Id.* at 296.

⁹⁹ Carolyn Copps Hartley, “*He Said, She Said*”: *The Defense Attack of Credibility in Domestic Violence Felony Trials*, 7 VIOLENCE AGAINST WOMEN 510, 514 (2001).

¹⁰⁰ *Id.* at 514.

¹⁰¹ Katie Zezima, Deanna Paul, Steven Rich, Julie Tate & Jennifer Jenkins, *Domestic Slayings: Brutal and Foreseeable*, WASH. POST (Dec. 9, 2018),

she-said situations present themselves, a video or audio recording of either the abuse or an admission of abuse would quickly aid law enforcement in deciding whether and who to arrest.¹⁰² In fact, victims of abuse are regularly encouraged to document their abuse for legal purposes.¹⁰³ The second feature of domestic violence is that it is inherently domestic; it occurs most commonly in the home—in private.¹⁰⁴ Application of all-party consent requirements results in a victim who is unable to corroborate abuse because it takes place where the abuser exhibits a reasonable expectation of privacy, implicating Chapter 934.¹⁰⁵

Florida's legislature did not turn a deaf ear to the Florida Supreme Court's pleading in *McDade*; the legislature is not ignorant to the harm that all-party consent imposes on victims. Noting the importance of the problem encountered in *McDade*, the Legislature responded with an amendment to Chapter 934, implementing a new, narrow exception:

It is lawful under this section and ss. 934.04–934.09 for a child under 18 years of age to intercept and record an oral communication if the child is a party to the communication and has reasonable grounds to believe that recording the communication will capture a statement by another party to the communication that the other party intends to commit, is committing, or has committed an unlawful sexual act or an unlawful act of physical force or violence against the child.¹⁰⁶

McDade was an unjust and illogical result. The *McDade* court recognized the need for reliable evidence of crimes.¹⁰⁷ The statute places privacy interests in the home over victims' interest in achieving justice.¹⁰⁸ The aforementioned amendment attempts to resolve these concerns, giving a

https://www.washingtonpost.com/graphics/2018/investigations/domestic-violence-murders/?utm_term=.67b37369c62e.

¹⁰² *Building Your Case: How to Document Abuse*, NAT'L DOMESTIC VIOLENCE HOTLINE (May 12, 2014), <https://www.thehotline.org/2014/05/12/building-your-case-how-to-document-abuse/> (encouraging victims to safely save digital evidence of abuse).

¹⁰³ *Id.*; *Smartphone Apps that Help You Document Abuse*, DOMESTICSHELTERS.ORG (Aug. 15, 2016), <https://www.domesticshelters.org/domestic-violence-articles-information/smartphone-apps-that-help-you-document-abuse/> (encouraging use of smartphone applications that record audio and video); *5 Important Ways to Document Abuse*, BREAK THE CYCLE: DATING VIOLENCE BLOG, <https://www.breakthecycle.org/blog/5-important-ways-document-abuse> (last visited Apr. 7, 2019).

¹⁰⁴ *See McDade v. State*, 154 So. 3d 292, 294 (Fla. 2014).

¹⁰⁵ *Id.* at 296–97.

¹⁰⁶ FLA. STAT. § 934.03(2)(k) (2019).

¹⁰⁷ *See McDade*, 154 So. 3d at 299.

¹⁰⁸ *See id.*

single-party consent exception to children for the purpose of substantiating abuse allegations.¹⁰⁹

The Legislature did not go far enough. One-party consent for child-victims is not enough.¹¹⁰ Victims of abuse in the home should not give up their ability to corroborate their abuse because their abusers’ privacy interests outweigh their safety.

Anna, our hypothetical character we met earlier, in the introduction of this comment, is in a situation almost exactly like the victim in *McDade*, except because Anna is an adult victim of physical abuse, rather than a child victim of sexual abuse, the Legislature has determined that her abuser’s privacy outranks her ability to achieve justice.¹¹¹

Anna’s story is not rare. And it mirrors a recent case in the news: the story of Neha Rastogi.¹¹² The only difference, however, is that Rastogi was not burdened by an all-party consent requirement. A Silicon-Valley-based Apple employee, Rastogi found herself in a relationship filled with violent abuse.¹¹³ Her husband beat her regularly throughout their ten years of marriage.¹¹⁴ He said he wished to see her murdered, that he imagined her being stabbed to death. Rastogi secretly recorded multiple instances of threats and abuse and turned the recordings over to law enforcement, resulting in her husband’s prosecution.¹¹⁵ One video recorded the couple arguing and the repeated sounds of Rastogi’s husband beating her in the presence of their two-year-old child.¹¹⁶

Because she did not live in Florida, Rastogi’s video recording was admissible in court. But in Florida, she would not have been so lucky. Not only would the recording have been inadmissible as evidence in court, but Rastogi would have been subject to criminal liability. And in a further act of manipulation, Rastogi’s husband could have sued her for violating his privacy. Women like Neha Rastogi should not fear criminal action for recording the abuse they endure on a daily basis.

¹⁰⁹ § 934.03(2)(k); *see also* H.R. 7001, 2015 Leg. (Fla. 2015).

¹¹⁰ *See* David K. Warren, *supra* note 45, at 251–52.

¹¹¹ *See id.* at 250; *see also* JUDICIARY COMMITTEE, POST-MEETING STAFF ANALYSIS, H.R. 2015, 1 (Fla. 2015), <https://www.flsenate.gov/Session/Bill/2015/7001/Analyses/h7001a.JDC.PDF>.

¹¹² Michael Daly, *Silicon Valley CEO Pleads ‘No Contest’ to Abusing His Wife—and Is Offered a Deal for Less than 30 Days in Jail*, DAILY BEAST, <https://www.thedailybeast.com/silicon-valley-ceo-pleads-no-contest-to-abusing-his-wifeand-is-offered-a-deal-for-less-than-30-days-in-jail> (May 5, 2017, 2:30 PM).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

b. Victims of Other Crimes

Although domestic violence victims are most impacted by the application of Chapter 934, the application of the statute results in the suppression of evidence of other serious crimes, including extortion and murder. In *State v. Walls*, a victim of extortion recorded, in his own home, a conversation between him and his alleged extortioners.¹¹⁷ The extortioners made incriminating statements, which were caught on the recording.¹¹⁸ The Florida Supreme Court held that the recordings were wrongfully intercepted in violation of Chapter 934 and were correctly suppressed by the trial court.¹¹⁹ To be clear, the victim, *in his own home*, surreptitiously recorded the statements, but was barred from using them to prove the misconduct.¹²⁰

In *Smith v. State*, a mother, using a call-recording application on her phone, recorded a conversation between herself and the alleged killer of her twenty-month-old child.¹²¹ In the recorded conversation, the defendant told the mother the child was not waking up.¹²² The Fifth District Court of Appeal held that the trial court erred in admitting the recording because the surreptitious recording of the phone call violated Chapter 934.¹²³

The limited privacy interests in recording a conversation should not outweigh the probative value of evidence of criminal conduct resulting from these interceptions. And victims of crime should not be subject to suit by the perpetrator, nor should they themselves be charged with a felony for simply trying to achieve justice.

2. The Justice System Generally

Florida's justice system, criminal and civil, suffers as a whole from the all-party consent requirement. The Florida legislature states that the purpose of the Chapter is "to protect effectively the privacy of wire and oral communications, [and] to protect the integrity of court and administrative proceedings"¹²⁴ But Chapter 934 does not achieve its stated purpose. Probative, relevant evidence is suppressed, resulting in unjust outcomes in both the criminal and civil spheres.

¹¹⁷ *State v. Walls*, 356 So. 2d 294, 295 (Fla. 1978).

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 296.

¹²⁰ *Id.*

¹²¹ *Smith v. State*, 261 So. 3d 714, 715 (Fla. Dist. Ct. App. 2018).

¹²² *See id.*

¹²³ *Id.* at 716.

¹²⁴ FLA. STAT. § 934.01(2) (2020).

3. Technology

We live in an era of rapid technological advancement. Home surveillance systems are affordable and readily available.¹²⁵ Many doorbells are equipped with a camera linked to the homeowner’s smartphone.¹²⁶ Eyeglasses record video.¹²⁷ People utilize high-tech recording devices, including Go-Pros¹²⁸ and selfie-sticks,¹²⁹ to record vacation memories, parties, and outdoor activities. Cellphones, which function as cameras, voice recorders, and mini-computers, are almost an extension of a person’s body.¹³⁰ We live in an age where the recording of activity is commonplace to save happy memories, for security purposes, and to make life easier. Taking videos and posting to Facebook, Snapchat, and Instagram is a daily ritual for many.¹³¹ Because of this shift in societal norms, Chapter 934’s bar against surreptitious recording stifles social exchange, fails to achieve its desired purpose, and raises the very real risk of criminalizing commonplace conduct.¹³²

The application of the all-party consent requirement to situations involving advanced technology is unclear.¹³³ Courts have not yet tested the boundaries of the law. Due to the reasonable expectation of privacy requirement, most recorded conversations will not fall under the purview of Chapter 934.¹³⁴ But many will. And as technology advances, the law must also advance.

a. Social Exchange

All-party consent statutes are hampering the very thing they seek to promote: social exchange.¹³⁵ Major shifts in technology have led to the rapid

¹²⁵ *Complete Surveillance Systems*, AMAZON, <https://www.amazon.com/Complete-Surveillance-Systems/b?ie=UTF8&node=898406> (last visited Nov. 18, 2020).

¹²⁶ RING, <https://ring.com> (last visited Apr. 7, 2019).

¹²⁷ *Glass*, GOOGLE, <https://www.google.com/glass/start/> (last visited Nov. 15, 2020); SPECTACLES, <https://www.spectacles.com/> (last visited Nov. 15, 2020).

¹²⁸ GOPRO, <https://gopro.com> (last visited Nov. 15, 2020).

¹²⁹ David Beren, *The 5 Best Selfie Sticks of 2020*, LIFEWIRE, <https://www.lifewire.com/best-selfie-sticks-4048577> (last updates Jan. 7, 2021).

¹³⁰ *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018); *Riley v. California*, 573 U.S. 373, 393–394 (2014).

¹³¹ Brian Peters, *We Analyzed 15,000 Instagram Stories from 200 of the World’s Top Brands (New Stories Research)*, BUFFER (Nov. 8, 2018), <https://blog.bufferapp.com/instagram-stories-research>.

¹³² Johl, *supra* note 45, at 177–78.

¹³³ *See id.*

¹³⁴ *See id.*

¹³⁵ *See id.*

integration of technology with social interaction. Millennials are mocked for always being on their phones,¹³⁶ but the stereotype signals how intertwined technology is with the daily lives of the current generation, and it foreshadows the behavior of future generations. Technology is not just a tool; it has become an important part of human interaction.

Chapter 934 does not encourage social exchange but undermines it.¹³⁷ As discussed above, states that impose all-party consent requirements articulate a common purpose: to encourage vital social exchange and ensure that people do not live in fear of eavesdropping.¹³⁸ As technology use has increased, the statute no longer furthers its purpose. People are intentionally recording their lives, including their conversations.¹³⁹ Innocent use of commonplace technology can quickly evolve into a felony conviction or civil suit by an irate recorder. And because there is a lack of clarity in the boundaries of the law, there is a chilling effect on the use of these new technology types, technology that promotes human communication. All-party consent laws hamper social interaction.

And single-party consent jurisdictions still achieve what all-party consent jurisdictions state as their purpose. Eavesdropping, listening in on a conversation one is not a party to, is always illegal. Free, robust communication is not stifled in single-party consent jurisdictions. Single-party consent jurisdictions just accept that when someone conveys information to another, that person may not always keep the information private. That fear is no more real and palpable in single-party consent than it is in all-party consent jurisdictions. The law does not further its purpose.

b. Criminalizing Commonplace Conduct

It is also likely that Chapter 934 criminalizes commonplace conduct. If a person has in-home security cameras that record audio, or a nanny-cam, and that device records a conversation, Chapter 934 is implicated. Wearing Google Glass or Snapchat Spectacles to “capture your world, the way you

¹³⁶ See Catey Hill, *Millennials Engage with Their Smartphones More than They Do Actual Humans*, MARKETWATCH (June 21, 2016, 6:01 AM), <https://www.marketwatch.com/story/millennials-engage-with-their-smartphones-more-than-they-do-actual-humans-2016-06-21>.

¹³⁷ Aatif Sulleyman, *Millennials and Generation Z Interact More Through Phones and Apps than in Real Life, Report Finds*, INDEPENDENT (Oct. 19, 2017, 12:06 AM), <https://www.independent.co.uk/life-style/gadgets-and-tech/news/millennials-generation-z-smartphone-habits-apps-communications-real-life-a8008641.html>.

¹³⁸ See, e.g., *Commonwealth v. Hyde*, 750 N.E.2d 963, 970 (Mass. 2001).

¹³⁹ Sulleyman, *supra* note 137; Enrique Dans, *The Internet of the Ephemeral*, FORBES (Aug. 8, 2016, 12:22 PM), <https://www.forbes.com/sites/enriquedans/2016/08/08/the-internet-of-the-ephemeral/#5575413e22fb>.

see it”¹⁴⁰ or even so much as recording a video with your iPhone for your Instagram Story¹⁴¹ could fall within the purview of Chapter 934.¹⁴² An obvious limit exists, however, because of the reasonable expectation of privacy requirement. When these recordings are taken in public places, at a large party, or in a busy restaurant, it seems fairly straightforward that a person would not exhibit a reasonable expectation of privacy in their communication. As explained by *McDade*, the home is one place, almost certainly, where a person exhibits a reasonable expectation of privacy.¹⁴³ But because of the context-specific nature of the reasonable expectation of privacy inquiry, there is a lingering question of whether a conversation in an automobile, in a secluded public area, in a dark corner of a restaurant, in a backyard, or in a business meeting could implicate the statute.

The problem is in these grey areas. The example of Ivan, the ridesharing driver we met in the introduction of this comment, illustrates one of these grey areas. A vehicle passenger obviously exhibits reduced privacy interests as opposed to someone in a home.¹⁴⁴ But it is unclear whether Ivan would have violated the statute if he recorded communications with passengers.

The aforementioned new, evolving technologies are rapidly increasing in use.¹⁴⁵ Thus, with the increased use of recording technology, more people will be intentionally, surreptitiously recording conversations, and thus unintentionally violating the statute.¹⁴⁶

4. Exposing Misconduct

People employ recording devices to promote important societal interests. Security cameras are everywhere. When an exciting event occurs, people quickly whip out their smartphones to capture it on video.¹⁴⁷ And

¹⁴⁰ *Glass*, X, <https://www.x.company/glass/> (last visited Apr. 7, 2019); SPECTACLES, *supra* note 127.

¹⁴¹ Instagram Stories are a feature on the popular app Instagram. The Stories feature allows users to upload photos or short videos to their “story,” which disappears every 24 hours. Many other social media applications have utilized similar features, with Snapchat being the first to implement this type of photo and video sharing. For information on how the Stories feature works, see Alina Bradford, *Everything You Need to Master Instagram Stories*, CNET (Apr. 24, 2018, 8:19 AM), <https://www.cnet.com/how-to/how-to-use-instagram-stories/>.

¹⁴² FLA. STAT. § 934.03 (2020).

¹⁴³ See *McDade v. State*, 154 So. 3d 292, 299 (Fla. 2014).

¹⁴⁴ See *Rakas v. Illinois*, 439 U.S. 128, 148–49 (1978).

¹⁴⁵ *Mobile Fact Sheet*, PEW RESEARCH CENTER (June 12, 2019), <http://www.pewinternet.org/fact-sheet/mobile/>.

¹⁴⁶ Johl, *supra* note 45, at 189.

¹⁴⁷ See Jesse Harlan Alderman, *Police Privacy in the iPhone Era?: The Need for Safeguards in State Wiretapping Statutes to Preserve the Civilian’s Right to Record Public Police Activity*, 9 FIRST AMEND. L. REV. 487, 488 (2011).

when something bad is afoot, people turn to those same recording devices to capture evidence of the misconduct. Florida's ban on surreptitious recording stifles social mechanisms for shining light on improper behavior.

Surreptitious recording has beneficial value beyond crime-fighting and evidence gathering. Surreptitious recordings can reveal employee misconduct, political malfeasance, bullying, racism, or unethical business dealings. As Justice Brandeis famously said before beginning his tenure on the Court: "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."¹⁴⁸ Surreptitious recording encourages the use of modern technology to uncover nefarious behavior and promote social change.

Nationally, the recording of government officials in all-party consent jurisdictions has resulted in criminal charges for many. And these stories did not occur in Florida; they very well could have. In most states, the laws are verbatim the same as Chapter 934. In February 2019, a university student who livestreamed a meeting with his congressman was charged with two felony counts of wiretapping.¹⁴⁹ In 2017, a woman looking for her daughter at her daughter's school recorded her conversation with the school principal and was later charged with a felony.¹⁵⁰ When a concerned father met with a school principal to inquire about whether his daughter was being bullied, he recorded the meeting.¹⁵¹ Soon after, he was charged with a felony.¹⁵² In 2015, when a whistleblower secretly recorded his phone conversation with his superior to catch him admitting to ethics violations, the local district attorney charged him with a felony.¹⁵³ A scared and humiliated special needs student secretly recorded a bully tormenting him, and he was arrested for violating the state's anti-wiretap laws.¹⁵⁴ A taxicab authority officer recorded a phone

¹⁴⁸ LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY AND HOW BANKERS USE IT* 92 (1914).

¹⁴⁹ Sarah Ash, *SU Student Facing Felony Charges for Wire Tapping*, WMDT (Feb. 14, 2019), <https://www.wmdt.com/2019/02/su-student-facing-felony-charges-for-wire-tapping/>.

¹⁵⁰ Barry Simms, *Mom Faces Felony Wiretapping Charges After Recording Conversation with Principal*, WBALTV (Dec. 7, 2017, 10:42 AM), <https://www.wbal.tv.com/article/mom-faces-felony-wiretapping-charges-after-recording-conversation-with-principal/14378453>.

¹⁵¹ *Pa's Wiretapping Law is Too Restrictive*, YORK DAILY REC. (Aug. 22, 2016, 9:27 AM), <https://www.ydr.com/story/opinion/editorials/2016/08/22/pas-wiretapping-law-too-restrictive-editorial/88997020/>.

¹⁵² *Id.*

¹⁵³ Rick Lee, *Judge Orders Wiretapping Charge Dismissed Against Unilife Whistle-Blower*, YORK DAILY REC. (July 8, 2015, 8:30 PM), <https://www.ydr.com/story/news/local/2015/07/08/judge-orders-wiretapping-charge-dismissed-against-unilife-whistle/72247922/?from=global&sessionKey=&autologin=>.

¹⁵⁴ Patrick Frye, *Disabled Boy Records Bullies Tormenting Him, Police Charge Him with Illegal Wiretapping*, INQUISITR (Apr. 12, 2014), <https://www.inquisitr.com/1209361/disabled-boy-records-bullies-tormenting-him-police-charge-him-with-illegal-wiretapping/>.

conversation with the chief of the taxi authority to expose rampant taxicab overcharging schemes and was charged with a felony when the tape leaked.¹⁵⁵

Some record conversations as a protective measure against wrongdoing, even though no wrongdoing results, and are punished as a result. In 2018, a thirteen-year-old boy who recorded a conversation with his principal was charged with a felony under an all-party consent statute.¹⁵⁶ In January 2019, a man surreptitiously recorded his neighbor to prove a point in a property line dispute. After the civil case ended, his neighbor pressed criminal charges for the secret recording.¹⁵⁷

Each of these cases resulted in various outcomes. Some were dismissed as a result of public outcry, some resulted in guilty pleas to lower charges, some were dismissed on other grounds, and some resulted in a felony conviction. Even when the ultimate result is not a conviction, though, the use of the wiretapping laws as a sword to stifle whistleblowers, concerned parents, and cautious students is simply wrong. Further, each of the charged individuals carries a stain on their reputation. A quick search of their names reveals a news article touting a felony charge. In a single-party consent state, they would be praised as heroes if the recording resulted in the exposure of wrongdoing. These stories are real-world examples of what happens in all-party consent jurisdictions.

a. Private Misconduct

Surreptitious recordings have resulted in several newsworthy events. Just in the past year, a Georgia woman captured her neurologist touching her inappropriately without her consent,¹⁵⁸ a woman recorded a police officer coercing her into sexual favors,¹⁵⁹ and a secret recording of business meeting

¹⁵⁵ George Knapp, *I-Team: Taxicab Investigator Found Not Guilty in Wiretapping Case*, 8NEWSNOW, <https://www.lasvegasnow.com/news/i-team-taxicab-investigator-found-not-guilty-in-wiretapping-case/1301437520> (last updated July 13, 2018, 8:21 PM).

¹⁵⁶ Austin Berg, *Illinois 13-Year-Old Charged with Eavesdropping Felony for Recording Meeting with Principal*, ILL. POLICY (June 21, 2018), <https://www.illinoispolicy.org/illinois-13-year-old-charged-with-eavesdropping-felony-for-recording-meeting-with-principal/>.

¹⁵⁷ Samantha McDaniel-Ogletree, *Charge Says Man Violated Eavesdropping Law by Recording Conversation with Neighbor*, MYJOURNALCOURIER (Jan. 27, 2019, 4:56 AM), <https://www.myjournalcourier.com/news/article/Charge-says-man-violated-eavesdropping-law-by-13565066.php>.

¹⁵⁸ Danny Robbins, *He Was Caught on Video, but Georgia Doctor Kept His Medical License*, AJC (Apr. 27, 2018), https://www.ajc.com/caught_on_video_but_kept_georgia_medical_license/.

¹⁵⁹ Randy Travis, *Secret Recording Catches Deputy in Blackmail, Request for Sexual Favors*, FOX 5 ATL. (Aug. 30, 2018, 3:54 PM), <http://www.fox5atlanta.com/news/i-team/secret-recording-catches-deputy-in-blackmail-request-for-sexual-favors>.

discussions revealed improper influence in an energy deal.¹⁶⁰ In 2016, a woman secretly recorded her conversations with a medical examiner.¹⁶¹ Her recordings ultimately uncovered a flawed death investigation and highlighted the need for oversight in that office.¹⁶² Secret recordings have also resulted in the successful settlement of an estate¹⁶³ and exposure of employee misconduct.¹⁶⁴ Notably, the famous Halliburton whistleblower, Tony Menendez, who exposed the energy industry behemoth's SEC rule violations, gathered evidence by secretly taping company meetings.¹⁶⁵ These people are met with congratulations and news interviews, while their all-party consent jurisdiction resident counterparts are met with felony charges.

b. Government Misconduct and Recording Police

Recording of government officials does not result in improved outcomes for those in all-party consent jurisdictions. In February 2019, a university student who livestreamed a meeting with his congressman was charged with two felony counts of wiretapping.¹⁶⁶

There is also an important concern with recording police officers. In light of recent changes in social attitudes towards police conduct, one of the first responses to a police-citizen interaction is to record it. These recordings have resulted in the exposure of police misconduct but have also exonerated police from accusations of wrongful behavior. At the moment, some police officers respond to being recorded by arresting the individual. Many Circuits have held that, under the First Amendment, there is a right to record police officers in public.¹⁶⁷

¹⁶⁰ Tux Turkel, *Secret Recordings Point to Improper Influence by Top UMaine Official in Lucrative Power Contract*, PORTLAND PRESS HERALD, <https://www.pressherald.com/2018/02/04/recordings-point-to-improper-influence-by-top-umaine-exec-in-lucrative-power-contract/> (last updated Feb. 5, 2018).

¹⁶¹ *Secret Recordings Reveal Flawed Death Investigation*, FOX 9 KMSP (Nov. 16, 2016, 3:53 PM), <http://www.fox9.com/news/investigators/secret-recordings-reveal-flawed-death-investigation>.

¹⁶² *Id.*

¹⁶³ David Kravets, *Court OKs Covert iPhone Audio Recording*, WIRED (Aug. 18, 2010, 4:37 PM), <https://www.wired.com/2010/08/covert-iphone-audio-recording/>.

¹⁶⁴ *See* Johl, *supra* note 45, at 200.

¹⁶⁵ Jesse Eisinger, *The Man Who Blew the Whistle on Halliburton*, THE ATLANTIC (Apr. 23, 2015), <https://www.theatlantic.com/business/archive/2015/04/the-man-who-blew-the-whistle-on-halliburton/391215/>.

¹⁶⁶ Ash, *supra* note 149.

¹⁶⁷ *See, e.g., Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011) (holding that “[b]asic First Amendment principles, along with case law from this and other circuits” acknowledge a constitutionally protected right to videotape police carrying out their duties in public); *see also Fields v. City of Philadelphia*, 862 F.3d 353 (3d Cir. 2017) (holding there is a First Amendment right to record law enforcement in public subject to reasonable time, place, and manner restrictions); *Turner v. Driver*, 848

In the background of each of these cases are state wiretap laws.¹⁶⁸ Most wiretap laws are not implicated because the officers do not exhibit a reasonable expectation of privacy in their communications—because the recorded actions are taking place in public.¹⁶⁹ But the Circuits have only recognized a right to record law enforcement officers in contexts where an officer has no reasonable expectation of privacy and have not answered the question in the context of more private communication, such as during a traffic stop¹⁷⁰ or in an office meeting.¹⁷¹ Thus, the intersection between wiretap laws and the right to record police acting in their public duties only creates an issue if police officers possess a reasonable expectation of privacy while acting in their law enforcement duties.¹⁷²

Prosecution for secretly recording law enforcement is not a hypothetical matter. Tiawanda Moore used her cellphone to record a conversation with an Internal Affairs officer regarding her complaint against a police officer accused of groping Ms. Moore.¹⁷³ She was charged with eavesdropping and spent two weeks in jail, although the charges were later dropped.¹⁷⁴ In *Commonwealth v. Hyde*, the defendant was not as lucky as Ms. Moore.¹⁷⁵ After using a camcorder to record a traffic stop because he sought to file a police harassment complaint, Mr. Hyde was charged under eavesdropping

F.3d 678, 689 (5th Cir. 2017) (holding there is a First Amendment right to record police and noting that “[f]ilming the police contributes to the public’s ability to hold the police accountable, ensure that police officers are not abusing their power, and make informed decisions about police policy” in addition to helping law enforcement); *ACLU v. Alvarez*, 679 F.3d 583, 586 (7th Cir. 2012) (granting a preliminary injunction against the Illinois State Attorney enjoining enforcement of Illinois’ wiretap law against the ACLU in the context of openly recording police officers’ oral communications in public places); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (holding a citizen had a “First Amendment right to film matters of public interest” when the citizen videotaped and audio recorded police officers at a public protest); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (holding there is a First Amendment right to videotape police activities because “[t]he First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest.”); *Akins v. Knight*, 863 F.3d 1084, 1087 (8th Cir. 2017) (affirming a district court’s finding that there is a First Amendment right to audio or video record a public official in public); *cf. Sandberg v. Englewood*, 727 F. App’x 950, 963 (10th Cir. 2018).

¹⁶⁸ See, e.g., *Alderman*, *supra* note 147, at 488.

¹⁶⁹ *Bast*, *supra* note 40, at 862.

¹⁷⁰ *Cf. Commonwealth v. Hyde*, 750 N.E.2d 963, 964 (Mass. 2001) (holding a secret recording taken during a traffic stop of statements made by police officers violated state wiretap statute).

¹⁷¹ *Cf. United States v. McIntyre*, 582 F.2d 1221, 1224 (9th Cir. 1978) (suppressing audio recorded evidence collected from a bug placed in a police officer’s office via a briefcase because the officer exhibited a reasonable expectation of privacy in the communications uttered in his office, rendering the recorded utterances an “oral communication” under 28 U.S.C. § 2511).

¹⁷² See, e.g., *Alderman*, *supra* note 147, at 494.

¹⁷³ Justin Welply, *When, Where and Why the First Amendment Protects the Right to Record Police Communications: A Substantial Interference Guideline for Determining the Scope of the Right to Record and for Revamping Restrictive State Wiretapping Laws*, 57 ST. LOUIS U.L.J. 1085, 1085–86 (2013).

¹⁷⁴ See, e.g., *id.*

¹⁷⁵ *Hyde*, 750 N.E.2d at 965–66.

laws, convicted, and his conviction was upheld by the state's highest court.¹⁷⁶ In both Illinois and Massachusetts, where these situations occurred, the eavesdropping statutes do not contain a reasonable expectation of privacy provision, so recording a conversation without the consent of all parties violates the statute even if the conversation takes place at a high volume in a public place.¹⁷⁷

Even in states with reasonable expectation of privacy requirements, though, prosecution under wiretap laws occurs.¹⁷⁸ In *McDonough v. Fernandez-Rundle*, McDonough secretly recorded his meeting with the Homestead Chief of Police, which took place in the Chief's office with a friend of McDonough's and a detective.¹⁷⁹ After a dispute ensued regarding what was said at the meeting, McDonough published portions of the recording on YouTube to confirm his account of the events. Miami-Dade State Attorney Fernandez-Rundle sent McDonough a letter containing a threat of felony arrest and prosecution under section 934.03. The Eleventh Circuit disposed of the case without deciding any constitutional issues and held that the speakers did not exhibit a reasonable expectation of privacy given the facts of the situation.

There is an unanswered question, however: is there a circumstance where police officers, acting in their job function, can exhibit a reasonable expectation of privacy in a communication with a citizen? There may be narrow situations where officers acting in their public duties do exhibit a reasonable expectation of privacy, such as during a private interview between a single officer and an individual in a private setting, as contrasted with the public circumstances in the *McDonough* case.¹⁸⁰ Given Florida's approach with the home, a police interview in a private residence would likely fall under Chapter 934.

Further, it was important to the court in *McDonough* that the Chief did not set ground rules for the meeting and did not provide any notice that established an expectation of confidentiality.¹⁸¹ But what if he had? And what if the meeting was simply between the Chief of Police and McDonough? Florida has not given us an answer to those questions, but given the current state of the law, it is not clear. And recording police is an important part of government accountability.

¹⁷⁶ See *id.* at 966.

¹⁷⁷ Welply, *supra* note 173, at 1085.

¹⁷⁸ Andy Hershberger, *Man Arrested After Recording Police Awarded \$275,000 in Settlement*, WMUR 9, <https://www.wmur.com/article/man-arrested-after-recording-police-awarded-dollar275000-in-settlement/13979834> (last updated Nov. 29, 2017, 6:27 PM).

¹⁷⁹ *McDonough v. Fernandez-Rundle*, 862 F.3d 1314, 1316 (11th Cir. 2017).

¹⁸⁰ See *id.*

¹⁸¹ *Id.*

In single-party consent jurisdictions, recording of police is a non-issue. If the police are in public, they have no reasonable expectation of privacy. And if they are in private, one-party consent kicks in, and a person may record their interaction with the police without fear of prosecution. Whether or not there is a constitutional right to record police in private settings, society has an interest in police accountability, and recording police officers while in execution of their duties prevents abuses of power.

V. CONCLUSION

While the contours of Chapter 934 are not yet clear, there is no doubt that statutory violations will increase. The continued rapid growth of technology will bring with it an increase in recording. With this increase in recording, people will, without a doubt, violate Chapter 934. Chapter 934 needs to adapt to accommodate these updates in technology. Instead of criminalizing surreptitious recording, it should be used for beneficial purposes like protecting victims, promoting truth-finding, using technology, and exposing misconduct. Single-party consent would provide a solution to all of the problems discussed in this comment.

A change to single-party consent only has one real effect: it allows someone already in possession of information they have been consensually provided with to record that information and serve important societal interests.¹⁸² Florida needs a major update on its wiretap law, and that update is single-party consent. Victims need it. Society needs it. The Florida Legislature needs to make the change.

¹⁸² Johl, *supra* note 45, at 181–82.