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## HIDDEN HOME VIDEOS: SURREPTITIOUS VIDEO SURVEILLANCE IN DIVORCE

REBECCA V. LYON\*

### INTRODUCTION

Divorce is an extremely sensitive and volatile area of law. Still, the facts of some divorce cases sound like a media tabloid. Accusations of cheating,<sup>1</sup> child abuse,<sup>2</sup> and even bestiality<sup>3</sup> occur in the middle of these contentious cases. The invention of new technology, like video cameras, adds to the animosity because technology allows spouses to catch each other doing embarrassing and possibly unsuspected activities within the home.<sup>4</sup> A new question has arisen: What happens legally when an individual secretly video records their spouse during a divorce?

There are many laws in place today that protect an individual's right to privacy.<sup>5</sup> However, these laws are not all-inclusive, and they leave people unprotected from intrusion in certain instances. For example, the Federal Wiretapping Statute expressly prohibits auditory wiretapping, but remains silent on any form of videotaping.<sup>6</sup> This gap has left courts to conclude that surreptitious video recordings, while possibly illegal under state statutes, are not prohibited under the Federal Wiretapping Statute.<sup>7</sup> The Federal Wiretapping Statute also remains silent on whether it applies to spouses recording each other surreptitiously in the marital home.<sup>8</sup> In the

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1. *See, e.g.*, *Sperry v. Sperry*, 103 S.W. Rep. 419 (Tex. Ct. App. 1907).
2. *See, e.g.*, *Rutter v. Rutter*, 730 S.E.2d 626, 633 n.16 (Ga. Ct. App. 2012).
3. *See, e.g.*, *Kroh v. Kroh*, 567 S.E.2d 760, 764 (N.C. Ct. App. 2002).
4. *See, e.g.*, *Rutter*, 730 S.E.2d at 633; *Kroh*, 567 S.E.2d at 764.
5. *See, e.g.*, The Federal Wiretap Statute, 18 U.S.C. § 2511 (2008); GA. CODE ANN. § 16-11-62 (2010); 720 ILL. COMP. STAT. ANN. 5/14-2 (2006).
6. 18 U.S.C. § 2511.
7. *See, e.g.*, *United States v. Larios*, 593 F.3d 82, 90 (1st Cir. 2010) (agreeing with other circuits that the plain meaning of the Federal Wiretapping Statute does not apply to silent video surveillance); *United States v. Falls*, 34 F.3d 674, 679 (8th Cir. 1994) ([W]e find that every circuit to have addressed this issue has concluded that Title I and FISA neither regulate nor prohibit domestic silent video surveillance"); *United States v. Koyomejian*, 970 F.2d 536, 539 (9th Cir. 1992) (concluding that the plain meaning of the Federal Wiretapping Statute does not apply to silent video surveillance).
8. 18 U.S.C. § 2511 (2008).

past, this has led to some disagreement among courts.<sup>9</sup> However, most courts today would agree that the Federal Wiretapping Statute applies to spouses.<sup>10</sup>

The absence of state video surveillance statutes leaves individuals unprotected from surreptitious video recordings under many circumstances. The lack of black letter law guiding the courts can lead to curious manifestations.

One area in which this presents a serious problem is with spouses. If anyone other than a spouse recorded an individual in the privacy of their own home, they would likely be outraged. This leaves an interesting question: how does the law treat spouses in the middle of a divorce? In many jurisdictions today, not only can spouses surreptitiously videotape each other, but they can also introduce these videotapes in divorce court.<sup>11</sup> This can lead to serious problems for people getting divorced.

This Note analyzes laws regarding video surveillance and how surreptitious video surveillance can be misused in a divorce proceeding. The Note then argues for the creation of a statute or judicial action that will prevent spouses from recording these videos and entering them into divorce proceedings. Section I will analyze the Federal Wiretapping Statute and the gaps that the federal statute leaves for state law to fill.<sup>12</sup> Section II will analyze state law regarding whether surreptitious video recordings are legal and would be allowed into divorce proceedings. There are some states with video recording laws that remain under-inclusive and some states that do not have video recording statutes at all. Section III will analyze why the lack of protections in video surveillance law pose several problems in divorce proceedings. Such problems include increased adversity, taking situations out of context, using the recordings out of spite, negatively affecting the children involved, and causing the judge to consider legally irrelevant evidence. Section IV will propose ways to address the areas that current video surveillance law does not cover.

9. Compare *Simpson v. Simpson*, 490 F.2d 803, 804 (5th Cir. 1974); *Perfit v. Perfit*, 693 F. Supp. 851, 855–56 (C.D. Cal. 1988); *London v. London*, 420 F. Supp. 944, 946 (S.D.N.Y. 1976) with *Glazner v. Glazner*, 347 F.3d 1212, 1214 (11th Cir. 2003); *Kempf v. Kempf*, 868 F.2d 970, 973 (8th Cir. 1989); *Heggy v. Heggy*, 944 F.2d 1537, 1541 (10th Cir. 1991).

10. See *Glazner*, 347 F.3d at 1214; *Kempf*, 868 F.2d at 973; *Heggy*, 944 F.2d at 1541.

11. There are certain areas in which even spouses may be protected from surreptitious video recordings in the home, such as the bedroom or bathroom. See MASS. GEN. LAWS ANN. ch. 272, § 105 (2012); N.Y. PENAL LAW § 250.45 (2003).

12. See 18 U.S.C. § 2511 (2008).

## I. WHAT THE FEDERAL LAW DOES (AND DOES NOT) COVER

There has been a great deal of analysis on the scope of the Federal Wiretapping Statute.<sup>13</sup> The consensus among courts is that federal law does cover wiretapping in the marital home, with certain exceptions that exist in the plain language of the statute, but does not cover video surveillance.

### A. Wiretapping in the marital home

The Federal Wiretapping Statute states that “[e]xcept as otherwise specifically provided in this chapter any person who intentionally intercepts, endeavors to intercept . . . any wire, oral, or electronic communication . . . shall be punished . . . or subject to suit [by the Federal Government].”<sup>14</sup> The exceptions provided include a situation in which the person who intercepts the communication is a party to the communication.<sup>15</sup> The plain language of this statute appears to cover *any* person who engages in audio wiretapping, and does not provide an exception for spouses.

The uncertainty of whether the Federal Wiretapping Statute applies to spouses arises from spousal tort immunity. A few early cases analyzed the Federal Wiretapping Statute as not including spouses, even those who are getting divorced, because spouses could not sue each other for torts like invasion of privacy.<sup>16</sup> The law often treats spouses uniquely. There are protections that allow an individual to refuse to testify against their spouse in court.<sup>17</sup> There are even a few states that still recognize the ability of one spouse to prevent the other from testifying (the Adverse Testimony Privilege), although this protection has been abandoned in most states.<sup>18</sup> The founding principle behind spousal tort immunity is that the husband and wife is one “unit.”<sup>19</sup> Once married, a woman’s identity merges with her

13. See, generally, Camille Calman, *Spy vs. Spouse: Regulating Surveillance Software on Shared Marital Computers*, 105 COLUM. L. REV. 2097 (2005); Robert A. Pikowsky, *The Need for Revisions to the Law of Wiretapping and Interception of Email*, 10 MICH. TELECOMM. TECH. L. REV. 1 (2003); Richard C. Turkington, *Protection for Invasions of Conversational and Communication Privacy by Electronic Surveillance in Family, Marriage, and Domestic Disputes Under Federal and State Wiretap and Store Communications Acts and the Common Law*, 82 NEB. L. REV. 693 (2004).

14. 18 U.S.C. § 2511.

15. *Id.*

16. See *Simpson v. Simpson*, 490 F.2d 803, 806 n.7 (5th Cir. 1974); *Perfit v. Perfit*, 693 F. Supp. 851, 855–56 (C.D. Cal. 1988).

17. Milton C. Regan, Jr., *Spousal Privilege and the Meanings of Marriage*, 81 VA. L. REV. 2045, 2053–54 (1995).

18. *Id.* at 2054.

19. Carl Tobias, *Interspousal Tort Immunity in America*, 23 GA. L. REV. 359, 363 (1989).

husband's identity.<sup>20</sup> A more current argument for spousal tort immunity is the idea of preserving "matrimonial harmony."<sup>21</sup> This argument is based on the idea that the courts do not want to interfere with the harmony of the marital unit by allowing tort claims to come between spouses.

Treating divorcing couples as a spousal unit is problematic, however, because people getting divorced no longer want to be part of the same unit. Often they are stuck fighting this battle from under the same roof because they cannot afford to move out, or refuse to move out for fear of losing claim to the house or their belongings.<sup>22</sup> Today, the courts recognize this and acknowledge that even spouses are protected from wiretapping by each other.<sup>23</sup>

There are, however, circumstances under which spouses can legally record each other. For example, the Federal Wiretapping Statute allows an individual to record a communication if the recorder is a party or a party to the conversation has consented.<sup>24</sup> In divorce proceedings, this exception can play out where one parent "consents" for a child and records the conversation between the child and the other parent.<sup>25</sup>

For example, in *Pollock v. Pollock*, a divorce case originating in Kentucky, a mother recorded a phone conversation between her husband and their daughter.<sup>26</sup> The mother then argued that the recording was legal because she vicariously consented for her daughter, and thus the circumstanc-

20. *Id.*

21. Carl Tobias, *The Imminent Demise of Interspousal Tort Immunity*, 60 MONT. L. REV. 101 (1999).

22. The media is filled with advice to divorcing couples, telling them that it is a bad idea to move out of the house during the divorce because, according to the media, it will increase costs, affect an individual's right to the property, and could cause them to see their children less if the children stay at home. *See, e.g.*, Silvana D. Raso, *The Male Side of Divorce: What Men Need to Know*, HUFFINGTON POST (Oct 17, 2013, 12:34 PM), [http://www.huffingtonpost.com/silvana-d-raso/the-male-side-of-divorce-\\_b\\_1749279.html](http://www.huffingtonpost.com/silvana-d-raso/the-male-side-of-divorce-_b_1749279.html); Sam DeHority & Sunil Ramsamooj, *Divorce Mistakes That Will Ruin Your Life*, MEN'S FITNESS (Oct 17, 2013, 12:38 PM), <http://www.mensfitness.com/women/dating-advice/divorce-mistakes-that-will-ruin-your-life>; Cathy Meyer, *Steps to Take When Preparing For Divorce*, ABOUT.COM (Oct 17, 2013, 12:39 PM), [http://divorcesupport.about.com/od/thedivorceprocess/ss/divorce\\_prep\\_8.htm](http://divorcesupport.about.com/od/thedivorceprocess/ss/divorce_prep_8.htm).

23. *See* Glazner v. Glazner, 347 F.3d 1212, 1214 (11th Cir. 2003); Kempf v. Kempf, 868 F.2d 970, 973 (8th Cir. 1989); Heggy v. Heggy, 944 F.2d 1537, 1541 (10th Cir. 1991); *see also* Cary J. Mogerman & Stephanie L. Jones, *Cutting Edge Issues in Family Law: Article: The New Era of Electronic Eavesdropping and Divorce: An Analysis of the Federal Law Relating to Eavesdropping and Privacy in the Internet Age*, 21 J. AM. ACAD. MATRIMONIAL LAW 481, 499 (finding that the Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits have expressly rejected the idea of interspousal immunity to the Federal Wiretapping Statute, while only the Fifth Circuit expressly acknowledges one).

24. 18 U.S.C.A. § 2511(d) (2008).

25. *Pollock v. Pollock*, 154 F.3d 601, 610 (6th Cir. 1998); *see, e.g.*, *Thompson v. Dulaney*, 838 F. Supp. 1535, 1544 (D. Utah 1993); *Silas v. Silas*, 680 So. 2d 368, 370 (Ala. Civ. App. 1996).

26. *Pollock*, 154 F.3d at 603.

es fell under the consent exception to the Federal Wiretapping Statute.<sup>27</sup> The Sixth Circuit stated that if

the guardian has a good faith, objectively reasonable basis for believing that it is necessary and in the best interest of the child to consent on behalf of his or her minor child to the taping of telephone conversations, the guardian may vicariously consent on behalf of the child to the recording.<sup>28</sup>

Furthermore, because the mother in *Pollock* alleged that she was doing so because she believed her husband to be emotionally abusing their daughter, the court found that it was legal for the mother to record the conversation.<sup>29</sup>

### *B. Video Wiretapping*

Video wiretapping can be an even more sensitive area than audio wiretapping. Videotaping an individual while they are doing things around the house goes even further than recording their conversations. However, the Federal Wiretapping Statute does not cover this area, it only explicitly provides for “wire, oral, or electronic communication.”<sup>30</sup>

This leaves state law to cover an entire area of surveillance. Some states have chosen to enact laws regarding video surveillance, and these laws vary widely in what they cover.<sup>31</sup> On the other hand, many states have modeled their anti-wiretapping acts on the federal act, and have yet to create any legislation covering video surveillance.<sup>32</sup>

Therefore, the Federal Wiretapping Statute covers spouses recording each other under a large percentage of circumstances. However, state laws still have many areas to fill, and one of the largest gaps left up to the states is video surveillance.

27. *Id.* at 606.

28. *Id.* at 610.

29. *Id.* at 611.

30. 18 U.S.C.A. § 2511.

31. *See, e.g.*, ALA. CODE § 13A-11-32 (1977); MICH. COMP. LAWS ANN. § 750.539d (2004); GA. CODE ANN. § 16-11-62 (2010); N.Y. PENAL LAW § 250.45 (2003).

32. *See, e.g.*, *Kroh v. Kroh*, 567 S.E.2d 760, 763 (N.C. Ct. App. 2002) (holding that while the wife admits that she videotaped her husband’s activities, the plain language of the North Carolina and Federal Wiretapping statutes only cover oral communications); *Minotty v. Baudo*, 42 So. 3d 824, 832 (Fla. Dist. Ct. App. 2010) (“As the Florida statute is patterned after the federal statute and contains essentially the same language, we conclude that silent video surveillance is not covered.”).

## II. STATE LAW

While there are a few states that have adopted statutes prohibiting video surveillance under certain circumstances,<sup>33</sup> many states do not have such statutes.<sup>34</sup> This section will discuss some of the state statutes regarding video surveillance and mention ways in which they leave uncertainty as to (1) whether recording spouses during divorce is illegal and (2) if it is legal, whether the recordings are allowed into divorce proceedings. This section also mentions how state courts handle spousal recording during divorce where there are no statutes regarding the issue.

### *A. States with minimal video surveillance statutes*

Some states regulate video surveillance only to a minimal extent. These states include Nevada and West Virginia, which prohibit video recordings in certain specific locations; Massachusetts, New York, and South Carolina, which prohibit voyeuristic video recordings; and Alabama, which prohibits video recording while trespassing.<sup>35</sup>

Some states only regulate video surveillance in specific locations or under specific circumstances. For example, Nevada and West Virginia have very specific statutes regulating video surveillance.<sup>36</sup> Nevada has a statute that prohibits “any kind of surreptitious electronic surveillance on the grounds of any facility owned or leased by the State of Nevada without the knowledge of the person being observed,” but provides exceptions for law enforcement and security personnel.<sup>37</sup> Nevada also uses similar language to prohibit surveillance on public school property or on a college campus.<sup>38</sup> West Virginia specifically prohibits video surveillance by an employer.<sup>39</sup> The statute makes it a misdemeanor for employers to record their employ-

33. See ALA. CODE § 13A-11-32(a); NEV. REV. STAT. ANN. § 331.220 (1993); NEV. REV. STAT. ANN. § 393.400 (1993); NEV. REV. STAT. ANN. § 396.970 (1993); W. VA. CODE ANN. § 21-3-20 (1999); MASS. GEN. LAWS ANN. ch. 272, § 105; N.Y. PENAL LAW § 250.45; N.Y. PENAL LAW § 250.40; S.C. CODE ANN. § 16-17-470 (2001); GA. CODE ANN. § 16-11-62 (2010); ME. REV. STAT. tit. 17-A, § 511 (2007); MICH. COMP. LAWS ANN. § 750.539d; UTAH CODE ANN. § 76-9-402 (1973).

34. See *Kroh*, 567 S.E.2d at 763 (discussing G.S. § 15A-287(1)(a)); *Minotty*, 42 So. 3d at 832 (discussing FLA. STAT. ANN. § 934.03 (2010)); *People v. Drennan*, 101 Cal. Rptr. 2d 584, 588 (Cal. App. Ct. 2000) (discussing CAL. PENAL CODE § 630 (2011)).

35. See ALA. CODE § 13A-11-32(a); NEV. REV. STAT. ANN. § 393.400; NEV. REV. STAT. ANN. § 396.970; W. VA. CODE ANN. § 21-3-20; MASS. GEN. LAWS ANN. ch. 272, § 105; N.Y. PENAL LAW § 250.45; N.Y. PENAL LAW § 250.40; S.C. CODE ANN. § 16-17-470.

36. See NEV. REV. STAT. ANN. § 331.220; NEV. REV. STAT. ANN. § 393.400; NEV. REV. STAT. ANN. § 396.970; W. VA. CODE ANN. § 21-3-20.

37. NEV. REV. STAT. ANN. § 331.220.

38. NEV. REV. STAT. ANN. § 393.400; NEV. REV. STAT. ANN. § 396.970.

39. W. VA. CODE ANN. § 21-3-20.

ees in public and private locations.<sup>40</sup> The specific nature of these statutes prevents them from being used where a spouse records the other spouse during a divorce.

Some states have video surveillance laws that are specific to voyeurism or other sexually deviant behavior. Massachusetts, New York, and South Carolina all have statutes that protect an individual from being recorded with intimate areas uncovered.<sup>41</sup>

To be convicted for surreptitious video surveillance under Massachusetts law, the recorder must have done the video surveillance in an area where an individual would have a reasonable expectation of privacy *and* the recorder must have videotaped the unknowing individual nude or partially nude.<sup>42</sup>

The first problem with this statute is that it does not specify whether an individual has an expectation of privacy from their own spouse during a divorce proceeding for the purposes of this statute.<sup>43</sup> Some statutes specifically define an expectation of privacy to cover an area in which an individual would reasonably feel comfortable disrobing, such as a bedroom, bathroom, and so on, as hinted at by the requirement of partial nudity in the Massachusetts statute.<sup>44</sup> In the absence of an explicit definition, this issue can be very problematic because there are strong arguments for and against stating that an individual has an expectation of privacy from the spouse they are divorcing. On the one hand, as stated in an early Fifth Circuit case:

A third-party intrusion into the marital home, even if instigated by one spouse, is an offense against a spouse's privacy of a much greater magnitude than is personal surveillance by the other spouse. The latter, it seems to us, is consistent with whatever expectations of privacy spouses might have vis-a-vis each other within the marital home.<sup>45</sup>

People getting divorced are often people who once shared the most intimate aspects of their lives with each other. Therefore, it makes sense that they have little to no expectation of privacy from each other.

On the other hand, there are a few problems with this reasoning. First, there is a significant difference between sharing personal habits, secrets, and other intimate things with your spouse and actually having your spouse

40. *Id.*

41. MASS. GEN. LAWS ANN. ch. 272, § 105; N.Y. PENAL LAW § 250.45; N.Y. PENAL LAW § 250.40; S.C. CODE ANN. § 16-17-470.

42. MASS. GEN. LAWS ANN. ch. 272, § 105.

43. *See id.*

44. MASS. GEN. LAWS ANN. ch. 272, § 105; N.Y. PENAL LAW § 250.40; ME. REV. STAT. tit. 17-A, § 511 (defining "private place" as "a place where one may reasonably expect to be safe from surveillance, including, but not limited to, changing or dressing rooms, bathrooms and similar places").

45. *Simpson v. Simpson*, 490 F.2d 803, 809 (5th Cir. 1974).



record those intimate things. Second, people divorcing rarely continue to share the intimate aspects of their lives with each other; sometimes they continue to share the marital home for a myriad of reasons, but this does not mean they want to continue to share the intimate aspects of their lives with each other.<sup>46</sup> The lack of guidance from the legislature leaves the court to weigh these alternatives on its own.

The second problem with the Massachusetts statute is that it requires that the individual be recorded nude or partially nude.<sup>47</sup> If one member of the household sets up a video camera in the living room, for example, and no one walks through the living room nude or partially nude, the recorder has not violated the statute, regardless of whether the recorded individual had an expectation of privacy in the living room.

New York law covers a little more than the Massachusetts law. In New York, the first category of unlawful surveillance requires intent and some sort of specific purpose, including amusement, entertainment, profit, degrading or abusing another, or sexual gratification.<sup>48</sup> This category of unlawful surveillance also requires that the individual be in the process of dressing or undressing, or partially nude, for the recorder to be convicted. New York's second category of unlawful surveillance requires that the recorder does the recording intentionally "[f]or no legitimate purpose."<sup>49</sup> Here, the person does not have to be recorded while undressing, so long as they were recorded "in a bedroom, changing room, fitting room, restroom, toilet, bathroom, washroom, shower or any room assigned to guests or patrons in a motel, hotel or inn, without such person's knowledge or consent."<sup>50</sup> Unfortunately, neither of these categories provides statutory relief for an individual being recorded while fully clothed in areas of the house such as the kitchen, living room, basement, and so on.<sup>51</sup>

46. Some reasons to remain together in a marital home include: attempting to obtain "leverage" over the other spouse, believing they have a right to remain in their home, nowhere else to go, etc. *See, e.g.,* Silvana D. Raso, *The Male Side of Divorce: What Men Need to Know*, HUFFINGTON POST (Oct 17, 2013, 12:34 PM), [http://www.huffingtonpost.com/silvana-d-raso/the-male-side-of-divorce-\\_b\\_1749279.html](http://www.huffingtonpost.com/silvana-d-raso/the-male-side-of-divorce-_b_1749279.html); Sam DeHority & Sunil Ramsamooj, *Divorce Mistakes That Will Ruin Your Life*, MEN'S FITNESS (Oct 17, 2013, 12:38 PM), <http://www.mensfitness.com/women/dating-advice/divorce-mistakes-that-will-ruin-your-life>; Cathy Meyer, *Steps to Take When Preparing For Divorce*, ABOUT.COM (Oct 17, 2013, 12:39 PM), [http://divorcesupport.about.com/od/thedivorceprocess/ss/divorce\\_prep\\_8.htm](http://divorcesupport.about.com/od/thedivorceprocess/ss/divorce_prep_8.htm).

47. MASS. GEN. LAWS ANN. ch. 272, § 105.

48. N.Y. PENAL LAW § 250.45.

49. *Id.*

50. *Id.*

51. *See id.*

South Carolina's statute prohibits voyeurism and what the statute calls "peeping tom[s]." <sup>52</sup> The portion of the statute prohibiting "peeping tom[s]" states that

[i]t is unlawful for a person to be . . . a peeping tom on or about the premises of another or to go upon the premises of another for the purpose of becoming . . . a peeping tom. The term "peeping tom", as used in this section, is defined as a person who peeps through windows, doors, or other like places, on or about the premises of another, for the purpose of spying upon or invading the privacy of the persons spied upon and any other conduct of a similar nature, that tends to invade the privacy of others. The term "peeping tom" also includes any person who employs the use of video or audio equipment for the purposes set forth in this section. <sup>53</sup>

This statute is fairly inclusive in that it covers observing any activity that invades the observed individual's privacy. <sup>54</sup> However, this statute requires an individual to go on the premises of another. <sup>55</sup> This statute, therefore, cannot be applied in circumstances where both spouses are living together during the divorce and one records the other because the recording occurs on their own premises.

Requiring some sort of trespassing on private property is a common element of surveillance crimes in a few states. Alabama's surveillance statute states "[a] person commits the crime of criminal surveillance if he intentionally engages in surveillance while trespassing in a private place." <sup>56</sup> The comments provided during the enactment of the statute state "Alabama law had no provision expressly covering surveillance. . . . Criminal surveillance, as defined in this section, . . . must be done through visual observation or photography." <sup>57</sup> The first problem that arises under the statute is the uncertainty of whether it covers video cameras. Assuming that "photography" covers video cameras, which is already stretching the black letter law, the second problem is that the statute only covers surveillance done while trespassing. <sup>58</sup>

The Alabama statute leaves out several important considerations. The statute does not contemplate video surveillance done in store dressing rooms, public bathrooms, or other circumstances not involving trespassing, and the statute's plain language does not cover recording done in one's

52. S.C. CODE ANN. § 16-17-470 (2001).

53. *Id.*

54. *See id.*

55. *Id.*

56. ALA. CODE § 13A-11-32(a).

57. *Id.*

58. *Id.*

own home. Therefore, for the purposes of spouses surreptitiously recording each other, this statute does not afford any protection to the recorded party.

*B. More inclusive video recording statutes*

On the other hand, a few states provide fairly inclusive video surveillance statutes. Georgia, Michigan, Maine and Utah, for example, all have statutes that prohibit a wide range of video surveillance. However, as a recent case in Georgia demonstrates, these states still may not provide enough protection for spouses going through a divorce.<sup>59</sup>

The Georgia Wiretapping Statute does a good job of covering circumstances that the Federal Wiretapping Statute does not cover. It makes it unlawful for “[a]ny person, through the use of any device, without the consent of all persons observed, to observe, photograph, or record the activities of another which occur in any private place and out of public view.”<sup>60</sup> The statute then provides certain circumstances in which the surveillance is lawful, such as “[t]o use for security purposes, crime prevention, or crime detection any device to observe, photograph, or record the activities of persons who are within the curtilage of the residence of the person using such device.”<sup>61</sup>

This statute is more helpful than others for a few reasons: First, the statute covers recording “through the use of any device.”<sup>62</sup> This language makes the statute electronically neutral, and it allows for some flexibility as technology progresses and new recording devices are invented. Second, the statute covers activities “which occur in any private place and out of public view.”<sup>63</sup> The statute does not use language such as “reasonable expectation of privacy,” suggesting that it does not matter whether the individual reasonably expected the activities to be private from the recorder so long as the activities were conducted “out of public view.” The home is almost certainly considered “out of public view.” Finally, the statute lists crime detection, crime prevention, and security purposes as exceptions. Exceptions such as these have certain advantages, and they support public policy by encouraging private citizens to aid in crime prevention and detection and by promoting safety. The problem with these exceptions is that they create a question of motive, the truth of which can be very difficult to determine.

59. See *Rutter v. Rutter*, 730 S.E.2d 626, 628 (Ga. Ct. App. 2012).

60. GA. CODE ANN. § 16-11-62(2) (2010).

61. GA. CODE ANN. § 16-11-62(2)(C).

62. *Id.*

63. *Id.*

The next portion of the Georgia Code that leaves the statute open to misuse is the portion that states that a “videotape . . . made in accordance with this subparagraph, or a copy thereof . . . shall be admissible in a judicial proceeding, without the consent of any person observed.”<sup>64</sup> The statute does not specify what type of judicial proceeding the video shall be admissible in.<sup>65</sup> It is possible that the legislature only intended this evidence to be allowed in for criminal proceedings, or for only criminal or tort proceedings, like trespass. It is not clear from the language, but in light of the fact that the legislature designed the exception to deter crime, it is unlikely that the legislature meant for divorce proceedings to be included.

In *Rutter v. Rutter*, an appellate court in Georgia was confronted with the question of whether a recording was permissible and should be allowed into a divorce proceeding.<sup>66</sup> During the divorce proceedings, Stacy Rutter was no longer sleeping at the parties’ marital residence, but she kept clothes there, performed some daily chores there, received mail there, and continued to pay a portion of the mortgage.<sup>67</sup> Among other things, the divorce proceedings involved a disagreement over child custody.<sup>68</sup>

While in the process of obtaining their divorce, Stacy Rutter surreptitiously installed video surveillance in the marital home where Charles Rutter was staying.<sup>69</sup> Stacy claimed that she installed the cameras while attempting to catch Charles committing a crime, specifically, child abuse.<sup>70</sup> The trial court allowed the video recordings into evidence, and Charles Rutter immediately appealed the decision.<sup>71</sup>

The appellate court first found that Stacy had recorded her husband legally.<sup>72</sup> The court noted that Stacy was probably not trying to prevent crime, nor was it likely that she installed the video cameras for security purposes, as she installed the cameras secretly.<sup>73</sup> Rather, the court determined that Stacy was most likely recording Charles in an attempt to catch him committing a crime solely to help her gain custody of their children, rather than to deter the crime or to press charges.<sup>74</sup> However, even with this interpretation, the court held that under the Georgia statute, it is permissible

64. GA. CODE ANN. § 16-11-62(2)(C).

65. *Id.*

66. *Rutter v. Rutter*, 730 S.E.2d 626, 626 (Ga. Ct. App. 2012).

67. *Id.* at 632–633.

68. *Id.* at 633.

69. *Id.* at 626.

70. *Id.* at 633 n.16. There was no evidence that Charles abused Stacy or the children. *Id.*

71. *Id.* at 626.

72. *Id.* at 628.

73. *Id.* at 633.

74. *Id.*

to record activities within the curtilage of an individual's own home in order to detect crime, and that is what Stacy Rutter was doing.<sup>75</sup>

Furthermore, the court held that this evidence is admissible in a divorce proceeding.<sup>76</sup> The statute explicitly states that a videotape made for one of the exceptions provided "shall be admissible in a judicial proceeding, without the consent of any person . . . recorded."<sup>77</sup> This language is what led the Georgia court to allow Stacy Rutter's recording of her husband into the divorce proceedings.<sup>78</sup>

One big factor in the court's decision was the rule of lenity.<sup>79</sup> The rule of lenity protects defendants in criminal court by encouraging courts to interpret criminal laws narrowly.<sup>80</sup> The court in *Rutter* argued that the Georgia statute is a criminal one, and that because Stacy's video recording could have been interpreted as a crime, the analysis warranted applying the rule of lenity.<sup>81</sup> However, there are a few issues with applying the rule of lenity here.

First, the court could have held that the recording was legal under the Georgia statute but not admissible in the divorce proceedings because the latter goes beyond the legislative intent. The court could have supported this interpretation with the fact that the statute says that a videotape made under one of the exceptions to the statute "may be disclosed by such a resident to the district attorney or a law enforcement officer and shall be admissible in a judicial proceeding."<sup>82</sup> The fact that the statute first states that the recorder may disclose the videotape to a district attorney or policeman suggests that the statute was solely referring to criminal proceedings. While there are arguments against this interpretation,<sup>83</sup> the issue of whether to allow the recording into divorce proceedings has no bearing on the criminality of Stacy's act, and therefore does not warrant the rule of lenity.

The second issue with using the rule of lenity here is that one of the main guiding principles behind the rule of lenity is to provide fair notice before convicting an individual of a crime.<sup>84</sup> In *Rutter*, Stacy was not in danger of being convicted of a crime. The purpose behind applying the rule

75. *Id.*

76. *Id.* at 628.

77. GA. CODE ANN. § 16-11-62(2)(C) (2010).

78. *Rutter*, 730 S.E.2d at 628.

79. *Id.* at 632.

80. Phillip M. Spector, *The Sentencing Rule of Lenity*, 33 U. TOL. L. REV. 511, 512 (2001-2002).

81. *Rutter*, 730 S.E.2d at 632.

82. GA. CODE ANN. § 16-11-62(2)(C).

83. For example, why did the legislature not say "criminal proceedings" instead of "judicial proceedings" if that is what they meant?

84. Spector, *supra* note 80, at 535 n.131.

of lenity was not present. If anything, it is just as important for Charles to know that his wife can surreptitiously record him and have that evidence introduced in court as it is for Stacy to know that she can do so. This case does not involve a situation in which the state is bringing an action against one individual and the individual needs protection. *Rutter* involved two individuals, and under this fact pattern, Charles was arguably the one who needed legal protection from his wife's recordings. Therefore, the rule of lenity does not fulfill its protective purpose under the facts of the case.

One problem with the outcome in this case is that it leaves the statute open to misuse. First, as acknowledged in *Rutter*, Stacy was recording her husband for the purposes of child custody.<sup>85</sup> Although she was trying to catch him hurting the children, she at no point alleged that she was doing so to file criminal charges or to deter crime.<sup>86</sup> The reason she was trying to catch him commit a crime was for child custody purposes, a noble purpose if Charles was indeed abusing the children, but one not related to criminal proceedings.<sup>87</sup> This holding makes it easy for individuals to trump up charges and surreptitiously record their spouse in the marital home.

Second, Stacy did not have to provide any evidence that Charles might have been abusing the children.<sup>88</sup> She at no point had to show pictures of injuries, or had to report that her children had told her Charles was abusing them, or had to provide an affidavit or testimony from a doctor, or anything of that nature.<sup>89</sup> Consequently, this ruling could open divorce courts to a huge amount of abuse. If one party simply has to allege that the other party may be committing a crime, they could easily lie to the court without any factual evidence to support the allegation. In *Rutter*, even after Stacy recorded Charles, the court did not find any evidence of child abuse.<sup>90</sup> Therefore, the statute does not provide sufficient protection from false allegations to the recorded party.

Third, by the time the recorder introduces these videotapes into evidence, they have already recorded the other party. Therefore, it is easy for one party to place cameras around the residence, wait to catch their spouse doing something illegal, and then claim that they were trying to catch their spouse doing it in the first place.

85. *Rutter*, 730 S.E.2d at 633.

86. *Id.*

87. *See id.*

88. *Id.* at 633 n.16.

89. *Id.*

90. *Id.*

Fourth, nothing in the statute requires that the crime in question be committed for the recordings to be legal. With all of these risks for abuse and uncertainties, the recorded party will usually be unfairly disadvantaged. While Stacy's situation was possibly an extreme situation because it involved allegations of child abuse, the party being recorded could be caught doing a number of things. Furthermore, once the recordings are taken, there is the potential for blackmail, especially if the party was caught doing something not necessarily illegal but possibly embarrassing, such as walking around the house not completely clothed, watching adult videos, or even dancing or singing in an unusual manner.

The multiple avenues available for abuse demonstrate the different ways in which spouses can abuse statutes such as the Georgia statute in light of *Rutter*.

Michigan, Maine, and Utah all have similar statutes to the one in Georgia regarding video recordings.<sup>91</sup> All three have statutes that state that it is illegal to install, place, or use "in any private place, without the consent of the person or persons entitled to privacy in that place, any device for . . . recording . . . [the] events in that place."<sup>92</sup> This portion of the statutes, like Georgia's, uses the terms "private place" and "any device," which have the advantages of covering more circumstances than other video surveillance statutes.<sup>93</sup>

However, some of the statutes include language that limits the application of the statute. For example, Maine further defines "private place" as "a place where one may reasonably expect to be safe from surveillance, including, but not limited to, changing or dressing rooms, bathrooms, and similar places."<sup>94</sup> The definition suggests that particular rooms, rather than entire homes, are subject to the "private place" analysis. This leaves open the possibility that recording an individual in their living room or other places around the house does not violate the statute.

Furthermore, Michigan's statute also provides exceptions like Georgia's.<sup>95</sup> Michigan's surveillance statute states "[t]his section does not prohibit security monitoring in a residence if conducted by or at the direction of the owner or principal occupant of that residence unless conducted for a

91. ME. REV. STAT. tit. 17-A, § 511 (2007); MICH. COMP. LAWS ANN. § 750.539d (2004); UTAH CODE ANN. § 76-9-402 (1973).

92. ME. REV. STAT. tit. 17-A, § 511; MICH. COMP. LAWS ANN. § 750.539d; UTAH CODE ANN. § 76-9-402.

93. See GA. CODE ANN. § 16-11-62 (2010); ME. REV. STAT. tit. 17-A, § 511; MICH. COMP. LAWS ANN. § 750.539d; UTAH CODE ANN. § 76-9-402.

94. ME. REV. STAT. tit. 17-A, § 511.

95. See GA. CODE ANN. § 16-11-62; MICH. COMP. LAWS ANN. § 750.539d.

lewd or lascivious purpose.”<sup>96</sup> This exception is arguably less susceptible to the type of misuse that occurred in *Rutter*. The Michigan statute remains silent on whether the video recording will be allowed into judicial proceedings, rather than explicitly allowing it in.<sup>97</sup> However, the law does not expressly prohibit the evidence, which leaves the decision to each individual case, and therefore susceptible to misuse.<sup>98</sup>

When comparing the substance of the Michigan statute to the Georgia statute, there are notable similarities.<sup>99</sup> The Michigan statute states that security monitoring by the owner of the residence is not prohibited, while Georgia’s statute states that security monitoring, crime detection, and crime prevention are not prohibited.<sup>100</sup> While Michigan’s statute is admittedly narrower, it is still a question of intent. In *Rutter*, Stacy Rutter admitted that she recorded her husband specifically for the purposes of the child custody dispute.<sup>101</sup> However, if she had not admitted that fact, the court may not have had a way to determine her intent. Stacy could just as easily have lied about her intent in installing the video surveillance, as could any other party to a divorce. Therefore, while the Michigan statute may make it more difficult for parties who have already admitted their intentions behind installing the surreptitious video surveillance; it is almost as easy to lie about intention under the Michigan statute as it is under the Georgia statute.

There is a strong policy argument for allowing video recordings for security purposes, such as the statutes allow in Georgia and Michigan, and this article is not advocating to get rid of these exceptions.<sup>102</sup> Furthermore, it is true that many crimes rely upon intent, and the legislature is being reasonable in relying upon intent when determining whether to criminalize video surveillance. However, there are alternative ways to restrict misuse of the exception other than abandoning the exception all together that merit attention, as discussed in the proposal section below.

Finally, possibly the most extensive video surveillance statute is Vermont’s, which states that “[n]o person shall intentionally. . .film. . .in any format a person without that person’s knowledge and consent while [the taped individual] is in a place where he or she would have a reasonable expectation of privacy within a home or residence.”<sup>103</sup> By using inclusive

96. MICH. COMP. LAWS ANN. § 750.539d.

97. *Id.*

98. *Id.*

99. *See* GA. CODE ANN. § 16-11-62(2)(C); MICH. COMP. LAWS ANN. § 750.539d.

100. *See* GA. CODE ANN. § 16-11-62(2)(C); MICH. COMP. LAWS ANN. § 750.539d.

101. *Rutter v. Rutter*, 730 S.E.2d 626, 633 (Ga. Ct. App. 2012).

102. *See* GA. CODE ANN. § 16-11-62(2)(C); MICH. COMP. LAWS ANN. § 750.539d.

103. VT. STAT. ANN. tit. 13, § 2605 (2009).



language such as “in any format” and “within a home or residence,” this statute could reasonably be interpreted to cover circumstances where one spouse records another during a divorce.<sup>104</sup> However, this still depends on the court’s interpretation of “expectation of privacy.” Despite the problems with each of these states’ statutes, they are ahead of many other states by having such an inclusive video recording statute.

*C. States that do not have any video surveillance statutes*

Many states have modeled their wiretapping statutes after the Federal Wiretapping Statute.<sup>105</sup> The problem that arises is that these statutes then do not protect against video surveillance.<sup>106</sup> This in turn leaves the courts with nothing to turn to when situations arise such as the one in *Rutter*.

For example, an analysis of the North Carolina Wiretapping Statute arises in *Kroh v. Kroh*, a case involving the litigation of a particularly adversarial divorce.<sup>107</sup> Among other things, Teresa Kroh accused her husband of sexually deviant acts, recorded his conversations with their children, and placed a hidden video camera in the marital home.<sup>108</sup> Teresa Kroh admitted that she hid the camera and videotaped her husband’s activities.<sup>109</sup> Despite this and the malevolent intent behind the recordings, the court felt forced to hold that

under the plain language of G.S. § 15A-287(1)(a) (as well as the federal Omnibus Act), only oral communications are covered by the Act. Thus, Teresa Kroh’s videotaping of her husband would not violate the Electronic Surveillance Act unless such videotaping also included an audio recording.<sup>110</sup>

The court based this holding in large part on the fact that it “note[d] the many similarities between the Electronic Surveillance Act and the federal wiretapping statute.”<sup>111</sup> The court then referenced federal court rulings regarding the Federal Wiretapping Statute in support of its conclusion.<sup>112</sup>

104. *See id.*

105. *See, e.g.,* *Kroh v. Kroh*, 567 S.E.2d 760, 763 (N.C. 2002) (discussing N.C. Gen. Stat. § 15A-287(1)(a) (1995)); *Minotty v. Baudo*, 42 So. 3d 824, 832 (2010) (discussing FLA. STAT. ANN. § 934.03 (2010)).

106. *See Kroh*, 567 S.E.2d at 763 (discussing G.S. § 15A-287(1)(a)); *Minotty*, 42 So. 3d at 832 (discussing FLA. STAT. ANN. § 934.03).

107. *Kroh*, 567 S.E.2d at 762 n.1.

108. *Id.* at 762–64.

109. *Id.* at 762.

110. *Id.* at 763.

111. *Id.*

112. *Id.*

Other states have also reached the conclusion that their wiretapping statutes cover audio surveillance, but not video surveillance.<sup>113</sup>

It is possible that the legislature left video surveillance out of penal statutes because they have not agreed upon the appropriate language to use in criminalizing surreptitious video surveillance. As demonstrated by the many different state video surveillance laws, there are many different ways to criminalize video surveillance.<sup>114</sup> On the other hand, it is possible that the legislature has not criminalized video surveillance unintentionally because the technology is somewhat new. Because of the quick evolution of technology, a “device neutral” statute such as the ones used in Georgia, Michigan, Maine and Utah can be especially helpful.<sup>115</sup> Regardless of how or why the ability to video record one’s spouse during a divorce exists, it is now the responsibility of the legislature to consider how it needs to react to the outcomes demonstrated in cases like *Rutter* and *Kroh*.

### III. WHY BRINGING VIDEO RECORDINGS INTO DIVORCE PROCEEDINGS IS A PROBLEM

Allowing video recordings into divorce and child custody cases, as was done in *Rutter* and *Kroh*, can lead to serious problems. This section will outline some of the possible problems that can arise. These problems include increased adversity, taking situations out of context, using the recordings out of spite, negatively affecting the children involved, and causing the judge to consider legally irrelevant evidence. To illustrate some of these problems, this section will introduce hypothetical situations to provide context to the possible issues.

#### *A. Allowing video recordings in the home and introducing them into divorce proceedings can increase hostility.*

One spouse recording the other can create hostility on both ends, for the recorder and the recorded. Once the recorded spouse realizes their spouse has recorded him or her, he or she may feel betrayed, and he or she may become defensive and wonder what the recorder has caught on camera. Furthermore, the recorder can catch the recorded spouse doing something the recorder does not like. For instance, the recorder may catch his or

113. See, e.g., *Minotty*, 42 So. 3d at 832 (discussing FLA. STAT. ANN. § 934.03 (2010)); *Drennan*, 101 Cal. Rptr. 2d at 587 (Cal. App. 3d 2000) (discussing CAL. PENAL CODE § 630).

114. See, e.g., GA. CODE ANN. § 16-11-62 (2010); ME. REV. STAT. tit. 17-A, § 511 (2007); W. VA. CODE ANN. § 21-3-20 (1999).

115. See GA. CODE ANN. § 16-11-62; ME. REV. STAT. tit. 17-A, § 511; MICH. COMP. LAWS ANN. § 750.539d (2004); UTAH CODE ANN. § 76-9-402 (1973).

her spouse talking about the recorder negatively, saying something to the children that the recorder does not like, or drinking alcohol before going to work.<sup>116</sup>

For example, suppose Mary and Jack Russo are getting a divorce. Mary's attorney claims to have mailed certain documents to Mary's marital home that Mary does not remember receiving. Because Jack is the one who sleeps at the marital residence while Mary is staying with her sister, Mary suspects Jack of throwing away the mail to hurt her in the divorce case. She secretly hides video cameras in the house, including one pointing to Jack's personal safe in case he is hiding anything in regards to their divorce case.

Jack finds the video camera recording his safe, and, believing Mary to be trying to get the combination and steal from him, hides his own video cameras throughout the house. Neither party can find every video camera hidden by the other, and even if they can, they have no way of knowing that they really have found all of them.

Although both parties may have already been at each other's throats prior to the video camera incident, the introduction of video cameras has only made the situation worse.<sup>117</sup> Both parties now feel as though they cannot trust the other and neither feel comfortable in their marital home.

Furthermore, while the viewers are going through the days of video surveillance, there is no guarantee they will catch the other committing any crimes. However, because both parties placed the cameras around the house trying to catch the other committing a crime, be it mail tampering or stealing, under the Georgia statute these recordings may pass as legal and may even be admissible in the divorce cases.<sup>118</sup>

Even if they do not introduce these recordings in court, Jack and Mary may catch the other spouse doing something that they do not like, such as going through the other person's drawers, picking the kids up from school early when they agreed the kids should stay for band practice, or something else along those lines. The little things that might have slipped by and not affected the case have now blown up, and each spouse has gotten more defensive and more competitive with each other. This has likely reduced the chance that both parties would be willing to settle or to move the di-

116. See, e.g., *Pollock*, 154 F.3d at 604 (recorder heard her daughter complaining about being in her custody); *Simpson*, 490 F.2d at 804 (recorder heard another man making advances on wife, and "while the wife was resisting, she was not doing so in a firm and final fashion").

117. There are several cases where the recorded spouse sued the recorder. See, e.g., *Kroh*, 567 S.E.2d at 762 (husband sued wife for recording him); *Thompson*, 838 F. Supp. at 1537 (same).

118. See GA. CODE ANN. § 16-11-62(2)(C).

voiced proceedings along without much dispute.<sup>119</sup> The increased adversity can draw out the divorce, which is costly for the parties and problematic for the crowded court system.<sup>120</sup>

*B. Videos are often taken out of context.*

Videos take things out of context in a few ways: First, people do things at home that they are not likely to do in public, and it is possible to catch someone at their worst at home when that side would normally not come out in public.<sup>121</sup> A spouse may spend an hour complaining to himself or herself about the other spouse in the house alone, but spend the rest of the time in public being civil and trying to get through the divorce without causing trouble. The introduction of video cameras in the house can show one moment when the recorded spouse loses their temper, and now the recorder knows about that one moment where she otherwise would not have—some occurrence that was otherwise negligible now takes center stage because the other party has viewed it. Second, the video camera only catches what people do in a particular room or at a particular spot in a room. Therefore, the video camera will almost certainly miss important pieces of an incident.

As a hypothetical example, Alex and Lindsey Johnson are in the middle of an agreed, non-contentious divorce. Then one day, Alex notices their dog, Captain, is limping. Alex knows Lindsey has never liked Captain because he chewed up a lot of her shoes, so he suspects Lindsey of animal abuse. Rather than confronting her and stirring up trouble, Alex decides to put video surveillance around the house just to make sure that Lindsey is not hurting Captain.

While watching these recordings, Alex sees Lindsey come in around lunchtime, when they both know Alex will not be home because he works too far away to come home for lunch. Lindsey came home with a man Alex has never met before, and while he was there the man walked around the

119. It is possible that it will instead increase litigation between the parties. *See, e.g., Kroh*, 567 S.E.2d at 762 (husband sued wife for recording him); *Thompson*, 838 F. Supp. at 1537 (same).

120. Divorces can be expensive. While they vary greatly, the courts have found that attorneys' fees for only one party can reasonably be \$175,000-\$185,000. *Darden v. Witham*, 209 S.E.2d 42, 47 (S.C. 1974) (finding \$175,000 to wife's attorney reasonable); *Adams v. Adams*, 376 So. 2d 1204, 1205-06 (Fla. Dist. Ct. App. 1979) (finding \$185,000 to wife's attorneys reasonable, stating the amount to be "entirely consistent with the evidence as to the hours and effort expended, the results achieved, and the quality of the services rendered").

121. The law itself displays a sort of "reverence . . . for the individual's right of privacy in his house." *Miller v. United States*, 357 U.S. 301, 313 (1958).

house as though he knew it well. Then the man and Lindsey went into the bedroom and did not come out for a while.

When Lindsey learns that Alex was recording her, she is furious. Alex is positive that Lindsey is having an affair, and nothing Lindsey says will change his mind. It is true that suspicions and accusations happen frequently without video recordings.<sup>122</sup> However, allowing video recordings multiplies the possibility of these events happening. Furthermore, people do things carelessly in the privacy of their own home that they generally would not do in public.

Admittedly, if the court allows part of the video in, the opposing party may ask the court to bring in the rest of the footage.<sup>123</sup> However, this does not necessarily reduce the likelihood of the videos causing problems. The recording party knows where the cameras are and is less likely to be caught doing something. Therefore, introducing the rest of the footage is not very likely to help the recorded party. Furthermore, the introduction of the rest of the contents will not always help provide context. Videos may only catch what happened in one room, what happens when the individual is in the direct path of the camera, and so on. Finally, there may be hours of recordings to go through, some possibly more embarrassing than the clip introduced. Therefore, the other party may be unwilling to either go through the days of recordings, allow their attorney to go through the footage, or allow additional embarrassing footage to be shown in court.

*C. Video recordings are as likely to be used for spite as they are to be used for any other reason.*

There are many ways in which the recorder can use video recordings of his or her spouse for spite. Today's technology consists of numerous different online media outlets and more are created every day. There are now websites such as YouTube, Facebook, Twitter, and others that allow people to share information.<sup>124</sup>

122. See, e.g., *Lee v. Lee*, 477 N.W.2d 429, 431 (Mich. Ct. App. 1991) (wife accused husband of affair, which he denied); *Zamstein v. Marvasti*, 692 A.2d 781, 783 (Conn. 1997) (wife accused husband of child abuse).

123. Consider Federal Rules of Evidence § 106. Remainder of or Related Writings or Recorded Statements, which states "If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part — or any other writing or recorded statement — that in fairness ought to be considered at the same time." 28 U.S.C. § 106 (2013).

124. YOUTUBE, <https://www.youtube.com/> (last visited Mar. 25, 2014); FACEBOOK, <https://www.facebook.com/> (last visited Mar. 25, 2014); Twitter, <https://twitter.com/> (last visited Mar. 25, 2014).

The reality in a world such as this is that there is the possibility for a much larger privacy invasion than ever before. Today, all it takes is recording a video on a phone and uploading it to YouTube for thousands, eventually even millions to see the video.<sup>125</sup> With all of these possibilities, it is even more important that there are laws in place protecting people's privacy in their own home.

Even if there are laws protecting what users can and cannot post on the internet, the rules often cannot be enforced until the user has already posted the video and thousands of people have seen it. Furthermore, the recorder can also send the video to friends of either spouse, employers, or other people in an attempt to embarrass or hurt the recorded spouse.<sup>126</sup>

As an example of a spouse using the recordings for spite, imagine the situation with Alex and Lindsey Johnson again. Alex caught Lindsey going into the bedroom with another man. To make matters worse, the other man is a married man that Alex knows. Now, to get back at Lindsey, Alex plans to show the videotape to the other man's wife to ruin their marriage as well, just to hurt Lindsey.

Spouses see sides of each other that almost no one else does, because at one point they trusted each other with this intimacy.<sup>127</sup> When that intimate relationship is dissolving, the parties can hurt each other in ways that no one else can.<sup>128</sup> Additionally, they often continue to have access to the same home and personal property that they had during the marriage.<sup>129</sup> Therefore, it is critical that legislatures protect the parties from certain privacy invasions.

125. Youtube has "more than 1 billion daily video views, with more than 24 hours of new video uploaded to the site every minute." *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 28 (2d Cir. 2012).

126. Theresa Kroh, in *Kroh v. Kroh*, told numerous third parties that her husband had sex with a dog, including her husband's sister and friends. 567 S.E.2d at 762. It is possible that, if she had caught the act on videotape, she would have sent the tape to those individuals.

127. Naomi Cahn & Robert Tuttle, *Dependency and Delegation: The Ethics of Marital Representation*, 22 SEATTLE UNIV. L. R. 97, 113 (1998) (citing CATHERINE KOHLER RIESSMAN, *DIVORCE TALK: WOMEN AND MEN MAKE SENSE OF PERSONAL RELATIONSHIPS* 212 (1990)) ("When most people marry, they expect emotional intimacy, companionship, and sexual fulfillment with their partner. They envision a 'companionate marriage – the belief that husband and wife should be each other's closest companion.'").

128. *Id.* at 116 ("Just as marital intimacy opens the possibility for some of life's richest experiences, it also leaves spouses vulnerable to some of life's most devastating emotional, and even physical, injuries.").

129. See, e.g., *Kroh*, 567 S.E.2d at 762; *Rutter*, 730 S.E.2d at 632–33 (Ga. Ct. App. 2012) ("[Stacy Rutter] continued, during the time that she used the video surveillance devices, to keep clothes and other personal items at the marital residence, she paid a portion of the mortgage for that residence, she received some mail at that residence, and she spent some portion of every other day at the residence, doing things like cooking, eating, bathing, and washing clothes.").

*D. Introducing video recordings can negatively affect the children involved*

Child custody battles often negatively affect children in a number of ways.<sup>130</sup> Parents may use children to get information about each other, tell the children that the other parent is doing things to hurt them in the divorce proceedings, and so on.<sup>131</sup> This can leave children feeling stuck in the middle.

When parents are recording children without the children's knowledge, and the children later discover that they were being recorded, it can affect how secure the children feel in their own home. They might have been doing some embarrassing acts, talking negatively about one or both parents,<sup>132</sup> or even simply discussing private issues with a parent or a friend. Regardless of what they are doing, the knowledge that their parent was videotaping them to hurt the other parent can make the child feel like a casualty in his or her parents' divorce.<sup>133</sup>

Additionally, one parent using the children against the other is one of the biggest causes of emotional trauma in children during divorce and custody proceedings.<sup>134</sup> If the children know that one parent is recording the other, they may feel obligated to tell the other parent.<sup>135</sup> Alternatively, they may promise not to tell the other parent. In either scenario, the secret is pitting the child against one parent. The situation can negatively affect the child's relationship with one of his or her parents, if not both. Furthermore, this emotional trauma can lead to juvenile depression, conduct disorders, sleeping disturbances, and difficulty with communication skills.<sup>136</sup>

It is true that in *Rutter v. Rutter*, the allegations were child abuse.<sup>137</sup> Arguably, catching the father hurting the children is more important than

130. For analyses of how these disputes can affect children, see Judge Don R. Ash, *Bridge Over Troubled Water: Changing the Custody Law in Tennessee*, 27 U. MEM. L. REV. 769, 773-74 (1997); Robert E. Emery, *Easing the Pain of Divorce for Children: Children's Voices, Causes of Conflict, and Mediation Comments on Kelly's "Resolving Child Custody Disputes"*, 10 VA. J. SOC. POL'Y & L. 164, 169 (2002).

131. See, e.g., *Pollock*, 154 F.3d at 604 (mother recorded conversations between daughter and father); *Thompson*, 838 F. Supp. at 1537 (mother recorded conversations between father and three- and five-year-old children).

132. See, e.g., *Pollock*, 154 F.3d at 604 ("Courtney . . . was upset and complaining of Judge Morris's decision to require her to live with [her mother].").

133. The adversarial nature of divorce already causes children to be "used as currency in emotional transactions." Ash, *supra* note 130, at 774.

134. *Id.* at 773-74.

135. See, e.g., *Pollock v. Pollock*, 154 F.3d 601, 604-05 (6th Cir. 1998).

136. Ash, *supra* note 130, at 773.

137. *Rutter v. Rutter*, 730 S.E.2d 626, 633 n.16 (Ga. Ct. App. 2012).

any lack of security or comfort the children may feel.<sup>138</sup> However, the appellate court stated that there was no evidence, in the videotape or otherwise, to support Stacy's allegations.<sup>139</sup> Stacy could have alleged that she thought Charles was committing any crime, regardless of what reasons she had for believing so, and that would be sufficient under the Georgia statute.<sup>140</sup>

It is possible to create a rule where, under circumstances where there is convincing evidence that there is some sort of abuse taking place, the judge can then allow more fact gathering.<sup>141</sup> However, under the statutes that exist now, or the lack thereof, individuals can record spouses without any prerequisite showing of evidence.

*E. Video cameras can bring in evidence that the judge should not be considering*

In contentious divorce proceedings, spouses are likely to accuse each other of dozens of things, such as having an affair,<sup>142</sup> committing child abuse,<sup>143</sup> or even engaging in bestiality,<sup>144</sup> and the judge has probably heard many of them before. However, hearing these allegations can be very different from seeing them.

For example, Kevin and Alice Latham are getting a divorce, and they are fighting for custody over their two daughters. Alice thinks that Kevin cannot handle raising the two girls, so she places video cameras around the house to use against Kevin in the custody proceedings. One daughter, Kelly, is reacting poorly to her parents' marriage dissolving and has started going out to parties late at night, and sometimes police officers drive her home. When this happens, both parents often yell at Kelly and tell her they will send her to boarding school if she keeps it up. One night, around two in the morning, Kelly comes home and wakes up her father, who has been sleeping on the couch. Angry at her behavior and that Kelly woke him up at such a late hour, Kevin starts yelling at Kelly, telling her if she keeps this

138. For analysis of the "privacy versus security" debate, see generally Kenneth E. Himma, *Privacy Versus Security: Why Privacy is Not an Absolute Value or Right*, 44 SAN DIEGO L. REV. 857 (2007).

139. *Rutter*, 730 S.E.2d at 633 n.16.

140. GA. CODE ANN. § 16-11-62(2) (2010).

141. Currently, there are other protections in place, such as obtaining orders of protection, calling DCFS, obtaining experts to watch the children with the father, etc. See for example 325 ILL. COMP. STAT. ANN. 5/2 (2010); KY. REV. STAT. ANN. § 403.740 (2010); MINN. STAT. ANN. § 518B.01 (2013); UTAH CODE ANN. § 78B-7-103 (2008); W. VA. CODE § 48-27-501 (2001).

142. See, e.g., *Lee*, 477 N.W.2d at 431.

143. See, e.g., *Zamstein*, 692 A.2d at 783; *Kroh*, 567 S.E.2d at 762.

144. See, e.g., *Kroh*, 567 S.E.2d at 762.



up, he is sending her to boarding school. The yelling wakes up Alice, who decides to come to Kelly's defense and tries to look like the reasonable parent in front of the camera. Alice uses the video in the custody proceedings, making it look like Kevin is unreasonable and would just ship the kids off to boarding school if he got custody. This recording might bias the judge in the custody proceedings, despite the fact that both parents have yelled at Kelly for the same behavior.<sup>145</sup>

Also, going back to the Alex and Lindsey Johnson hypothetical, Alex appears to have caught Lindsey committing adultery. The recording may sway the judge, even though most states have created a "no fault" divorce, and adultery is not one of the factors typically listed in division of assets statutes.<sup>146</sup> By admitting video recordings into divorce and custody proceedings, people may bias the judge in their favor, even when other party has not done anything legally wrong.

#### IV. PROPOSALS

There are several ways to protect the individuals that current video surveillance laws do not protect, and while this section lists a few, this list is not all-inclusive. The possible methods of protection from surreptitious video surveillance, especially in divorce proceedings, can include creating a broad law to cover video surveillance, adding a section disallowing these videos in divorce proceedings to existing statutes, or creating a presumptive evidentiary rule that excludes videos from evidence.

##### *A. The legislature can create a broad law to cover video surveillance*

Creating a law covering video surveillance, as the legislature did in Georgia, has many advantages. While the Georgia statute left a gap that allowed for misuse in *Rutter*, the law in place provides some restrictions. For example, the law only allows surreptitious videotaping on the owner's property so long as the owner has the intent to provide security, to prevent crime, or to detect crime.<sup>147</sup> This would rule out video evidence where a party can prove to a certain extent that the recorder made the video recordings for any other purpose. While it may not be difficult for an individual to

145. For example, in *Thompson v. Dulaney*, the court pointed out "the transcripts [between Thompson and his children] were introduced. At the custody hearing, the court determined that both Thompson and Dulaney were fit to be named guardian of the children, but nonetheless awarded Denise Dulaney custody." 838 F. Supp. at 1537.

146. *Principles of the Law of Family Dissolution: Analysis and Recommendations*, A.L.I. § 4.09, at 732 (2002).

147. GA. CODE ANN. § 16-11-62(2)(C).

allege that they are trying to catch a crime in the act, there is a chance that the opposing party can introduce evidence that the recorder had an ulterior motive.

It is probably better for the states to have a statute that explicitly states what to do under these circumstances. For example, a statute that generally prohibits video recordings “out of public view” and without consent, like the Georgia statute does in its first section, is a good place to start.<sup>148</sup> Providing certain exceptions, like the Georgia and Michigan statutes do for public policy, can make sense, so long as the exceptions are limited as suggested in the subsection below.<sup>149</sup>

*B. For states with video recording statutes, add a section prohibiting use in divorce proceedings*

This solution is only applicable for states such as Georgia and Michigan that have statutes addressing the issue of surreptitious video surveillance. The main issue with these statutes is that they remain ambiguous as to the legality of surreptitious spousal recordings and the recordings’ admissibility in domestic relations proceedings.<sup>150</sup>

The first problem with the Michigan and Georgia statutes is that their exceptions leave them open for misuse. The statutes need to narrow the applicability of their exceptions from “security purposes, crime prevention, or crime detection” and “security monitoring.”<sup>151</sup> For example, the statute could state that the recorder can only make these recordings with the intention of turning them over to the police for prosecution if they catch a crime or security breach. Alternatively, the statute could prohibit the use of the recordings in the event that the recordings have not caught a crime.

A second problem with the Georgia statute is the provision that states that the videos are allowed into “judicial proceedings” because the statute does not clarify the type of proceeding.<sup>152</sup> It is probably consistent with the intent of the legislature to allow videos in to criminal proceedings, as the recorder is supposed to take these videos with the intent to provide security, to detect crime, or to prevent crime, and the statute states that the recorder may give the videos to a district attorney or a law enforcement officer.<sup>153</sup> It is possibly also within the legislative intent to allow videos into certain

148. See GA. CODE ANN. § 16-11-62(2).

149. See GA. CODE ANN. § 16-11-62(2)(C); MICH. COMP. LAWS ANN. § 750.539d (2004).

150. See GA. CODE ANN. § 16-11-62(2)(C); MICH. COMP. LAWS ANN. § 750.539d.

151. See GA. CODE ANN. § 16-11-62(2)(C); MICH. COMP. LAWS ANN. § 750.539d.

152. See GA. CODE ANN. § 16-11-62(2)(C).

153. See *id.*

civil proceedings, such as trespass. However, that part remains unclear. It is also unclear as to whether the legislature intends for this evidence to be admissible in a battery case, a breach of contract case, or other civil cases. It is highly unlikely that the legislature created the statute with the intent that the recorder uses the videos in divorce proceedings, but with the current language of the statute, that also remains unclear.<sup>154</sup> Even if the legislature wants the obtained surveillance to be admissible in most circumstances, it could provide a narrow exception for domestic relations proceedings.

*C. Create a presumptive evidentiary rule for divorce proceedings*

Another possible way to prevent many of the problems associated with surreptitious video recordings is to create a presumptive evidentiary rule that the recorder cannot bring the recordings into divorce proceedings. Therefore, the rule would provide a rebuttable presumption that the judge will not admit the recordings. However, if the rule is only presumptive, the parties can overrule it by some showing of need.<sup>155</sup> This need could be, for example, a showing of probable cause that a crime is being committed, or a showing of compelling need for the video recordings. This rule would prevent most of the problems associated with introducing video recordings into divorce proceedings. However, this rule would not prevent the recordings from taking place, for better or worse.

#### CONCLUSION

Under current laws, there are limited protections from surreptitious video recordings by spouses during divorce. The current laws and judicial remedies for these recordings are inadequate for preventing spouses from making these recordings and introducing the recordings in divorce court. This is a problem because it can lead to increased adversity; the recordings can be taken out of context; the recording can be used out of spite; allowing this to happen can have an adverse effect on children; and, these recordings can capture evidence that the judge should not consider. With all of the problems that this poses, either the state legislatures should enact statutes

154. *See id.*

155. *See, e.g.,* John M. v. Paula T., 571 A.2d 1380, 1384 (Penn. 1990) (presumption of legitimacy can be overcome by clear and convincing evidence to the contrary); Newburgh v. Arrigo, 443 A.2d 1031, 1035 (N.J. 1982) (presumption of marriage validity may be overcome by clear and convincing evidence); Concrete Pipe & Prods. v. Constr. Laborers Pension Trust, 508 U.S. 602, 635, (1993) (presumption of reasonableness can be overcome "by proof by a preponderance" that the assumptions were unreasonable).

remedying this lack of protection or the judiciary should create an evidentiary presumption to exclude the recordings.