NOTES

LOCATION, LOCATION, LOCATION: A "PRIVATE" PLACE AND OTHER AILMENTS OF GEORGIA SURVEILLANCE LAW CURABLE THROUGH ALIGNMENT WITH THE FEDERAL SYSTEM

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I. INTRODUCTION

If a confidential informant wearing a camera concealed in his clothing—also called a "button camera"—ventures into a drug dealer's home to make a drug buy, will the video recording of the illegal transaction captured by the button camera be admissible in court? This question and variations on it have provoked a good deal of thoughtful head-scratching by Georgia law enforcement and prosecutors due to the ambiguity and wiggle room plaguing the state statutory scheme regarding visual surveillance.

In Georgia, the answer to the question above is most likely no unless (1) the informant had the consent of all other persons surveilled—an unrealistic option[1]—or (2) the prosecutor makes a creative argument that the defendant's home did not constitute a "private place" in which the defendant had an expectation to be free from surveillance.[2] This situation results from O.C.G.A. § 16-11-62(2), which forbids "[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."[3]

For an illustration of the troubling results under this Georgia surveillance law, consider the following scenario.[4] An underage girl wires herself with a hidden camera before entering the office of a male attorney who has a history of molesting her. The minor captures video recordings of the illegal sexual encounters that occur between them in the office. She then goes to the police to report the sexual abuse, and prosecutors charge the attorney with child molestation and aggravated sexual battery, among other crimes.[5]

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[1] *See* Katz v. United States, 389 U.S. 347, 358 (1967) (observing that "the very nature of electronic surveillance precludes its use pursuant to the suspect's consent").

[2] *See* O.C.G.A. § 16-11-62(2) (2011) (prohibiting any type of visual surveillance performed in "any private place and out of public view" without the consent of all parties observed).

[3] *Id.* (emphasis added).

[4] *See generally* State v. Madison, 714 S.E.2d 714 (Ga. Ct. App. 2011) (presenting a real-life example of the factual circumstances offered here).

[5] The defendant in *Madison* was charged with these crimes. *Id.* at 715.

But when the case makes its way through the crowded docket, this already horrific story gets much worse. Because the prosecutor unadvisedly stipulated that the defendant's office constituted a private place, the videotapes are inadmissible.[6] Despite the illegality and disgusting nature of the defendant's actions, the videotapes proving that he committed these sexual crimes—the tapes that represent the best possible evidence of his wrongdoing[7]—cannot be admitted. This ruling then potentially spirals the victim into a he-said-she-said battle after she already risked so much by attempting to obtain concrete evidence of her abuse, evidence on which she now cannot rely.

This nonsensical reality results from the language of O.C.G.A. § 16-11-62(2), as quoted above.[8] Ultimately, the rigidity of the all-party consent requirement found in this statute led to the inadmissibility of the girl's videotapes in *State v. Madison* under similar facts.[9] Once the prosecutor stipulated that the defendant's office constituted a private place, the court's hands were tied because the defendant had not consented to being recorded.[10] On the other hand, if the statute allowed a one-party consent exception for visual recordings of criminal conduct instead of requiring all-party consent for any kind of visual surveillance, these tapes would have been admissible despite the prosecutor's

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[6] *See id.* (noting that the trial court granted the defendant's motion to suppress the video recordings on the grounds that the videos were made in a private place without consent of all parties recorded).

[7] *See* Quintrell v. State, 499 S.E.2d 117, 119 (Ga. Ct. App. 1998) (declaring that in the context of video recordings "[w]here a scene or events can be captured faithfully as is, the factfinder will have a more objective and accurate rendition than generally can be achieved through recollection by a witness").

[8] *See supra* note 3 and accompanying text.

[9] *See Madison*, 714 S.E.2d at 716–17 (holding that the all-party consent language in the statute, as opposed to the one-party consent language in O.C.G.A. § 16-11-66(a) (2011) regarding oral communications, prevented the admission of the visual recordings even though the minor girl was a consenting participant in the surveillance).

[10] *See id.* at 717 (noting that a party cannot complain of a ruling that he contributed to by his own action, implying that the prosecutor's stipulation as to the classification of the office as a private space dictated the court's decision about the admissibility of the tapes). The court's discussion on this point allows the inference that the all-party consent requirement played a large part in excluding the tapes, for the prosecutor's stipulation as to the nature of the location would have been irrelevant if all parties had consented to the surveillance.

stipulation. Because the girl consented to the surveillance, having conducted it herself, the tapes would have been admissible under a one-party consent exception regardless of whether the office constituted a private place.

Although the all-party consent and private place principles may seem straightforward in scenarios like the one above,[11] O.C.G.A. § 16-11-62(2) actually leaves investigators and prosecutors uncertain about the potential admissibility of visual-surveillance evidence much of the time.[12] For instance, the private place provision of the statute remains ambiguous. Although the statute is not expressly couched in terms of a "reasonable expectation of privacy"[13] as federal law is,[14] a private place nonetheless is defined as a space "where one is entitled *reasonably to expect* to be safe from casual or hostile . . . surveillance."[15] This broad definition has proven problematic, lending itself to various interpretations.[16]

Consider again the scenario involving the confidential informant who records a video of a drug transaction with the defendant inside the defendant's home. Can the defendant participating in that illegal transaction reasonably expect to be free from casual or hostile surveillance when he voluntarily exposes illicit activity to the informant, regardless of the location? Should he be able to *reasonably* expect such privacy under the law? Can the defendant in the child molestation scenario reasonably expect freedom from being recorded when he voluntarily exposes himself to the minor's "casual . . . surveillance"[17] of his illicit activities with her? Should the law allow him to reasonably expect such freedom? Georgia litigators have employed creative arguments for or against such

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[11] The author means straightforward in the sense that if every party did not consent to being surveilled and the surveillance was conducted in a private place, then the videos are inadmissible regardless of any other considerations.

[12] Interview with Alberto C. Martinez, Jr., Prosecutor and Wiretapping Consultant, Prosecuting Attorney's Council of Georgia, in Milledgeville, Ga. (Sept. 4, 2011) [hereinafter Martinez Interview].

[13] "Reasonable expectation of privacy" is somewhat of a term of art within the realm of visual surveillance law at the federal level. *See infra* Part II.A.

[14] *See infra* Part II.A.

[15] O.C.G.A. § 16-11-60(3) (2011) (emphasis added).

[16] *See* Martinez Interview, *supra* note 12.

[17] O.C.G.A. § 16-11-60(3).

propositions,[18] and because there is no Georgia Supreme Court or Court of Appeals case directly on point,[19] they have had the latitude to do so.

Conversely, under federal law, the answers to the questions posed above regarding the admissibility of visual-surveillance evidence in both scenarios not only would be clearer but also more sensible. Specifically, the answers most likely would be: Yes, the videos would be admissible because the defendants in such circumstances could not reasonably expect to be free from surveillance, even within these private spaces.[20] This difference in outcomes results largely from the one-party consent exception that exists at the federal level[21] in direct opposition to the all-party consent requirement under the Georgia statute. But this difference in outcomes also often results from federal courts reasoning that defendants do not have a reasonable expectation of

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[18] *See, e.g.*, Shuman v. State, 271 S.E.2d 18, 19 (Ga. Ct. App. 1980) (arguing against affording defendants a legal right to privacy in criminal transactions, stating that "the Constitution does not protect persons who engage in criminal transactions from the risk that those with whom they choose to do business may be government agents or informants"). Although this Georgia case did not involve visual surveillance, the court's argument against legally providing a reasonable expectation of privacy in criminal conduct in relevant here.

[19] Cases like *Shuman* deal only with audio communications or other undercover activities not involving visual surveillance, leaving much ground uncovered by the courts in this field. *See infra* Part II.B.

[20] It is important to note that while the tape recorded by the government informant in the drug-buy scenario described at the outset of this Note would be admissible for the reasons set forth in the text above, the videos taken by the victim in the molestation scenario would most likely be admissible under federal law for an additional reason: Fourth Amendment protections concerning visual surveillance only extend to surveillance conducted by government actors. John E. Theuman, Annotation, *Constitutionality of Secret Video Surveillance*, 91 A.L.R.5th 585, 596 (2001). Thus, because the recordings were created by a private party acting independently of the government, Fourth Amendment restrictions would not prevent the admission of the videos in the molestation scenario. *See infra* note 36.

[21] *See, e.g.*, United States v. Nerber, 222 F.3d 597, 604 (9th Cir. 2000) (holding that videos of a drug buy recorded by a confidential informant wearing a hidden camera were admissible because when the informant was present, the surveillance was carried out with his consent "and defendants bore the risk that their activities with the informants were being surveilled").

privacy in the illicit activities that they voluntarily expose to third parties who secretly may be recording the interaction.[22]

Georgia courts have expressed the need to provide fact finders with evidence of the highest quality obtained from the most reliable sources.[23] Fully aligning Georgia law with federal law in allowing a one-party consent exception for video surveillance[24] of illicit activities would advance this goal. Further, couching the standard for admissibility of such evidence in terms of a "reasonable expectation of privacy" could alleviate some of the problems caused by the ambiguity of the current Georgia surveillance statute.[25]

This Note explores the discrepancies between Georgia surveillance law and its federal counterparts and suggests revisions for the laws governing video recordings in Georgia. Part II highlights the differences between federal and state law regarding visual surveillance, while Part III delves into the problems that arise with Georgia surveillance law and how these problems could be allayed, especially when compared with the federal system.

II. BACKGROUND

Due to the increased availability, shrinking size, and diminishing cost of easily concealable video-surveillance equipment, this technology is becoming more and more useful in

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[22] *See, e.g.*, United States v. Davis, 326 F.3d 361, 366 (2d Cir. 2003) (holding that no Fourth Amendment violation occurred when a confidential informant secretly taped a drug buy in the defendant's home because the defendant "forfeited" any reasonable expectation of privacy in the illicit activities that he voluntarily exposed to the informant whom he had invited).

[23] *See* Quintrell v. State, 499 S.E.2d 117, 119 (Ga. Ct. App. 1998) ("The law seeks the highest evidence from the purest sources . . . .").

[24] Georgia law already incorporates a one-party consent exception for audio recordings. O.C.G.A. § 16-11-66(a) (2011) ("Nothing in Code Section 16-11-62 shall prohibit a person from intercepting a wire, oral, or electronic communication where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.").

[25] This proposition seems especially accurate when one considers the many federal cases that have laid the foundation for what is and is not considered a reasonable expectation of privacy. *See infra* Part II.A.

the field of covert visual surveillance.[26] As a result, questions regarding the admissibility of recorded visual evidence in Georgia courts are becoming more prevalent and more important, especially for the investigators and attorneys who seek to capture and present such evidence.[27] To comprehensively understand the problems that arise with video evidence in Georgia, grasping the foundations of video-surveillance regulation at both federal and state levels is necessary.[28]

A. FOURTH AMENDMENT: THE FOUNDATION FOR FEDERAL REGULATION OF VIDEO SURVEILLANCE

While Congress has enacted federal legislation regulating the interception of wire and oral communications,[29] this legislation does not apply to the arguably more intrusive technique[30] of silent[31] visual surveillance.[32] Without applicable statutory

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[26] *See* OFFICE OF TECH. ASSESSMENT, OTA-CIT-293, FEDERAL GOVERNMENT INFORMATION TECHNOLOGY: ELECTRONIC SURVEILLANCE AND CIVIL LIBERTIES 62 (1985) ("As cameras become smaller, and easier to install and to monitor, their attractiveness as a means of monitoring activities in private places becomes greater.").

[27] Martinez Interview, *supra* note 12.

[28] Fundamental differences exist between federal law and Georgia law regarding the use of electronic observation devices; occasionally, however, Georgia courts have proven receptive to federal case law and reasoning based on the Fourth Amendment. *See, e.g.*, *Quintrell*, 499 S.E.2d at 119 ("In discerning the scope of the [Georgia] statutory meaning of 'private place,' we ascribe the same scope as has been given to the Fourth Amendment protections.").

[29] *See* Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1851 (codified as amended in scattered sections of 18 U.S.C.) (setting out federal wiretap regulations).

[30] *See* United States v. Nerber, 222 F.3d 597, 603 (9th Cir. 2000) ("Hidden video surveillance is one of the most intrusive investigative mechanisms available to law enforcement."); *see also* Theuman, *supra* note 20, at 595 ("[V]ideo surveillance . . . may be considered far more invasive than conventional investigative techniques—for the camera sees all, and forgets nothing.").

[31] If surveillance equipment records audio feed as well as video, the audible portions of the recorded material will be subject to federal wiretapping laws. 1 JAMES G. CARR & PATRICIA L. BELLIA, THE LAW OF ELECTRONIC SURVEILLANCE § 3:75, at 315 (2011). If *any* party to the conversation consented to being recorded, however, the audio portions of the tape will be admissible under the consent exception in 18 U.S.C. § 2511(2)(c) and (d). *Id.* at 316.

[32] United States v. Larios, 593 F.3d 82, 90 (1st Cir. 2010); *see also Nerber*, 222 F.3d at 605 (recognizing the absence of federal statutory regulation regarding the government's use

controls, federal courts are left to wrestle with claims that the use of covert video surveillance violates a defendant's constitutional rights under the Fourth Amendment.[33]

The text of the Fourth Amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[34]

In considering Fourth Amendment challenges to visual recorded evidence, courts have rejected the contention that video surveillance is so invasive that it should be held unconstitutional per se.[35] Nonetheless, video surveillance remains subject to the restrictions and requirements of the Fourth Amendment, as developed largely by the courts.[36]

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of video surveillance); United States v. Koyomejian, 970 F.2d 536, 538–39 (9th Cir. 1992) (en banc) (finding that 18 U.S.C. § 2511 does not apply to silent video surveillance by the terms of the statute itself); United States v. Mesa-Rincon, 911 F.2d 1433, 1436–37 (10th Cir. 1990) (noting that Congress has not yet delineated any constitutional requirements pertaining to video surveillance); United States v. Biasucci, 786 F.2d 504, 508 (2d Cir. 1986) (stating that nothing in the statute indicates that Congress intended to prohibit video surveillance); United States v. Torres, 751 F.2d 875, 880–81 (7th Cir. 1984) (finding that video surveillance is not within the scope of the statute); OFFICE OF TECH. ASSESSMENT, *supra* note 26, at 62 ("Electronic visual surveillance of public places is not specifically addressed by Federal statutes, although the assumption is that it is legitimate. Electronic visual surveillance of private places is not presently addressed by Federal laws.").

[33] Theuman, *supra* note 20, at 595.

[34] U.S. CONST. amend. IV.

[35] Theuman, *supra* note 20, at 595–96 (noting that federal courts have typically rejected the argument that video surveillance is unconstitutional per se); *see also* United States v. Taketa, 923 F.2d 665, 677 (9th Cir. 1991) (stating that covert video surveillance does not violate a person's reasonable expectation of privacy in itself); CARR & BELLIA, *supra* note 31, at 312 (stating that simply videotaping someone does not amount to a " 'seizure' in Fourth Amendment terms").

[36] Theuman, *supra* note 20, at 596. However, these constitutional restrictions and requirements do not apply to video surveillance carried out by private parties acting independently of the state; the Fourth Amendment only constrains government action. *Id.* The implications of this legal caveat can be somewhat surprising. For example, although

The Fourth Amendment ordinarily requires that any search be conducted pursuant to a valid warrant issued upon a showing of probable cause.[37] Nevertheless, many courts allow into evidence the fruits of warrantless video surveillance conducted by state actors under certain circumstances.[38] The two most important instances in which federal courts accept warrantless video surveillance involve situations where either (1) the surveillance is conducted with the consent of one of the parties being observed[39] or (2) the persons being observed do not have a reasonable expectation of privacy in the location or under the circumstances in question.[40] Otherwise, when government actors conduct video surveillance in places generally considered private without consent of at least one of the persons under observation, the surveillance usually constitutes an illegal search.[41]

A valid Fourth Amendment challenge to surveillance requires the complaining party to have had a subjective expectation of privacy that was objectively reasonable under the circumstances.[42]

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the defendants in a Pennsylvania case had a protectable privacy interest in the bedroom of their home, police were held not to have violated that interest when a third party turned over a privately made videotape of the defendants engaging in unlawful conduct in that bedroom. *Id.* at 597, 606 (discussing Commonwealth v. Kean, 556 A.2d 374 (Pa. Super. Ct. 1989)).

[37] *Id.* at 596. The bulk of the circumstances presented in this Note, though, will be based on the assumption that no warrant has been issued; therefore, this requirement of the Fourth Amendment will not be discussed in depth.

[38] *Id.*

[39] This one-party consent exception stands in direct opposition to the all-party consent requirement of the Georgia surveillance statute. *See infra* Part II.B.

[40] Theuman, *supra* note 20, at 596.

[41] *See, e.g.*, United States v. Nerber, 222 F.3d 597, 605 (9th Cir. 2000) (holding that the defendants had a reasonable expectation of privacy and that continuing government surveillance without a warrant constituted a Fourth Amendment violation once the consenting informant left the hotel room that was under surveillance); *see also* Kent Greenfield, Comment, *Cameras in Teddy Bears: Electronic Visual Surveillance and the Fourth Amendment*, 58 U. CHI. L. REV. 1045, 1057 (1991) ("When officials use [electronic visual surveillance] in nonpublic areas and without the consent of a person present, the surveillance constitutes a search in most cases." (footnotes omitted)).

[42] *See* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (explaining that a two-part requirement exists for a legitimate Fourth Amendment challenge—not only must the complainant have demonstrated a subjective expectation of privacy, but that expectation must also be one that society recognizes as reasonable); *see also* United States v. Taketa, 923 F.2d 665, 670 (9th Cir. 1991) (recognizing the same requirements for a valid

This requirement signifies that (1) the complaining party must have actually expected that he would not be surveilled, meaning that the party must have exhibited an intention to keep his actions to himself,[43] and (2) the privacy interest the party expected to be protected is "one that society is prepared to recognize as 'reasonable.' "[44] This section will further examine the intricacies behind finding a reasonable expectation of privacy after discussing the one-party consent exception existing under the federal scheme, which allows video surveillance even in places where subjects otherwise have a reasonable expectation of privacy.

1. Video Surveillance with Consent. Secret video surveillance without a warrant but with the consent of a subject of the recording has been allowed in various places generally considered private.[45] Additionally, Department of Justice guidelines establish a policy that "[e]lectronic visual surveillance of private places where one party has consented to the surveillance, even if that party is an undercover agent or informer, is assumed to be legitimate."[46] The basic rationale underlying this one-party consent exception relates to the idea that "[w]hat a person knowingly exposes to the public, even in his own home or office," does not receive Fourth Amendment protection.[47] Consequently, if a government actor consents to visual surveillance and then

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Fourth Amendment challenge in the context of video surveillance).

[43] *See Katz*, 389 U.S. at 361 (Harlan, J., concurring) (declaring that a person must exhibit an intent to keep his activities to himself for those activities to be protected under a reasonable expectation of privacy).

[44] *See id.* (laying out these two requirements and providing as an example that "conversations in the open would not be protected against being overheard, for the [speaker's] expectation of privacy under the circumstances would be unreasonable"); *see also Taketa*, 923 F.2d at 673 (noting that the test requires a finding that one's expectation of privacy, i.e., freedom from being surveilled, was objectively reasonable in society's view).

[45] *See* CARR & BELLIA, *supra* note 31, at 314 (listing various locations where warrantless video surveillance has been permitted based on the consent of one of the parties being observed, including private homes, common areas of residential buildings, hotels, restaurants, stores, offices, vehicles, and certain areas of police stations).

[46] OFFICE OF TECH. ASSESSMENT, *supra* note 26, at 62.

[47] United States v. Davis, 326 F.3d 361, 365 (2d Cir. 2003) (quoting *Katz*, 389 U.S. at 351) (applying this rationale to video evidence captured by a confidential informant who consented to wearing a hidden camera on his person). The proposition in the text above as it relates to the one-party consent exception demonstrates the frequent intersection of this exception with considerations of reasonable expectations of privacy.

records an activity voluntarily revealed to him by a defendant even within a private space, the video evidence should be admissible pursuant to the one-party consent exception.[48]

For example, the Second Circuit has held that the Fourth Amendment rights of a defendant were not violated when a consenting government informant recorded the defendant's illegal drug dealing after the defendant invited him into his private residence.[49] The court reasoned that once the defendant invited the informant into his home, he "forfeited his privacy interests" in the subsequent activities that he exposed to the informant.[50] Therefore, the video footage captured inside the defendant's home by the informant's hidden miniature camera was admissible.[51] The court justified its decision to admit the evidence by explaining that the video simply memorialized the events to which the informant could testify in court, having witnessed them as an invited guest in the defendant's home.[52]

Consent, however, only justifies warrantless video recording when the consenting party is present in the location being recorded.[53] For instance, video surveillance of a hotel room without a warrant but with consent of government informants has

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[48] *See id.* at 366 (admitting video evidence of a drug transaction that took place inside the defendant's home between the defendant and a confidential informant who had consented to wearing a camera to record the transaction). Such evidence would also be admissible pursuant to a court's finding that the defendant lacked a reasonable expectation of privacy in the illegal activities that he voluntarily exposed to the informant, as the Second Circuit found in *Davis*. *Id.* The court's reasoning there pertains to the question of what constitutes a reasonable expectation of privacy, a question explored *infra* Part II.A.*2*.

[49] *Davis*, 326 F.3d at 366.

[50] *Id.*

[51] *Id.*

[52] *Id.* *But see* United States v. Shabazz, 883 F. Supp. 422, 425 (D. Minn. 1995) (holding that the consent of an informant to place a video-recording device in the defendant's hotel room was not sufficient to overcome the violation of the defendant's Fourth Amendment protections). The holding in *Shabazz* resulted largely from the court's disapproval of the fact that the recording device allowed the government to continue recording the defendant even when the informant was not present. *Id.* This reasoning suggests that the one-party consent exception should be strictly applied.

[53] CARR & BELLIA, *supra* note 31, at 315; *see also Shabazz*, 883 F. Supp. at 425 (holding video recordings made inside the defendant's hotel room inadmissible due to the government's ability to record the defendant even when the consenting informant was not present).

been held to violate the Fourth Amendment during the times when the informants were not present in the room.[54] The Ninth Circuit explained this result in *United States v. Nerber*, reasoning that when the consenting informants were present in the room, the "defendants bore the risk" that their activities would be recorded.[55] On the other hand, when the informants were not present, no one under observation had consented to the surveillance, so the defendants' subjective expectations of privacy became objectively reasonable because they believed that they were alone in the room.[56] This explanation illustrates the intertwining of the one-party consent exception with the concept of reasonable expectations of privacy.

The rationales behind the one-party consent exception for Fourth Amendment protection at the federal level are varied and long-standing. For example, in 1966 Justice Stewart commented in *Hoffa v. United States* that the Supreme Court has never opined "that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it."[57]

Five years later, Justice White similarly recognized in *United States v. White* that persons engaging in illegal activities must realize the risk that the people to whom they reveal incriminating information may report that information to government authorities.[58] He also expressed the reluctance of the Court to construct "constitutional barriers to relevant and probative evidence which is also accurate and reliable."[59] The *White* Court further declared that it was "not prepared to hold that a defendant who has no constitutional right to exclude the informer's unaided

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[54] *See, e.g.*, United States v. Nerber, 222 F.3d 597, 604–05 (9th Cir. 2000) (admitting into evidence the portions of the video recorded when the consenting informants were present in the hotel room but excluding the recordings made after the informants left, at which point defendants' expectations to be free from surveillance became "objectively reasonable").

[55] *Id.* at 604.

[56] *Id.*

[57] 385 U.S. 293, 302 (1966). The Court in that case was dealing with audio rather than video recordings, but the Justice's reasoning appears equally applicable to both surveillance techniques.

[58] 401 U.S. 745, 752 (1971).

[59] *Id.* at 753.

testimony nevertheless has a Fourth Amendment privilege against a more accurate version of the events in question."[60] Although the Court did not consider video-surveillance evidence in *White*, its justifications for admitting audio evidence seem equally useful in the area of video evidence, particularly because visual surveillance often produces more accurate and reliable evidence than other investigatory techniques.[61] In fact, the Second Circuit has explicitly recognized this reality, holding that the underlying bases for admitting warrantless audio recordings as expressed in cases like *White* "apply with equal force" to video surveillance.[62]

2. Visual Surveillance and the Observed Party's Reasonable Expectation of Privacy. The Supreme Court noted in *Katz v. United States* that "the Fourth Amendment cannot be translated into a general constitutional 'right to privacy.' "[63] The Fourth Amendment does, however, protect a person's reasonable expectation of privacy.[64] The Court in *Katz* also stated that "the Fourth Amendment protects people, not places."[65] Therefore, "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection,"[66] but "what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[67]

Despite the Court's declaration that the Fourth Amendment protects people rather than locations, federal courts have often indicated that the physical place in which surveillance is conducted may be crucial in determining whether the subject of

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[60] *Id.*

[61] *See* Theuman, *supra* note 20, at 595 (noting the usefulness of video surveillance in developing an evidentiary record that may be more reliable than eyewitness testimony). *But see* Greenfield, *supra* note 41, at 1059 (arguing that the mere fact that video evidence may be more probative than other kinds of evidence should not universally justify the use of visual surveillance).

[62] *See* United States v. Davis, 326 F.3d 361, 363 (2d Cir. 2003) (deciding to "extend the rule of *White* . . . to video recordings that capture images visible to a consensual visitor").

[63] 389 U.S. 347, 350 (1967).

[64] *See id.* at 360 (Harlan, J., concurring) (characterizing the Court's holding in terms of the Fourth Amendment protection of the defendant's reasonable expectations of privacy).

[65] *Id.* at 351 (majority opinion).

[66] *Id.*

[67] *Id.* at 351–52.

observation has a reasonable expectation of privacy under the circumstances.[68] Location is especially relevant in terms of deciding whether society would consider a person's expectation of privacy reasonable under the circumstances.[69] For instance, the more public the area in which the surveillance occurs, the less likely that a constitutional challenge brought by the person under surveillance will succeed.[70]

Moreover, courts often consider not only the area in which the surveillance took place but also the nature of the intrusion resulting from the surveillance, including its severity, in determining whether a person enjoys a reasonable expectation of privacy under the circumstances.[71] For instance, video surveillance is often considered more intrusive than audio surveillance.[72] The Ninth Circuit attributes this to the incredibly invasive nature of covert video surveillance.[73] While a listening device only records sounds, a hidden camera has the ability to capture everything—sights, images, verbal communications, and even nonverbal gestures—with the observed person being none the

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[68] *See* United States v. Nerber, 222 F.3d 597, 604 (9th Cir. 2000) ("Defendants' privacy expectation was substantially diminished because of where they were.").

[69] Theuman, *supra* note 20, at 596–97.

[70] *Id*. at 598. For example, courts have held that video surveillance of public streets does not violate the Fourth Amendment rights of the persons observed because those persons have no reasonable expectation of privacy under the circumstances. Rodriguez v. United States, 878 F. Supp. 20, 22 (S.D.N.Y. 1995) (stating that video surveillance of a drug transaction on a public street did not violate the defendant's Fourth Amendment rights because the street was an entirely public place). Even surveillance conducted in open fields on private property has been held constitutional. *See, e.g.*, United States v. Bailey, No. 93-7007, 1993 WL 525667, at *7 (10th Cir. Dec. 17, 1993) (holding that open fields are not protected from video surveillance under the Fourth Amendment). Conversely, video surveillance of *public* restroom stalls, even of those missing doors, has been held to violate Fourth Amendment rights. *See* People v. Dezek, 308 N.W.2d 652, 655 (Mich. Ct. App. 1981) (holding that the stalls were temporarily private places and that the occupants of such stalls held expectations of privacy that society recognizes as reasonable).

[71] *See Nerber*, 222 F.2d at 603 (noting that the legitimacy of a person's expectation of privacy may depend on the nature of the intrusion and declaring that the court must also consider the severity of that intrusion).

[72] *See id.* ("Hidden video surveillance is one of the most intrusive investigative mechanisms available to law enforcement. [One reason is] [t]he sweeping, indiscriminate manner in which video surveillance can intrude upon us, regardless of where we are . . . .").

[73] *Id.*

wiser.[74] Many courts have held that such a fact should be considered in determining whether a surveilled person's Fourth Amendment rights were violated.[75]

The one-party consent exception and the general standard of reasonable expectations of privacy are fundamental principles of federal surveillance law. Federal courts have explored and developed these concepts over the past forty years.[76] While many questions may remain unanswered, the federal scheme nonetheless provides an adequate, sensible structure that state legislatures—including Georgia's General Assembly—could easily adopt and follow, with plenty of precedent at the federal level to guide them.

B. GEORGIA: PARTING WAYS WITH THE FEDERAL SCHEME

As noted by the United States Supreme Court in *Katz*, "the protection of a person's *general* right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States."[77] In accordance with this observation by the Court, Georgia statutorily regulates the use of visual surveillance.[78] The Georgia statute declares that "[i]t shall be unlawful for . . . [a]ny person, through the use of any device,[79] without the consent of all persons

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[74] *See* Theuman, *supra* note 20, at 595 (noting that video cameras capture "far more than conventional investigative techniques" and are far more intrusive).

[75] *See Nerber*, 222 F.2d at 603 (stating that the nature and severity of the intrusion should be taken into account when evaluating the reasonableness of an observed person's expectation of privacy).

[76] *See supra* Part II.A.

[77] Katz v. United States, 389 U.S. 347, 350–51 (1967).

[78] *See* O.C.G.A. § 16-11-62(2) (2011) (defining surveillance that is unlawful). The Georgia statutes dealing with unlawful surveillance are supplemental to federal legislation. Both the federal and state statutes must be complied with in order to render surveillance evidence admissible in Georgia state courts. Paul M. Kurtz, *Unlawful Eavesdropping and Surveillance and Related Crimes*, *in* CRIMINAL OFFENSES AND DEFENSES IN GEORGIA 1857, 1857 (Robert E. Cleary, Jr., ed., 2011). But of course, there is no statutory regulation of video surveillance at the federal level. *See supra* note 32.

[79] "Device" is defined in the Official Code of Georgia as "an instrument or apparatus used for overhearing, recording, intercepting, or transmitting sounds or for observing, photographing, videotaping, recording, or transmitting visual images and which involves in its operation electricity, electronics, or infrared, laser, or similar beams." O.C.G.A. § 16-11-

observed, to observe, photograph, or record the activities of another which occur in any private place and out of public view."[80]

The language of this statute carries several significant consequences. First, the qualifications of "in any private place *and* out of public view"[81] suggest that surveillance of an activity occurring in a private place may be allowed under the statute if the activity remains within public view, which could simply mean within the view of people walking by. The definition of private place also impacts the analysis. Section 16-11-60(3) defines private place as "a place where one is entitled reasonably to expect to be safe from casual or hostile intrusion or surveillance."[82] Nevertheless, the ambiguity of what qualifies as reasonable gives attorneys and courts in Georgia leeway to litigate this issue and riddle this seemingly clear definition with exceptions.[83]

Moreover, the plain words of the statute, "consent of all persons observed,"[84] seem to obliterate the federal one-party consent exception, which adversely affects the operation of Georgia law enforcement.[85] Even more perplexing is the fact that this all-party consent requirement directly conflicts with the policies previously expressed by the Georgia Court of Appeals. In *Quintrell v. State*,[86] Georgia's appellate court ascribed the same scope to the statutory meaning of private place under Georgia law as that given to the

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60(1) (2011). This statute also says that "the term 'device' shall specifically include any camera, photographic equipment, video equipment, or other similar equipment or any electronic, mechanical, or other apparatus which can be used to intercept a wire, oral, or electronic communication," subject to some enumerated exceptions. *Id.*

[80] *Id.* § 16-11-62(2). The statute also contains exceptions, including an exception for surveillance of incarcerated persons and one for surveillance of areas of one's real property for security purposes, because no reasonable expectation of privacy exists in these areas according to the statute. *Id.*

[81] *Id.* (emphasis added).

[82] *Id.* § 16-11-60(3).

[83] For an example of a creative exception crafted by the courts as to the reasonableness of one's expectation of privacy, see *Shuman v. State*, 271 S.E.2d 18, 19 (Ga. Ct. App. 1980) (finding that "the Constitution does not protect persons who engage in criminal transactions from the risk that those with whom they choose to do business may be government agents or informants," even in the defendant's own private residence, away from public view).

[84] O.C.G.A. § 16-11-62(2) (2011).

[85] Martinez Interview, *supra* note 12.

[86] 499 S.E.2d 117 (Ga. Ct. App. 1998).

Fourth Amendment protections at the federal level.[87] The court reasoned that to do otherwise would be nonsensical because then a witness could provide eyewitness testimony at trial but "would not be permitted to memorialize the evidence in place by way of a visual . . . evidence-recording device."[88] The court concluded that such an illogical result would undermine the court's express policy of "seek[ing] the highest evidence from the purest sources" to give the fact finder "a more objective and accurate rendition than generally can be achieved through recollection by a witness."[89]

Yet despite the recognition of these policies by the Court of Appeals of Georgia, the state statute remains a blockade to valuable and probative visual recorded evidence gathered in private places.[90] Not only does the statutory definition of private place[91] invite wide-open dispute and creative litigation regarding exactly where one can expect to be safe from "casual or hostile surveillance,"[92] but the statute itself also deprives fact finders of useful evidence that would be admissible under federal law.[93] The all-party consent requirement exacerbates these infirmities.[94]

The difficulties presented by the Georgia surveillance statute call for a resolution of these problems through modification or

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[87] *Id.* at 119.

[88] *Id.*

[89] *Id.*

[90] For an example of the statute's potentially obstructive effects, see *State v. Madison*, 714 S.E.2d 714, 715 (Ga. Ct. App. 2011) (holding that videotapes containing visual recordings of the defendant molesting his victim were inadmissible because the tapes were made in a private place without consent of the defendant).

[91] "[A] place where one is entitled reasonably to expect to be safe from casual or hostile intrusion or surveillance." O.C.G.A. § 16-11-60(3) (2011).

[92] O.C.G.A. § 16-11-60(3) (2011). What does "casual or hostile surveillance" include? Did the victim's observation of the defendant's illicit sexual activities in *Madison* constitute prohibited casual surveillance even though the defendant voluntarily exposed those activities to her? Does an undercover informant's surveillance of a drug dealer constitute hostile surveillance even in a public place? These questions shed light on the ambiguity of these statutory terms and the possible implications they carry.

[93] *See supra* notes 20–21 and accompanying text.

[94] For a demonstration of the troubling results potentially caused by the all-party consent requirement, see generally *Madison*, 714 S.E.2d 714 (providing an instructive example of how the all-party consent requirement under Georgia law not only leads to the inadmissibility of valuable evidence but also leads to disturbing legal outcomes in horrific criminal cases).

elimination of section 16-11-62(2). The next Part of this Note explores how the Georgia General Assembly could (and should) amend the statute to comport with the commonsense values expressed by the *Quintrell* court, an action that would also align Georgia surveillance law with the federal scheme.

III. ANALYSIS

Aligning Georgia surveillance law with corresponding law at the federal level would serve to both clear up the confusion that often results from the various possible interpretations of the Georgia statute and allow more probative, concrete evidence to come before fact finders in Georgia courts. This Part of the Note focuses on the shortcomings of the Georgia surveillance statute and explores potential solutions.

A. A "PRIVATE" PLACE

Although O.C.G.A. § 16-11-60(3) provides a definition of private place for the purposes of the Georgia surveillance statute, this definition leaves much to be desired, especially when considered in tandem with the definition of "public place," provided in the same title. As mentioned in Part II.B, section 16-11-60(3) defines a private place as "a place where one is entitled reasonably to expect to be safe from casual or hostile intrusion or surveillance."[95] The usual inference would be that the opposite of a *private* place would be a *public* space. For the purposes of title 16, however, Georgia law defines a public place as "any place where the conduct involved may reasonably be expected to be viewed by people other than members of the actor's family or household."[96] This definition of public place implies that *any* location, including private homes or offices, could potentially constitute a public place as long as the actor knows he is in the presence of nonfamily persons.[97] If read

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[95] O.C.G.A. § 16-11-60(3) (2011).

[96] *Id.* § 16-1-3(15).

[97] This reasoning has withstood scrutiny at the federal level. *See* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (explaining that while a man's home usually constitutes a place where he reasonably expects privacy, activities that he

side-by-side, these two statutory definitions seem to yield a grey area,[98] potentially opening up private residences to permissible visual surveillance if such surveillance is conducted by invitees who are not members of the resident's household. Reading these provisions together to consider the statutory limits set by section 16-11-62(2)[99] suggests that a person knowingly facilitating or participating in illicit activities within his home or office in the presence of those who are not members of his family or household cannot claim the private place protection of section 16-11-62(2).[100] No matter how logical this contention may seem, Georgia courts have not clearly addressed whether it is correct.[101]

Aligning Georgia surveillance law with federal law in this area would dispose of the murky statutory private/public place distinction,[102] a classification that currently makes all the difference because of the plain language of section 16-11-62(2).[103] If Georgia's surveillance law was framed in terms of a reasonable expectation of privacy, this single standard would be applied regardless of where the surveillance occurred. Such a change

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knowingly exposes to outsiders within that home are not entitled to Fourth Amendment protection because of the lack of an intention to keep those activities truly private).

[98] For an example of the blurred line between private and public places for purposes of section 16-11-62(2), see *Atlanta Independent School System v. S.F. ex rel. M.F.*, No. 1:09-CV-2166-RWS, 2010 WL 4837613, at *3 (N.D. Ga. Nov. 23, 2010) ("[C]ontinuous monitoring of both private and non-private [presumably public] areas and activities within an otherwise *public* facility constitutes the invasion of a *private* place." (emphasis added)).

[99] These limits would be (1) in a private place and (2) out of public view.

[100] At least one Georgia court has supported this reasoning. *See* Shuman v. State, 271 S.E.2d 18, 19 (Ga. Ct. App. 1980) ("[W]hen, as here, the home is converted into a commercial center to which outsiders are invited for purposes of transacting unlawful business, that business is entitled to no greater sanctity than if it were carried on in a store, a garage, a car, or on the street." (quoting Lewis v. United States, 385 U.S. 206, 211 (1966))). The court in *Shuman* was not considering covert video surveillance, but its logic easily extends to this evidentiary technique.

[101] Martinez Interview, *supra* note 12. While the Georgia Court of Appeals in *Shuman* appears to approve of the proposition asserted in the text above, the court was not considering visual recordings in that case. Moreover, no subsequent Georgia case since *Shuman*, which was decided in 1980, has followed its lead.

[102] The private/public place distinction would still factor into a consideration of the reasonableness of a person's expectation of privacy under a particular set of circumstances.

[103] Because visual surveillance is only unlawful under the statute if conducted in a private place and out of public view, the definitions of private and public become essential in determining if visual surveillance is unlawful under the circumstances.

would mean that covert visual recordings from within a private residence could be as admissible as those taken on a public street so long as the defendant had no reasonable expectation of privacy under the circumstances. Although discerning exactly when, where, and under what circumstances a person has a reasonable expectation of privacy may involve a complex analysis in any particular case, this test would at least provide a uniform standard for Georgia courts to apply with guidance from preexisting federal decisions on the matter.

Some Georgia courts have already indicated their willingness to align Georgia's private/public place standard with the federal reasonable expectation of privacy model. For instance, in *Quintrell*, the Court of Appeals of Georgia explicitly stated, "In discerning the scope of the statutory meaning of 'private place,' we ascribe the same scope as has been given to the Fourth Amendment protections."[104] In reaching this conclusion, the court emphasized the judicial preference for objective evidence, such as photographs or videotapes, over subjective evidence like eyewitness observations and recollections.[105] The *Quintrell* court further declared that "[n]othing in the statute indicates the General Assembly intended otherwise,"[106] implying the absence of a legislative obstacle preventing Georgia courts from paralleling Georgia law with federal law as much as possible.

Another Georgia court very recently bolstered the *Quintrell* rationale regarding state surveillance law. In *Atlanta Independent School System v. S.F. ex rel. M.F.*, a district court noted that according to Georgia courts, an evaluation of a defendant's expectation of privacy should depend on "the same principles as

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[104] Quintrell v. State, 499 S.E.2d 117, 119 (Ga. Ct. App. 1998).

[105] *See id.* ("We give this interpretation to the statutory term because, were it otherwise, an officer could enter the premises, search, . . . and testify as to all of this at trial but would not be permitted to memorialize the evidence in place by way of a visual . . . evidence-recording device . . . . The law seeks the highest evidence from the purest sources, not the opposite. Where a scene or events can be captured faithfully as is, the factfinder will have a more objective and accurate rendition than generally can be achieved through recollection by a witness.").

[106] *Id.*

privacy protections under the Fourth Amendment."[107] The court then noted that under the Fourth Amendment analysis set out in *Quintrell*, an individual must have a subjective expectation of privacy that society is prepared to recognize as reasonable.[108] That standard is identical to the two-fold requirement existing under federal law.[109] However, despite this recent recognition of the rationales expressed by the *Quintrell* court, other Georgia courts have failed to either support or reject the *Quintrell* reasoning.[110]

If the Georgia legislature is concerned about fully embracing the federal surveillance scheme, it could enact specific statutes to counteract what it views as unwelcome results under federal law. For instance, if Georgia lawmakers are apprehensive of the Fourth Amendment's limited scope,[111] the legislature could carefully craft a statute extending the reasonable expectation of privacy standard to all cases of visual surveillance, including those involving private individuals. Ultimately, bringing Georgia surveillance law in line with federal law would provide a clearer standard for Georgia courts to apply when deciding whether to admit video evidence. More importantly, doing so would firmly establish the notion that defendants have no reasonable expectation of privacy in the illicit conduct that they voluntarily expose to third parties, regardless of where that exposure occurs. As Justice White noted over forty years ago:

> [H]owever strongly a defendant may trust an apparent colleague, his expectations in this respect are not protected by the Fourth Amendment . . . . "[N]o interest legitimately protected by the Fourth Amendment is involved," for that amendment affords no protection to

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[107] No. 1:09-CV-2166-RWS, 2010 WL 4837613, at *2 (N.D. Ga. Nov. 23, 2010) (citing *Quintrell*, 499 S.E.2d at 119).

[108] *Id.*

[109] *See* United States v. Taketa, 923 F.2d 665, 670 (9th Cir. 1991) (recognizing these same requirements for a valid Fourth Amendment challenge under federal law in the context of video surveillance).

[110] The *Quintrell* reasoning has not been extended beyond the open fields surveillance doctrine, except for in *Atlanta Independent School System* where the Georgia district court followed the *Quintrell* reasoning in the context of a school.

[111] *See supra* notes 35–36 and accompanying text.

> "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it."[112]

Given this foundation, the advantages of the federal scheme become more visible, especially in light of cases like *State v. Madison*. Even if the prosecutor in that case had not stipulated as to the classification of the defendant's office as a private place,[113] by applying O.C.G.A. §§ 16-11-62(2) and 16-11-60(3), the court still could have concluded that the office was a private place and that the victim's visual recordings were therefore inadmissible. But, if the court had applied the federal reasonable expectation of privacy standard, even if the defendant subjectively believed that he would be free from surveillance, society would most likely refuse to recognize that belief as reasonable.[114] The pure logic expressed by the Supreme Court in cases like *Hoffa* and *White* demands that defendants be foreclosed from claiming Fourth Amendment privacy protections when they voluntarily expose unlawful activities to other parties who are smart enough to capture evidence of those activities.

These considerations support the conclusion that the Georgia General Assembly should modify Georgia surveillance law in a way that tracks the federal system. Such a modification would not only promote clarity and uniformity in judicial decision making on this topic, but it would also yield more intuitively acceptable results. This is true both in terms of eliminating the private/public space distinction and in terms of disposing of the all-party consent requirement of section 16-11-62(2).

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[112] United States v. White, 401 U.S. 745, 749 (1971) (quoting Hoffa v. United States, 385 U.S. 293, 302 (1966)).

[113] State v. Madison, 714 S.E.2d 714, 715 (Ga. Ct. App. 2011).

[114] After all, the Supreme Court's reasoning in cases like *White* demands that defendants cannot claim Fourth Amendment privacy protections when they voluntarily expose unlawful activities to third parties who record the wrongdoing.

B. THE ALL-PARTY CONSENT REQUIREMENT

Perhaps the most troubling aspect of the Georgia surveillance statute is the all-party consent requirement. Consider the *State v. Madison* scenario once again. Even if the victim had recorded the videos in the defendant's residence, car, or anywhere else, but for the all-party consent requirement, the prosecution would have had a much better chance at getting these videos into evidence during the subsequent criminal proceeding. If Georgia law recognized the one-party consent exception for video recordings[115] found at the federal level, the videotapes of the defendant's criminal behavior would have been admissible because the victim consented to the recording by conducting it herself.[116] Moreover, if Georgia surveillance law mirrored the federal scheme, these videos would not have been subject to Fourth Amendment scrutiny because they were recorded by a private actor independent of the government.[117] Allowing these videos into evidence would comport with a sense of justice and satisfy the desire to see the victim's molester punished.

Furthermore, the Court of Appeals of Georgia in *Gavin v. State* analyzed the all-party consent requirement in light of the legislative intent behind it.[118] The defendant in that case recorded a sexual encounter between himself and his neighbor without the neighbor's knowledge or consent.[119] The defendant argued that

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[115] As discussed in Part I of this Note, Georgia already recognizes a one-party consent exception for oral communications. *See supra* note 24. The court in *Madison* noted that if the videotapes had contained any audible portions that the prosecutor wished to admit into evidence, the court's analysis might have been different. 714 S.E.2d at 717 ("[I]f the video recordings made by W.M. had actually captured audible oral communications . . . and if the State were seeking to admit such communications, this might require a different result. However, we leave the consideration of this question for another day or for our General Assembly."). If the General Assembly would indeed extend the one-party consent exception to visual recordings, W.M.'s videotapes most likely would have been admissible regardless of whether they contained any oral communications.

[116] *See* United States v. Nerber, 222 F.3d 597, 604 (9th Cir. 2000) (holding that while a consenting informant was present, the visual surveillance was conducted with his consent, and the defendants therefore bore the risk that the conduct they voluntarily revealed to the informant would be recorded).

[117] The Fourth Amendment constrains only government actors. *See supra* note 36.

[118] 664 S.E.2d 797, 798 (Ga. Ct. App. 2008).

[119] *Id.* at 798.

because the term "any person" in section 16-11-66(a) applied only to a third party as opposed to a consenting participant,[120] the same meaning should be given to the term "any person" in section 16-11-62(2).[121] The court noted that such an argument gave rise to a need to consider the rules of statutory construction along with the legislative intent behind Georgia surveillance law.[122]

The court found that " '[O.C.G.A.] § 16-11-62 was intended to protect all persons from an invasion of privacy.' "[123] Having observed that courts have no authority to construe statutory language where the language is plain and open to only one interpretation,[124] the court stated that the "plain import" of the words in section 16-11-62(2) revealed the legislative intent that the consent required was that of all persons observed.[125] Therefore, interpreting "any person" in the way the defendant requested would leave the language, "without the consent of all persons observed," devoid of meaning.[126] While such reasoning is undoubtedly true, the court also stated that its interpretation of the statute as requiring consent of all parties observed "further[s] the 'intent of [the statute] to protect the citizens of this State from invasions upon their privacy.' "[127] This reasoning is what must be more rigorously scrutinized in terms of the rationales behind the all-party consent requirement as contrasted with the one-party consent exception.

Although the appellate court's reasoning in *Gavin* was logical regarding the legislative intent behind the all-party consent requirement, the reasoning loses its force when applied to cases involving criminal conduct caught on tape. While protecting privacy interests of innocent people like the neighbor in *Gavin* is a valuable policy goal, the extension of this protection to criminal

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[120] This section creates a one-party consent exception for the recording of oral communications. *See supra* notes 24, 115.

[121] *Gavin*, 664 S.E.2d at 798.

[122] *Id.*

[123] *Id.* at 798–99 (quoting Kelley v. State, 503 S.E.2d 881, 886 (Ga. Ct. App. 1998)).

[124] *Id.* at 798.

[125] *Id.* at 799.

[126] *Id.*

[127] *Id.* (quoting Ransom v. Ransom, 324 S.E.2d 437, 438 (Ga. 1985)).

activities raises significant concerns. For example, why would Georgia lawmakers wish to shield criminal behavior from surveillance even if such conduct occurs in a location generally considered private? A modification of the Georgia surveillance statute to include a one-party consent exception for recordings of criminal conduct would still protect the privacy interests that Georgia presumably intends to protect, those of persons who engage in lawful conduct behind closed doors. Such a modification would protect those interests while also forging a pathway to priceless and probative evidence of criminal wrongdoing.

The Georgia General Assembly has expressed its concern that " '[t]he employment of devices which would permit the clandestine overhearing, recording or transmitting of conversations or observing of activities which occur in a private place has come to be a threat to an individual's right of privacy.' "[128] While this presents a valid concern, the General Assembly would not have to abandon its attempts to secure the privacy of Georgia's citizens to align state surveillance law with the federal scheme. Rather, the legislature could design a new and improved statutory plan that would strike a balance between its current goals for privacy and the need to provide for the admissibility of evidence of criminal activity such as that found in *Madison*.[129] In fact, doing so would be in accordance with another of the General Assembly's expressed policies: to provide law enforcement with modern techniques for investigation and crime prevention.[130]

The General Assembly has already stated its reluctance to afford criminals too much privacy by carving out an exception to section 16-11-62(2) for incarcerated persons.[131] The existence of this exception presumably denotes the legislature's desire to monitor persons convicted of criminal conduct. If visual surveillance of convicted criminals does not subvert the

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[128] *Ransom*, 324 S.E.2d at 438–39 (quoting the predecessor of O.C.G.A. § 16-11-62).

[129] *See supra* notes 4–10 and accompanying text.

[130] *See Ransom*, 324 S.E.2d at 439 (discussing the General Assembly's goals of protecting the privacy interests of Georgians and providing law enforcement with advanced investigative techniques).

[131] O.C.G.A. § 16-11-62(2)(A) (2011).

legislature's goal of protecting privacy interests, then there is no apparent reason to refuse to extend this exception to persons engaging in illegal behavior who have yet to be caught and who may never be caught without this type of surveillance evidence. Doing so would allow visual evidence of criminal wrongdoing to be memorialized in a tangible form that could then be presented to a fact finder. The defendants in *Madison* and in other cases where criminal conduct has been caught on tape should enjoy no greater privacy in their criminal actions than should the incarcerated persons included in section 16-11-62(2)(A). Federal surveillance law appears to have already recognized this reality,[132] and Georgia lawmakers have already indicated some willingness to recognize the same principle with the incarcerated-persons exception. Molding a one-party consent exception into Georgia surveillance law would not disrupt the statute's clarity and would allow the admission of necessary evidence of criminal conduct, evidence that is currently inadmissible.

This exception would still protect persons engaged in lawful conduct whose privacy is invaded via visual surveillance but would not protect persons engaged in unlawful conduct who should not benefit from a privacy interest in the illicit activities they expose to third parties.[133] The General Assembly could extend the one-party consent exception already in existence for audio evidence to visual evidence and still draft a narrow statute protecting private recordings of lawful activity from becoming public.

IV. CONCLUSION

The differences between Georgia law and federal law reveal the unnecessary complications brought about by the state statutory scheme. The murkiness of the private place element of section 16-11-62(2) marks one convoluted aspect that the Georgia legislature

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[132] *See supra* Part II.A.*1*.

[133] This exception would be advantageous not only in cases like *Madison* or in drug-related cases where an informant or private party has captured an illegal transaction on tape; the exception would also be implicated in cases involving devices such as "nanny cams" that capture the abusive, criminal conduct of those entrusted to care for children.

could clear up with an adoption of the federal reasonable expectation of privacy standard. Moreover, the insensible and often disquieting outcomes that result from the all-party consent requirement contained in section 16-11-62(2) could also be abrogated by an alignment with surveillance law at the federal level, which includes the one-party consent exception. The General Assembly has many available options that could resolve much of the confusion abounding within law enforcement offices and courts in Georgia. Resolving this confusion would not only provide a more uniform standard for Georgia courts to apply when considering the admissibility of visual recorded evidence, it would also provide a less obstructed pathway to justice in many cases.

The next step for law enforcement personnel and judges in Georgia may be to once again attempt to persuade the legislature to clarify the issues described in this Note. Preferably, the legislature could do so in the form of a statutory exception limited to situations involving legitimate investigation of criminal conduct, regardless of whether the covert surveillance is carried out by law enforcement personnel or by private parties like the girl in *Madison*. Or the General Assembly could adopt the most desirable course by simply bringing Georgia surveillance law into conformity with the federal scheme. Absent such action, prosecutors and investigators are left to guess at what the Georgia courts will eventually make of this issue, and they risk the possibility of adverse consequences for engaging in what otherwise appears to be a legitimate investigative method.

Mary Beth Martinez