A MAN'S HOME IS HIS CASTLE, BUT IT HAS A SECRET DUNGEON: DOMESTIC VIOLENCE VICTIMS NEED AN AMENDMENT TO FLORIDA'S ALL-PARTY CONSENT LAW

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Abstract

Domestic violence is an epidemic that is occurring at alarming rates throughout the state of Florida and across the nation. Much of that abuse occurs behind closed doors inside the home where there are no witnesses. Because Florida law does not allow a person to record communications without the consent of everyone else involved, victims are forced to rely on uncorroborated verbal accusations when they report their abuse. Unfortunately, it is difficult to prosecute these cases because they turn into credibility contests where the abuser often has an unfair advantage and has learned how to manipulate the system. If the abuse was serious enough, the victim can rely on visible physical injuries to support her allegations. That is also problematic because it forces victims to use their bodies as evidence when far more effective substitutes are available. This Note demonstrates that, although we claim domestic violence is no longer a private matter, we are effectively keeping it hidden behind closed doors by refusing to let victims record their abuse and then making it exceedingly difficult to prove their allegations without corroboration. The abuser's right to privacy has become a priority over the victim's safety. This Note argues that domestic violence victims need the ability to record the abuse they suffer inside the homes they share with their abusers. Finally, this Note proposes a statutory amendment to Florida's all-party consent law that would achieve this goal.

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INTRODUCTION

Matthew snoops through his girlfriend Gwen's cellphone and computer while she is cooking dinner to see who she has been talking to and what websites she has visited. He reads her email messages. Upon discovering some text conversations with male friends, he confronts her and attacks her, holding her down. Gwen struggles to get him off of her and scratches him on his arm and neck. Their two children start to come out of their bedrooms to see what is going on, but Matthew tells them to go back in their rooms because he is trying to save the family. Gwen manages to get free and tries to leave, but he takes her keys and calls the police. He then lays down on the floor and calls the children back out, telling them to look at what their mother did to him. When the police arrive, he tells them she assaulted him during an argument about her cheating on him and that she has a history of mental illness. They see the scratches on his neck and arms, interview the couple's children, and arrest her.

Anyone reading the above paragraph would know that Matthew is lying to the police and has twisted the facts of his story to make Gwen look like an unbalanced aggressor. Moreover, and perhaps even more egregiously, he has used his own children as unwitting pawns in his deceitful game of control. When Gwen tries to explain this to investigators, prosecutors, and a judge or jury, she will have a difficult time overcoming the negative implications that Matthew's clever ruse have set in motion. Even with the help of an attorney, it will be her word against his, and he is the one with visible injuries and the children as carefully staged witnesses.

Imagine how incredibly helpful it would be if the incident had been recorded, both the video and the audio. Instead of being forced to rely on secondhand descriptions of what happened, everyone could see and hear the incident itself and arrive at conclusions that were based on direct observation. Eyewitness testimony can be dramatic and convincing, but video evidence is far more powerful, particularly when it shows a crime being committed.[1] Likewise, being able to hear exactly what happened gives context to the video and provides additional substantive evidence in its own right in a way that simply cannot be achieved using witness testimony.[2]

Unfortunately, a recording like that is not allowed in Florida. It is a criminal offense,[3] the evidence is not admissible in any formal proceeding,[4] and the person who made the recording can be sued by

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1. *See, e.g.*, United States v. Washington, 417 F.3d 780, 787 (7th Cir. 2005) ("Tape recordings, whether video or audio, are powerful evidence of guilt . . . ."); United States v. Martin, 746 F.2d 964, 972 (3d Cir. 1984) ("When the videotape shows a crime actually being committed, it simply leaves nothing more to be said.").

2. Attorneys Todd Mullins & Andrea Farinacci note:

> If a picture is worth a thousand words, a recording is worth a million. Recorded audio evidence is extremely powerful. A recorded voice captivates the listener with an aura of reality that cannot be matched by cold documents. Intonation. Pace. Volume. These can be much more telling than words. And the unscripted statements of individuals who do not know they are being recorded are usually more gripping than staged recordings such as public relations videos or Webcasts. Audio evidence beats even videotaped depositions if the recordings were made outside of (or especially before) the adversarial litigation context, without the motive to shade or deceive.

Todd Mullins & Andrea D. Farinacci, *A Trial Lawyer's Guide to Surreptitious Audio Evidence*, LITIGATION, Spring 2005, at 27, 27.

3. FLA. STAT. § 934.03(4)(a) (2016) (designating a recording of this type to be a third-degree felony).

4. *Id.* § 934.06 (prohibiting its use in "any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the state, or a political subdivision thereof").

anyone in the conversation for actual and punitive damages along with attorney's fees.[5] Unless every party to the conversation consents to the recording, it cannot be recorded.[6] Of course, it would be patently absurd for a victim to ask an abuser for permission to record him so the evidence could be used against him later on.

There is an exception that allows a person to make surreptitious recordings while under the direction of law enforcement.[7] But many victims of domestic violence do not feel safe starting an investigation or even making a preliminary report because they are afraid the police might prematurely alert the abuser or that the abuser himself may eventually discover the report as a matter of public record.[8] That risk is even greater when the abuser himself is a law enforcement officer or has friends with access to police databases.[9]

This Note argues that victims of domestic violence need to be able to secretly record the abuse they suffer inside the homes they share with

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5. *Id.* § 934.10(1) (allowing actual damages to be calculated at a rate of at least $100 per day for each violation).

6. *Id.* § 934.03(2)(d).

7. *Id.* § 934.03(2)(c); Mead v. State, 31 So. 3d 881, 882–83 (Fla. 4th DCA 2010) (holding that verbal authorization from a law enforcement officer to record an otherwise private conversation was sufficient to make it lawful under this exception).

8. KATHLEEN BEALL & HEIDI RADUNOVICH, REPORTING DOMESTIC VIOLENCE IN FLORIDA 2 (2014), https://edis.ifas.ufl.edu/pdffiles/FY/FY145400.pdf (noting that officers may arrest the abuser "no matter what [the victim might] want to happen at the time"). In an article published by the National Center on Domestic and Sexual Violence, Hallie Bongar White demonstrated that these problems are especially highlighted in rural areas. White stated:

> In small communities where members tend to know everybody, victims may hesitate to contact law enforcement or seek other services out of shame or for fear that her stalker will find out. She may be deterred from contacting law enforcement because her stalker is a friend or relative of a law enforcement officer or service provider.

HALLIE BONGAR WHITE, NAT'L CTR. ON DOMESTIC & SEXUAL VIOLENCE, STALKING IN INDIAN COUNTRY 1 (2004), http://www.ncdsv.org/images/SWCLAP_StalkingInIndianCountry.pdf. Victims' fears of getting help are not unfounded, as research suggests that the police can often cause more harm than good. Justin Gardner, *Nowhere to Go: Domestic Violence Victims Say Police Enable the Aggressor or Don't Believe Them*, FREE THOUGHT PROJECT (Oct. 8, 2015), http://thefreethoughtproject.com/domestic-violence-victims-police-encourage-aggressor/ (discussing the results of a survey showing that "in many cases, the police provide no help to victims of domestic violence and actually worsen the situation").

9. Sarah Cohen et al., *Departments Are Slow to Police Their Own Abusers*, N.Y. TIMES (Nov. 23, 2013), http://www.nytimes.com/projects/2013/police-domestic-abuse/ (discussing how victims are particularly afraid when their abusers are police officers because of their specialized training, and providing an analysis of the problem with complacency among fellow officers and their employers in Florida).

their abusers.[10] An amendment to Florida's all-party consent law would achieve that goal.[11] We are forcing abuse victims to use their bodies as evidence at a time when ubiquitous consumer technology, such as smartphones[12] or miniaturized recording devices,[13] offers a much better substitute. A variety of "apps" can simultaneously record and upload a video to the Internet for safekeeping in case the recording device is confiscated, lost, or destroyed.[14]

Part I examines the pervasiveness of domestic violence and some of the misconceptions among the general public that help sustain its existence. It also explores the secret nature of domestic violence and why incidents may be very difficult to prove without substantial corroboration. Although anyone can be a victim of domestic violence, women are disproportionately the victim, and that has debilitating ripple effects upon children and society in general.

Part II examines the recent history of Florida law regarding surreptitious recording, starting with the development of cases that interpreted the statute under a reasonable expectation of privacy standard and culminating in the recent *McDade* case,[15] in which the Florida Supreme Court eliminated much of that prior flexibility. The disturbing outcome of that case created a new reality where abuse victims are at

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10. For convenience, this Note refers to "recording" or "video" as including both the video and audio components. It is true that under Chapter 934 only the audio component requires all-party consent to be recorded. *See* FLA. STAT. § 934.02(1)–(2) (defining wire communication and oral communication); Minotty v. Baudo, 42 So. 3d 824, 829–32 (Fla. 4th DCA 2010) (rejecting a claim that the statutory prohibitions also applied to secretly recorded video without audio). But many modern consumer recording devices, such as smartphones, do not have the capability to record video only. Even if they can, a video without the audio track lacks an element of context and omits additional substantive evidence contained in the statements themselves.

11. It must be noted that domestic violence victims may be placing themselves at greater risk of attack by attempting to secretly record their abuser in action. ANN JONES, NEXT TIME SHE'LL BE DEAD 94 (rev. ed. 2000) (discussing how women are more often beaten because they are resisting or otherwise not behaving the way their abuser wants them to behave). But that speaks to how and when a victim should use their ability to record, not whether they should have that ability in the first place. If the law summarily denies victims the opportunity to record out of fear of what might happen to them if they are caught, it just reinforces the abuser's control scheme and helps to further immunize them from ever being held accountable.

12. Nearly two-thirds of Americans now own a smartphone. AARON SMITH ET AL., PEW RESEARCH CTR., U.S. SMARTPHONE USE IN 2015, at 2 (2015), http://www.pewinternet.org/files/2015/03/PI_Smartphones_0401151.pdf.

13. *See, e.g.*, Marc W. Tobias, *The Best Inexpensive Tools to Spy on People*, FORBES (Oct. 27, 2011, 10:40 AM), http://www.forbes.com/sites/marcwebertobias/2011/10/27/the-best-inexpensive-tools-to-spy-on-people/ (discussing a pair of glasses that record audio and video in high definition).

14. *See* Pete Erye, *Livestreaming App Comparison*, COPBLOCK (Jan. 16, 2013), http://www.copblock.org/26257/livestreaming-app-comparison/ (comparing the utility of different video streaming apps for both iOS and Android devices).

15. McDade v. State, 154 So. 3d 292 (Fla. 2014).

equal or greater risk of liability for trying to document their abuse than the abusers are for inflicting it, and where victims have less privacy in their own homes than their abusers do.

Part III looks at the need for a statutory amendment that would allow victims of domestic violence to secretly record their abusers in the act. It briefly surveys all-party consent laws in other states, along with any relevant exceptions for gathering evidence of a crime, and shows how those exceptions have helped victims. It concludes by proposing a straightforward amendment to Florida's wiretapping statute that would give victims of domestic violence the tools they need to expose their abusers and hold them accountable.

I. DOMESTIC VIOLENCE IS EASY TO COMMIT AND HARD TO PROVE

To understand why an amendment to Florida's all-party consent law is necessary to protect victims of domestic violence, it is important to briefly examine the nature of domestic violence itself. This Part looks at how easy it is to become a victim of abuse along with some of the tactics abusers use to conceal their behavior. It also shows that gender bias, along with misconceptions about domestic violence in general, makes it particularly difficult for female victims of abuse to prove their case in court unless they have suffered serious physical injuries.

A. *Victimization Is High, Reporting Is Low, and Understanding Is Anemic*

In over one-third of families in the United States, women experience physical assault.[16] Each year, anywhere from two to eight million women are beaten in their homes by their intimate partners.[17] Nearly thirty-seven percent of emergency-department visits by women are due to domestic battering.[18] A woman is in nine times greater danger of being a victim of assault in her own home than on the streets.[19] Approximately forty-five

16. MICHELE C. BLACK ET AL., NAT'L CTR. FOR INJURY PREVENTION & CONTROL, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 39 (2011), https://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf.

17. Albert R. Roberts, *Comparative Analysis of Battered Women in the Community with Battered Women in Prison for Killing Their Intimate Partners*, *in* HANDBOOK OF DOMESTIC VIOLENCE INTERVENTION STRATEGIES 49, 49 (Albert R. Roberts ed., 2002); *see also* SHANNAN CATALANO, U.S. DEP'T OF JUSTICE, INTIMATE PARTNER VIOLENCE, 1993–2010, at 1 (2015), http://www.bjs.gov/content/pub/pdf/ipv9310.pdf (finding that four out of five victims of intimate partner violence were female from 1994 to 2010).

18. MICHAEL R. RAND, U.S. DEP'T OF JUSTICE, VIOLENCE-RELATED INJURIES TREATED IN HOSPITAL EMERGENCY DEPARTMENTS 5 tbl.7 (1997), http://www.prisonpolicy.org/scans/bjs/vrithed.pdf.

19. ANGELA J. HATTERY, INTIMATE PARTNER VIOLENCE 14 (2009); ANNA KOSOF, BATTERED WOMEN 9 (1994).

percent of all women killed in the United States are killed by their male partners.[20]

The statistics for Florida are equally bleak. The number of reported incidents of domestic violence remained unchanged for 2013.[21] There were 108,030 incidents reported statewide that year, and 187 individuals died as a result of domestic violence.[22] Those deaths represented almost one-fifth of all homicides in Florida.[23]

The American Psychological Association (APA) defines domestic violence as the physical, sexual, and emotional maltreatment of a family member by another family member.[24] The Centers for Disease Control and Prevention (CDC) uses the term "intimate partner violence" to refer to physical, sexual, or psychological harm by a current or former partner without considering the sexual orientation or marital status of the couple.[25] Florida defines domestic violence in a similarly encompassing way,[26] including in domestic-violence statistics anyone who is living together in the same household as a family or has lived together in that manner in the past as well as those who are parents of a child in common.[27] Practitioners and the general public often use the various terms interchangeably as a shorthand reference to the many different methods abusers use to exert control over their victims.[28] Because at its core, domestic violence is about control.[29] Abusers strive to isolate their

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20. ALEXIA COOPER & ERICA L. SMITH, U.S. DEP'T OF JUSTICE, HOMICIDE TRENDS IN THE UNITED STATES, 1980–2008, at 18 (2011), http://www.bjs.gov/content/pub/pdf/htus8008.pdf.

21. FLA. DEP'T OF LAW ENF'T, 2013 ANNUAL UNIFORM CRIME REPORT (2013), http://www.fdle.state.fl.us/cms/FSAC/UCR/2013/CIF_annual13.aspx.

22. *Id.*

23. *Id.*

24. Julia L. Perilla et al., *Prevalence of Domestic Violence*, *in* 1 VIOLENCE AGAINST WOMEN AND CHILDREN 199, 199 (Jacquelyn W. White et al. eds., 2011).

25. *Id.*; *see also* LENORE E. A. WALKER, THE BATTERED WOMAN SYNDROME 392–94 (3d ed. 2009) (describing the four general types of domestic or intimate partner violence).

26. *See* FLA. STAT. § 741.28(2) (2016) (defining domestic violence as "any assault, aggravated assault, battery, aggravated battery, sexual assault, sexual battery, stalking, aggravated stalking, kidnapping, false imprisonment, or any criminal offense resulting in physical injury or death of one family or household member by another family or household member").

27. *Id.* § 741.28(3). Also, the related crime of "dating violence" does not require actual sexual intimacy to occur for a person in a significant relationship of an intimate or romantic nature to qualify for protection. *Id.* § 784.046(1)(d).

28. *See* Etiony Aldarondo & Michelle Castro-Fernandez, *Risk and Protective Factors for Domestic Violence Preparation*, *in* 1 VIOLENCE AGAINST WOMEN AND CHILDREN, *supra* note 24, at 221, 222.

29. EVAN STARK, COERCIVE CONTROL: THE ENTRAPMENT OF WOMEN IN PERSONAL LIFE 271 (2007) (discussing the many tactics of control used to "directly install women's subordination to an abusive partner"); *Wheel Gallery*, DULUTH MODEL, http://www.theduluthmodel.org/training/wheels.html (last visited Sept. 16, 2016) (placing the words "power and control" at the center of the wheel).

victims physically and mentally, cutting them off from any hope of help from the outside world.[30] They will even stoop so low as to use their own children as pawns in their control scheme, threatening the victim with the loss of custody among other consequences for not complying.[31]

Although many people think themselves immune from such control tactics, domestic violence can happen to anyone.[32] Low-income individuals may be at a greater risk of domestic violence,[33] but it is a problem that plagues people from all walks of life, including the wealthy and educated.[34] It is a common myth that these types of problems only happen to "someone else," when in fact it happens everywhere, every day.[35] Despite the troubling statistics showing how pervasive domestic violence is, the truth is that it is underreported.[36] Furthermore, the abuse and level of control typically escalates over time rather than leveling off or disappearing.[37] The result is a picture of a modern home that, for countless victims of domestic violence, is like a hidden prisoner-of-war camp.[38]

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30. STARK, *supra* note 29, at 271. There is an inherent irony in this strategy, however, because many abusers eventually drive their victims to the very people who will often rescue them from such abuse. *Id.* at 248–49.

31. LEIGH GOODMARK, A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM 37 (2012); Minn. Advocates for Human Rights, *Child Custody Issues*, STOP VIOLENCE AGAINST WOMEN (2003), http://hrlibrary.umn.edu/svaw/domestic/link/custody.htm.

32. *See* JONES, *supra* note 11, at 162–63; *cf.* WALKER, *supra* note 25, at 6 (noting that for women the most common risk-marker for becoming involved in a violent relationship is "simply being a woman.").

33. *See* GOODMARK, *supra* note 31, at 143; MICHELLE L. MELOY & SUSAN L. MILLER, THE VICTIMIZATION OF WOMEN 118–19 (2011) (describing how abusers will sabotage a victim's attempts to get an education or to find and hold a job because these means of independence are threats to the abuser's scheme of control).

34. *See* LUDY GREEN, ENDING DOMESTIC VIOLENCE CAPTIVITY xxii (2014); Eliza Shapiro, *Domestic Violence Among the Wealthy Hides Behind 'Veil of Silence,'* DAILY BEAST (Feb. 28, 2013, 4:45 AM), http://www.thedailybeast.com/articles/2013/02/28/domestic-violence-among-the-wealthy-hides-behind-veil-of-silence.html.

35. KOSOF, *supra* note 19, at 11.

36. PETER G. JAFFE ET AL., CHILD CUSTODY & DOMESTIC VIOLENCE 58–59 (2003) (observing that there is a much bigger problem with underreporting and the minimization of abuse by victims than there is with false allegations or exaggerated claims); *See* Robin S. Hassler, *Behind Closed Doors: The Realities of the Violent Family*, *in* 'TIL DEATH DO US PART? PRACTICAL ADVOCACY FOR DOMESTIC VIOLENCE CASES ch. 8, at 8-1 (1997) (noting that domestic violence is underreported by anywhere from one-half to two-thirds of the actual occurrences).

37. *See* JAFFE ET AL., *supra* note 36, at 4; KOSOF, *supra* note 19, at 56 (observing how most abusers were not always monsters and acted with the utmost civility during the courtship phase of their relationship with the victim); WALKER, *supra* note 25, at 350–51 (discussing how escalating abuse can act as a trigger later on for the anticipation of violence in a victim's mind, trapping them psychologically).

38. *See* JAFFE ET AL., *supra* note 36, at 4 (noting that the home is not a safe place for the millions of people who live with violence as an integral part of their lives); JONES, *supra* note 11,

B. *Secret Nature of the Abuse*

Both victims[39] and abusers are adept at maintaining an outward appearance of being just like everyone else.[40] As a result, it is not at all surprising that these dysfunctional relationships are simmering in public every day—what happens behind closed doors is either undetectable or people do not believe it when they see the warning signs. Victims often develop this façade, in part, to help cope with the ever-present feelings of hopelessness that surround them.[41] More insidiously, many abusers are highly respected professionals within their communities, such as lawyers and doctors, who appear to be devoted to their families.[42] When that image contrasts with the agitated or emotional behavior of the victim on the heels of a violent incident, others may conclude that the victim is exaggerating claims of abuse.[43] The abuser's ability to fool others into believing this phony appearance is an integral part of keeping the abuse a secret.[44] In fact, abusers fear anything that might expose what they do at home or have a liberating impact on their victims.[45]

To guard against any outside influence, abusers will invade the victim's privacy whenever and however they please.[46] Their extreme jealousy and insecurity causes them to read emails, tap phone lines,

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at 184 (analogizing a domestically violent home to a "jungle prison camp"); WALKER, *supra* note 25, at 419 (discussing the generational cycle of violence and the debilitating ripple effect that domestic abuse has on children in the home).

39. *See* WALKER, *supra* note 25, at 15 (observing that many victims of domestic violence are successful at maintaining a seemingly normal outward appearance to others around them, and that it is only after getting to know them that the signs of abuse become recognizable).

40. *See id.* at 7 (noting the difference between two subtypes of abusers: the "pit bulls" who act openly aggressive, and the "cobras" whose calm and deliberate manner under pressure makes them far more dangerous).

41. *Id.* at 8 (arguing that battered women are not helpless but that they are highly capable of surviving and dealing with the brutal psychological and emotional trauma they suffer at the hands of their abusers).

42. David Adams, *Identifying the Assaultive Husband in Court: You Be the Judge*, N.H. B.J. (Dec. 1, 1999), https://www.nhbar.org/publications/archives/display-journal-issue.asp?id=56.

43. *Id.*

44. JAFFE ET AL., *supra* note 36, at 35; *see* JONES, *supra* note 11, at 89 ("Batterers can be perfectly agreeable, straightforward, or conciliatory to police officers, bosses, neighbors, co-workers, or friends when they think it's in their best interests."); KOSOF, *supra* note 19, at 59 (repeating a battered woman who said, "'You would love him if you met him. To people outside, he was nice, he was in control, he seemed strong, and the type that we respect in our society"').

45. *See* GOODMARK, *supra* note 31, at 42 (describing how abusers often see higher education or outside employment as a threat on many levels); GREEN, *supra* note 34, at 48 (noting that abusers know their behavior would not be tolerated if it were seen by others); WALKER, *supra* note 25, at 18.

46. STARK, *supra* note 29, at 209 (discussing how abusers use "microregulation" to eliminate any free time or personal space a victim has).

record conversations, monitor the house with surveillance cameras, have friends or private investigators follow the victim, and even inspect their partner's underwear.[47] This lets the victim know that there is no place she can hide from her abuser and that he is always gathering information that can be used to control her.[48] Of course, the tragic irony of this scenario is that the victim has no privacy whatsoever[49]—even in her own home[50]—the abuser can enjoy his privacy to the fullest while stealing hers with impunity.[51]

Unfortunately, people who have never experienced or witnessed this type of oppression and brutality are often unable to imagine or reconstruct it accurately based on secondhand accounts.[52] Gender bias also helps obscure the true nature of domestic violence and masks the reality of what happens behind closed doors.[53] Data is scarce precisely because the problem happens at home with no other witnesses.[54] Privacy norms have evolved to a point that enables and encourages domestic violence.[55] Because the means of enforcing this type of control over abuse victims remains hidden from public view, many people believe that all is well in the home.[56] But all is not well, and the home is not a safe place for victims

47. *Id.* at 248–49. Men commonly justify this behavior by claiming infidelity. *Id.*

48. *See* GOODMARK, *supra* note 31, at 35; STARK, *supra* note 29, at 255, 257 (describing how some abusers go to the extreme of microsurveillance by repeatedly calling and texting their victims throughout the day and forcing them to check in at regular intervals).

49. GREEN, *supra* note 34, at 69 (describing how even victims in affluent homes are isolated and put under a microscope by their abuser's relentless pursuit of control).

50. A troubling yet simple example of just how bad the situation has become are the panic buttons and red banners that are now routine features on just about every website offering information on domestic violence. These buttons let users exit the page quickly in case their abuser is nearby, while also erasing their digital footprints on the website from their browser's history. *See, e.g.*, *Domestic Violence*, FLA. DEP'T CHILD. & FAMILIES, http://www.myflfamilies.com/service-programs/domestic-violence (last visited Sept. 16, 2016) (red warning message); FLA. COALITION AGAINST DOMESTIC VIOLENCE, http://www.fcadv.org/ (last visited Sept. 16, 2016) (red escape button and red safety alert banner); HUBBARD HOUSE, http://www.hubbardhouse.org/ (last visited Sept. 16, 2016) (maroon warning banner and escape bar); NAT'L COALITION AGAINST DOMESTIC VIOLENCE, http://www.ncadv.org/ (red safety exit button) (last visited Sept. 16, 2016); NAT'L DOMESTIC VIOLENCE HOTLINE, http://www.thehotline.org/ (last visited Sept. 16, 2016) (escape button and a separate warning pop-up upon the user's first visit to the website).

51. STARK, *supra* note 29, at 217 (describing "search and destroy missions" where the abuser invades every aspect of the victim's personal life to eliminate any potential threat that might undermine his brainwashing and control).

52. GREEN, *supra* note 34, at 35–36.

53. MELOY & MILLER, *supra* note 33, at 71.

54. KOSOF, *supra* note 19, at 9.

55. ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING 91 (2000).

56. GREEN, *supra* note 34, at 50 (using the "invisible fence" analogy).

of domestic violence.[57] Men beat women because they know how to get away with it.[58] It may be the abuser's castle, but it has become the victim's dungeon. When one judge denied an abuse victim's petition for a protective order against her husband after he threatened her with a gun, she recalled:

> [The judge] looked at me and he said, "I don't believe anything that you're saying . . . . There is no way that I could take that kind of abuse from them. Therefore, since I would not let that happen to me, I can't believe that it happened to you." . . . When I left the courtroom that day, I felt very defeated, very defenseless, and very powerless and very hopeless, because not only had I gone through an experience which I found to be very overwhelming, very trying and almost cost me my life, but to sit up in court and make myself open up and recount all my feelings and fear and then have it thrown back in my face as being totally untrue just because this big man would not allow anyone to do this to him, placed me in a state of shock which probably hasn't left me yet.[59]

C. *Difficulty in Prosecuting the Abusers*

Because of the secret nature of domestic violence, when a victim tries to reach out for help she often is forced to rely primarily upon either her own narrations of what happened[60] or, if the abuse was serious enough and happened recently, her visible physical injuries.[61] Both of these forms of evidence are problematic: the former because it turns into a credibility contest where the abuser often has an unfair advantage and has learned how to manipulate the system, and the latter because it forces victims to use their bodies as evidence when far more effective substitutes are available.

1. She Said, He Said

When women who are victims of domestic violence decide to come forward with formal allegations against their abusers, they are often met

57. *See* WALKER, *supra* note 25, at 360–61 (discussing how the level of control that abusers exert over their victims most closely resembles kidnapping or indentured servitude).

58. KOSOF, *supra* note 19, at 56–57. Matters are infinitely worse when children are involved because they give the abuser added leverage over the victim. *Id.* at 56.

59. Hilary D. Caplan et al., *Report of the Special Joint Committee on Gender Bias in the Courts*, 20 UNIV. BALT. L. REV. 1, 11–12 (1990–1991).

60. *See* Grey Tesh, *Top Evidentiary Issues in Domestic Violence Cases*, *in* HOW NOT TO GET BEATEN UP IN DOMESTIC VIOLENCE COURT ch. 2, at 2-1 (2013).

61. GOODMARK, *supra* note 31, at 110–11.

with skepticism and bias from the police, prosecutors, and juries.[62] Similar to the prejudice against rape victims suggesting that they are somehow responsible for being attacked,[63] many people still look to victims of domestic violence for an explanation rather than acknowledging that everyone has an absolute right to be free from this type of abuse.[64] With the deck stacked against them in the typical "she said, he said" case of domestic violence, women are often seen as being paranoid or hysterical and acting out of some type of hidden revenge motive.[65] Even judges, whom we would expect to exercise the greatest amount of understanding and objectivity, are not immune to the misconceptions surrounding domestic violence.[66] A common response to accusations of abuse is that if it was truly as bad as the victim says it is, she would leave.[67] The astonishing assumption is that the woman should leave the home when, in fact, it is the man who committed the crime.[68] Unfortunately, too many women are unable to articulate persuasive

62. Leigh Goodmark, *Telling Stories, Saving Lives: The Battered Mothers' Testimony Project, Women's Narratives, and Court Reform*, 37 ARIZ. ST. L.J. 709, 741–43 (2005).

63. JONES, *supra* note 11, at 8.

64. *See id.* at 5 ("[Outsiders] are still inclined to look to the woman (and to her psyche) for explanation.").

65. *Id.* at 32–33.

66. Director of the Center for Judicial Ethics Cynthia Gray notes the comments of one such judge:

> In addition, the judge made statements off-the-bench to his court clerk and the assistant district attorney indicating that he believed that many domestic assault charges were exaggerated by women and unfair to men and that he was skeptical about the merits of domestic assault cases in which the primary witness was the victim and the complaint was signed by a police officer instead of the victim. He said that he did not favor issuing an order of protection or keeping an alleged abuser out of the home unless the victim had come to court with a turban of bandages on her head. The judge said, "If a female victim was truly frightened, [she could] leave the home and go to other family or friends or to the shelter." The judge also told the assistant district attorney several times that he did not like most domestic violence cases because they involve "he said, she said" issues. The judge periodically told the court clerk that the police and prosecutors should be "more discreet" with domestic abuse cases and that the police should not always arrest the defendant because, "most likely, the defendant is the father; he's the husband; he's the one who makes the money, and it's not right that they're told that they can't go back into the house."

Cynthia Gray, *Comments Regarding Crimes Against Women*, JUD. CONDUCT REP., Summer 2007, at 3, 11 (alteration in original); *see also* Molly Dragiewicz, *Gender Bias in the Courts: Implications for Battered Mothers and Their Children*, *in* DOMESTIC VIOLENCE, ABUSE, AND CHILD CUSTODY ch. 5, at 5-12 to -13 (Mo Therese Hannah & Barry Goldstein eds., 2010) (discussing the minimization of violence against women by both judges and court personnel).

67. MELOY & MILLER, *supra* note 33, at 128.

68. *Id.*

narratives of what actually happened behind closed doors, and they face an uphill battle when seeking protection from their abusers.[69]

In contrast, many of the men who abuse women have learned how to manipulate the system and give very convincing false narratives to the police and in court.[70] They will often claim that they are the ones who are being abused by the woman, even rushing into court to get a preemptive restraining order against the woman.[71] Another popular tactic that takes advantage of the woman's fragile emotional state and shaken appearance immediately after an attack behind closed doors is to accuse her of being unstable or mentally ill, even suicidal.[72]

Most abusers know that women will have difficulty getting people to believe their claims of abuse, particularly when they have lived with the man for so long.[73] Although giving women the opportunity to expose their abusers and hold them accountable can empower them,[74] it falls short when the proof is lacking or bias and misconceptions undermine the woman's credibility.[75] When a case rests upon the uncorroborated accusations of the victim, men will either deny the allegations outright, minimize the seriousness of what happened, or shift blame to the victim herself.[76] In fact, false denials by men are much more common than exaggerated accusations by women.[77]

The outcome of most credibility contests in domestic violence cases sends a message to men that they can get away with committing abuse behind closed doors and tells women that they will not be protected

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69. *See* GOODMARK, *supra* note 31, at 89.

70. *See* JANIE MCQUEEN, HANGING ON BY MY FINGERNAILS: SURVIVING THE NEW DIVORCE GAMESMANSHIP AND HOW A SCRATCH CAN LAND YOU IN JAIL 16, 34 (2012); WALKER, *supra* note 25, at 337 (describing how men will injure themselves to have the woman arrested and call 911 first because the police often favor the credibility of the person who placed the call); MARY HAVILAND ET AL., THE FAMILY PROTECTION AND DOMESTIC VIOLENCE INTERVENTION ACT OF 1995: EXAMINING THE EFFECTS OF MANDATORY ARREST IN NEW YORK CITY 5 (2001), www.connectnyc.org/docs/Mandatory_Arrest_Report.pdf (reporting that at least as far back as 1995 abusers were learning to manipulate the law to their advantage).

71. Joan Zorza, *Batterer Manipulation and Retaliation Compounded by Denial and Complicity in the Family Courts*, *in* DOMESTIC VIOLENCE, ABUSE, AND CHILD CUSTODY, *supra* note 66, ch. 14, at 14-21.

72. MCQUEEN, *supra* note 70, at 18.

73. GREEN, *supra* note 34, at 70, 98.

74. SCHNEIDER, *supra* note 55, at 95.

75. *See* Ricki Lewis Tannen, *Setting the Agenda for the 1990s: The Historical Foundations of Gender Bias in the Law: A Context for Reconstruction*, 42 FLA. L. REV. 163, 178 (1990) (discussing how entrenched gender stereotypes from the past continued to undermine a woman's credibility in modern domestic violence cases).

76. STARK, *supra* note 29, at 246.

77. EVE S. BUZAWA ET AL., RESPONDING TO DOMESTIC VIOLENCE 388 (5th ed. 2015); JAFFE ET AL., *supra* note 36, at 17.

because no one believes them.[78] When men claim that they are "saving the family" by abusing the woman, "family" is equated with "father."[79] And because the man poses a danger only to the woman, he is not considered dangerous at all.[80] The ripple effects of this shortsightedness are even greater when children are involved, subjecting them to very dissimilar parenting styles and using them as surrogates for his continued abuse towards their mother.[81] For these reasons, many victims find that they need to corroborate their accusations if they are to have any hope of being taken seriously.[82] A dissenting Florida appellate judge recognized the implications of this problem when the court upheld a decision awarding child custody to an abusive father:

> The record includes at least five Petitions for Injunctions for Protection Against Domestic Violence filed by [the mother] in 1991, 1992, and 1993 and five injunctions enjoining [the father] from assaulting or battering and sexually battering [the mother] or her immediate family. This evidence was apparently dismissed by the court as a "he said**,** she said" standoff. In my view, the court failed to address the problem of domestic violence in the serious manner with which it should be dealt. Part of the problem with domestic violence is that the pattern of behavior is handed down from one generation to the next. If the chain is to be broken, children should not be raised in homes where this behavior goes on, since they will view it as the acceptable norm.[83]

2. Need for Corroboration or Visible Injuries

Prosecutors are more likely to pursue a case of domestic violence if the victim has suffered visible physical injuries, because they are easier to prove.[84] The myopic view of many people, including potential jurors, still requires the abuse to include some type of physical injury before it raises concerns or is considered a valid incident of domestic violence.[85] All the emotional, psychological, financial, and other forms of domestic

78. JONES, *supra* note 11, at 46.

79. *Id.* at 35.

80. *Id.* at 40.

81. *See* WALKER, *supra* note 25, at 37.

82. *See* Rosemary C. Hunter, *Gender in Evidence: Masculine Norms vs. Feminist Reforms*, 19 HARV. WOMEN'S L.J. 127, 157 (1996) (describing how misconceptions about domestic violence cause judges and juries to discount a woman's uncorroborated account of what happened).

83. Kopec v. Severance, 658 So. 2d 1060, 1061 (Fla. 5th DCA 1995) (Sharp, J., dissenting).

84. MELOY & MILLER, *supra* note 33, at 43.

85. *See* GOODMARK, *supra* note 31, at 30–31 (discussing the difficulty of convincing courts to recognize abuse that does not entail physical violence).

abuse are discounted or ignored outright if there is no physical element to it.[86] Cases based on circumstantial evidence are often too weak to withstand scrutiny at trial or on appeal.[87] Of course, incriminating statements made by an abuser could help strengthen a case. But it is highly unlikely that an abuser will make such statements to the police, and even if he does the evidence may be excluded at trial for a variety of reasons, such as the violation of his *Miranda* rights.[88]

Part of the problem is that some courts find it hard to believe that men could do these things, and women are often held to a higher standard of credibility than men.[89] Unless it comports with the judge's or jury's own life experience, they are likely to dismiss the victim's uncorroborated allegations of domestic abuse.[90] People simply want to see visible proof of what happened.[91]

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86. *See id.* at 41 ("Absent that one slap or punch, years of emotional, economic, and other forms of abuse go unaddressed.").

87. This can be a problem even when the burden of proof is less than the "beyond a reasonable doubt" standard required for criminal convictions. *See, e.g.*, Graham v. Fla. Parole Comm'n, 58 So. 3d 316, 318 (Fla. 1st DCA 2011) (reversing an inmate's revocation of conditional release based upon allegations of domestic violence where there were no physical injuries and the damage to the victim's bathroom was not direct evidence of battery or aggravated assault); Simmons v. Simmons, 649 So. 2d 799, 802 (La. Ct. App. 1995) (affirming the trial court's decision granting the father custody of the couple's child, and holding that there was no "history of perpetuating family violence" as required by statute, where there were "only occasional incidents of violence that may have been provoked by the wife's adultery" and her other abuse allegations were not corroborated by any document or the husband's admissions); Cox v. Cox, 613 N.W.2d 516, 521 (N.D. 2000) (affirming the trial court's decision to award custody of the couple's child to the father despite the mother's allegations of domestic violence, noting that his conviction for simple battery that caused bruises and hitting the car instead of her did not constitute an incident causing "serious bodily injury" or a "pattern," where her other allegations were found not credible).

88. *See* O'Brien v. State, 56 So. 3d 884, 888–89 (Fla. 1st DCA 2011) (holding that the trial court's error in admitting the defendant's confession that was obtained in violation of *Miranda* was not harmless, where there was no DNA or physical evidence, the only direct evidence was the testimony of the victim, and the State relied upon the defendant's confession to corroborate the victim's narration of what happened).

89. *See* WALKER, *supra* note 25, at 36 (noting this is especially problematic when children are involved); Karen Czapanskiy, *Domestic Violence, the Family, and the Lawyering Process: Lessons from Studies on Gender Bias in the Courts*, 27 FAM. L.Q. 247, 253 (1993) ("Every study collected substantial evidence that the credibility accorded women litigants is less than that accorded men litigants.").

90. *See* Carolyn Copps Hartley, "*He Said, She Said:" The Defense Attack of Credibility in Domestic Violence Felony Trials*, 7 VIOLENCE AGAINST WOMEN 510, 539 (2001) (describing how jurors who accept the common misconceptions about domestic violence will fill in the blanks with an unrealistic view of an abusive relationship); *see also* Lynn Hecht Schafran, *Gender and Justice: Florida and the Nation*, 42 FLA. L. REV. 181, 206–07 (1990) (discussing how members of the legal profession have an obligation to educate themselves about the realities of domestic violence and how gender bias often handicaps victims when they reach out to the system for help).

91. *See* Jeannette F. Swent, *Gender Bias at the Heart of Justice: An Empirical Study of State Task Forces*, 6 S. CAL. REV. L. & WOMEN'S STUD. 1, 58 (1996) (describing how many judges

Unfortunately, visible proof does not exist in many cases. Much of the abuse, especially the kind of emotional and psychological coercion that facilitates the abuser's control and leads to more violent forms of abuse, does not leave physical marks.[92] Even when physical violence does occur, most incidents involve minor injuries that are not visible.[93] Proof of these less visible forms of violence are relevant to show a pattern of abuse over time, giving context to a later and more serious incident when it occurs.[94] Also, abusers learn to hit women in ways and in places on their bodies that will not leave any marks.[95] Strangulation is a particularly dangerous form of physical abuse that does not leave lasting marks on the body,[96] but has recently been identified as one of the best indicators of whether the abuse may lead to homicide.[97]

Without visible proof of the abuse, victims of domestic violence are usually unable to convince others that the incidents actually happened or,

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ignore the power imbalance that exists behind closed doors in an abusive home; injuries that cannot be seen are simply not real).

92. As one author has noted:

> More pernicious still is some judges' requirement of visible physical injuries . . . . Although evidence of physical injury is relevant . . . it is not the *sine qua non* of domestic violence. Psychological abuse, threats of violence and menacing with a weapon do not leave physical scars. Injuries are often to parts of the body covered by clothing: breasts, abdomen, groin. The judicial requests for visible proof of injury are perceived to betray an attitude that women's testimony is not credible unless corroborated by a bruise, a laceration or a black eye.

Report of the New York Task Force on Women in the Courts, 15 FORDHAM URB. L.J. 11, 33 (1986) (footnotes omitted). The heightened scrutiny of battered women's credibility is "in direct contrast to the facts of the domestic-violence literature: Battered women don't exaggerate; they tend to minimize, to deny the severity and extent of the abuse, to protect the abuser and to hide their shame." *Id.*

93. Evan Stark, *Reframing Child Custody Decisions in the Context of Coercive Control*, *in* DOMESTIC VIOLENCE, ABUSE, AND CHILD CUSTODY, *supra* note 66, ch. 11, at 11-8; *see* MELOY & MILLER, *supra* note 33, at 62.

94. STARK, *supra* note 29, at 102.

95. Casey G. Gwinn & Anne O'Dell, *Stopping the Violence: The Role of the Police Officer and the Prosecutor*, 20 W. ST. U. L. REV. 297, 307 (1993) ("Sophisticated abusers can inflict incredible violence without leaving any physical marks and yet the vast majority of domestic violence cases end up being categorized as misdemeanors."); Douglas R. Marvin, *The Dynamics of Domestic Abuse*, F.B.I. L. ENFORCEMENT BULL. (July 1997), https://www2.fbi.gov/publications/leb/1997/july973.htm (noting that experienced batterers will not leave any marks behind as evidence).

96. Gael Strack & Eugene Hyman, *Your Patient. My Client. Her Safety: A Physician's Guide to Avoiding the Courtroom While Helping Victims of Domestic Violence*, 11 DEPAUL J. HEALTH CARE L. 33, 59 (2007).

97. Gael Strack & Casey Gwinn, *On the Edge of Homicide: Strangulation as a Prelude*, CRIM. JUST., Fall 2011, at 32, 34–35.

if they did, that they are as bad as the victim claims.[98] Gender bias in the courts,[99] society's misconceptions about domestic violence,[100] prosecutors who rely too heavily on the victim's testimony[101] or insist upon serious physical injuries,[102] and abusers who have learned how to inflict injuries without leaving visible evidence behind,[103] have all effectively boxed women in legally the way they are boxed in physically behind closed doors in their homes.[104] One domestic violence advocate put it this way:

> [T]he mental aspects of domestic abuse are often misunderstood or overlooked because we're taught to focus on physical markers. "Law enforcement can't do anything until there are physical marks or a threat . . . . All of us need to understand that if we wait until a battered woman looks like she's been beaten, we've already missed 90 percent of what they're dealing with. It's about control. It's about entitlement. It's about him thinking he can treat her like a piece of property."[105]

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98. *See* GREEN, *supra* note 34, at 33.

99. *See Gender and Justice in the Courts: A Report to the Supreme Court of Georgia by the Commission on Gender Bias in the Judicial System*, 8 GA. ST. U. L. REV. 539, 706 (1992) (finding that in rape and domestic violence cases, female victims labored under gender stereotypes and skepticism that men did not); Lynn Hecht Schafran, *The Obligation to Intervene: New Direction from the American Bar Association Code of Judicial Conduct*, 4 GEO. J. LEGAL ETHICS 53, 62 (1990) (describing how women encounter attitudes of skepticism when testifying in domestic violence cases).

100. *Report of the Florida Supreme Court Gender Bias Study Commission*, 42 FLA. L. REV. 803, 849 (1990) (reporting that "[t]he female victim of domestic violence is more likely to receive blame or indifference than support or understanding").

101. Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1899–1900 (1996).

102. *See* WALKER, *supra* note 25, at 141–42 (describing how some prosecutors are looking for broken bones and stitches).

103. *See* GAEL B. STRACK, "SHE HIT ME TOO:" IDENTIFYING THE PRIMARY AGGRESSOR: A PROSECUTOR'S PERSPECTIVE 19 (2001), http://www.ncdsv.org/images/she_hit_me.pdf (listing "[h]it the victim in places that will leave no marks or will be hard to see" among the common strategies used by batterers to avoid getting caught).

104. JEANNIE SUK, AT HOME IN THE LAW: HOW THE DOMESTIC VIOLENCE REVOLUTION IS TRANSFORMING PRIVACY 5 (2009) (noting how the home is becoming a shielded haven for abuse and that the concern is no longer over government intrusion, but about the need for government intervention to protect victims).

105. Emily Shire, *The Worst Question for Abuse Victims*, DAILY BEAST (Oct. 20, 2014, 5:45 AM), http://www.thedailybeast.com/articles/2014/10/20/the-worst-question-for-abuse-victims.html (interviewing victim's advocate Kit Gruelle and discussing the recent HBO documentary on domestic abuse, *Private Violence*).

D. *Women Are Disproportionately the Victims*

Women are nine times more likely to be the victim of a violent act in their own home than they are in public.[106] And while men are more likely to be the victim of an assault in general, women are more likely to be victimized by their intimate partner.[107] Among assault fatalities, forty-five percent of female victims are killed by their intimate partners, compared to five percent of male victims.[108] This imbalance has continued over time[109] because the root of the problem, the dynamics of an abusive relationship, has not changed.[110] The use of the female pronoun to describe victims of domestic violence does not deny that there are male victims, nor does it minimize their abuse; it simply recognizes that the vast majority of victims are female.[111]

Women are uniquely vulnerable, especially when children are involved. Gender stereotypes operate so that the man feels entitled to control his woman,[112] while the woman struggles to be a better wife or partner.[113] A man will typically claim that he suspected the woman was cheating on him as justification for his actions.[114] Even if she did have an affair, infidelity is never an excuse for abuse. The abuser can also use pregnancy as a weapon, often destroying the woman's birth control or denying her permission to use it in the first place.[115] When children are involved, he can leverage the woman's role as a mother against her: If

106. HATTERY, *supra* note 19, at 14.

107. MELOY & MILLER, *supra* note 33, at 57, 62 (discussing the conclusions of the National Crime Victimization and National Violence Against Women surveys).

108. COOPER & SMITH, *supra* note 20, at 18.

109. FLA. COAL. AGAINST DOMESTIC VIOLENCE, 4 FACES OF FATALITY: REPORT OF THE ATTORNEY GENERAL'S STATEWIDE DOMESTIC VIOLENCE FATALITY REVIEW TEAM 6 (2014), http://www.fcadv.org/sites/default/files/FACES%20OF%20FATALITY%20IVweb%20(2).pdf (reviewing domestic violence fatalities that occurred in Florida between 2004 and 2013 and finding that eighty-six percent of the decedents were women, while ninety-three percent of the perpetrators were men); MATTHEW R. DUROSE ET AL., U.S. DEP'T OF JUSTICE, FAMILY VIOLENCE STATISTICS 1 (June 2005), http://bjs.ojp.usdoj.gov/content/pub/pdf/fvs.pdf (reporting that seventy-three percent of family violence victims were female and seventy-five percent of the perpetrators were male); Hassler, *supra* note 36, at 8-1 ("The FBI estimates that 95 percent of the victims are female, and Florida figures show about 75 percent of the overall domestic violence victims are female.").

110. WALKER, *supra* note 25, at 4–5 (discussing how the author's conclusions still hold up more than thirty years after she first proposed them, even with more comprehensive data available today).

111. Sarah M. Buel, *Effective Assistance of Counsel for Battered Women Defendants: A Normative Construct*, 26 HARV. WOMEN'S L.J. 217, 229 (2003) (noting that "[m]ost scholars agree that domestic violence is not characterized by mutual battering").

112. JONES, *supra* note 11, at 96–97.

113. *Id.* at 148–49.

114. MELOY & MILLER, *supra* note 33, at 71; STARK, *supra* note 29, at 248.

115. GOODMARK, *supra* note 31, at 43.

she stays, she risks exposing the children to further violence; if she tries to leave, he can portray her as a manipulator trying to gain a tactical advantage in a potential divorce.[116] In front of the children, he will blame the mother for ending the marriage and then (in a truly cruel twist of reality) claim she is an unfit mother due to the emotional, psychological, and other behavioral symptoms he himself has caused by abusing her for so long.[117]

As a result of these tactics, the more vulnerable members of society are being held captive in their own homes due in part to a lack of credible proof of what really goes on behind closed doors.[118] And because this type of abuse is hidden inside the home, the current system forces those who are less capable of defending themselves physically to use their bodies as evidence.[119] Children are also being victimized, whether through their use as pawns in the abuser's scheme of control or through their exposure to the abuse taking place in the home. The law should stand up to protect them both. Until recently, it may have. But it no longer does.

II. FLORIDA'S ELUSIVE CRIMINAL ACT EXCEPTION TO CHAPTER 934

As this Part demonstrates, Florida courts have wrestled for decades with the statutory language of Chapter 934—which requires two-party consent to record—and the competing interests of society to hold individuals accountable for criminal behavior, especially when there are real-time recordings of an incident. Although courts have not always been receptive to prosecutors' attempts to use surreptitious electronic recordings as evidence under these circumstances, they would eventually

116. *Id.* at 69–70; *see also* Dragiewicz, *supra* note 66, at 14–15 (discussing how women's accusations of domestic abuse are often considered false and frivolous in the context of a divorce).

117. JAFFE ET AL., *supra* note 36, at 31. And by forbidding the woman to work or get a higher education, the man handicaps her even further by cutting her off from the means necessary to support herself and her children. GREEN, *supra* note 34, at 88–91 (discussing some of the many ways abusers will sabotage the woman's efforts such as hiding her keys, turning off the alarm clock so she will oversleep, and even forcing her to drop out of school).

118. To be sure, another significant obstacle is the victim who changes her mind and refuses to press charges or cooperate with the prosecution of the case. *See* JONES, *supra* note 11, at 142–43. But just as the law should not deny victims the tools to record their abuse because society is afraid of what the abuser's reaction might be, neither should society surrender out of discouragement because some victims recant. Not all victims may use the tools, but they need to be available to those who want to try.

119. *See* Caroline Forell, *Making the Argument That Stalking Is Gendered*, 8 J.L. & SOC. CHALLENGES 52, 79 (2006) (recognizing that women's physiology makes them more vulnerable and that they are physically weaker than men); Douglas A. Orr, Weiand v. State *and Battered Spouse Syndrome: The Toothless Tigress Can Now Roar*, FLA. B.J., June 2000, at 14, 20 (discussing how the concept of responding with equal force is problematic when applied to domestic violence self-defense cases because women are generally physically smaller and weaker than men).

allow a criminal act exception to exclusion for recordings made outside of the home. Then in 2013, Florida's Second District Court of Appeal finally extended this exception to the home itself and gave abuse victims new hope for protection in the future. Unfortunately, the Florida Supreme Court quashed that decision and fortified the dungeon in every abuser's home with binding statewide precedent.

A. *The Reasonable Expectation of Privacy Cases Held Promise for Victims*

In 1974, the Florida legislature amended Chapter 934 to require the consent of all parties to a communication before it could be recorded.[120] Until then, Florida had been a one-party consent state. The following year, in *State v. Walls*,[121] a victim of extortion threats secretly recorded an in-person conversation he had with the extortionists at his home.[122] But prosecutors were unable to use the recordings at trial because the Florida Supreme Court held that the new statutory amendments contained no applicable exceptions to the all-party consent rule and prohibited their use as evidence.[123] Several years later, in *State v. Tsavaris*,[124] the Florida Supreme Court decided that the statute's definition of "interception" also applied to conversations over a speakerphone that were recorded with an external device.[125] In that case, a medical examiner secretly recorded a phone conversation he had at his office with a murder suspect who had called to ask about his victim's autopsy results.[126] Because the recording was made without the suspect's consent, the court held it was unlawful and inadmissible at trial no matter how much more trustworthy it may have been than mere oral testimony.[127]

But then the court opened what appeared to be a window of hope for crime victims. In *State v. Inciarrano*,[128] the Florida Supreme Court held that the statute only protects those communications in which a person has a reasonable expectation of privacy.[129] In that case, the victim made an audio recording of his own murder.[130] The defendant went to the victim's

120. Act of June 19, 1974, ch. 249, sec. 2, § 934.02(2), 1974 Fla. Laws 694, 695.

121. 356 So. 2d 294 (Fla. 1978).

122. *Id.* at 295 (noting that the conversation and recording at issue occurred in February of 1975).

123. *Id.* at 296.

124. 394 So. 2d 418 (Fla. 1981).

125. *Id.* at 421.

126. *Id.* at 420.

127. *Id.* at 424, 427 (affirming the trial and appellate court's decisions suppressing the recording).

128. 473 So. 2d 1272 (Fla. 1985).

129. *Id.* at 1275.

130. *Id.* at 1274.

office to discuss a business deal in which the victim no longer wanted to participate, and the conversation ended when the defendant shot the victim five times.[131] Relying on the authority of *Walls* and *Tsavaris*, the appellate court reversed the trial court's denial of the defendant's motion to suppress the recording.[132] But the Florida Supreme Court quashed the appellate court's decision, holding that the language of the statute itself indicates that the legislature did not intend to shield every conversation from surreptitious recording.[133] Specifically, oral communications are expressly defined as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception *under circumstances justifying such expectation* and does not mean any public oral communication uttered at a public meeting."[134] Neither *Walls* nor *Tsavaris* addressed this statutory requirement and the court found those cases were inapposite.[135] Instead, the court imposed a two-part test that requires a person to have a subjective expectation of privacy that society is also prepared to recognize as reasonable before a communication will be protected under Chapter 934.[136] Because the defendant went to the victim's office with the intent to harm him, he had no reasonable expectation of privacy in their conversation, and the recording was not subject to exclusion under the statute.[137]

Justice Raymond Ehrlich concurred in the result but not with the court's reasoning, raising issues that would be echoed by other courts in the future and are worth briefly examining here.[138] He reasoned that the expectation of privacy that exists inside a person's home could not be extended to protect the defendant's communications inside the victim's office.[139] He disagreed with the majority's analysis and argued that the proper focus should be solely upon the recording's location, not the nature of the act or topic of the communication being recorded.[140] Otherwise, allowing criminal acts to waive privacy rights would lead to "absurd results," such as the police making warrantless entries into homes if the occupants are smoking marijuana.[141] The astonishing implication of this is that what is not protected in a victim's business office would be protected if it occurred in the defendant's own home. But that is wrong for several reasons.

131. *Id.*
132. *Id.*
133. *Id.* at 1275.
134. *Id.* (quoting FLA. STAT. § 934.02(2) (1981)).
135. *Id.*
136. *Id.*
137. *Id.* at 1275–76.
138. *Id.* at 1276 (Ehrlich, J., concurring in result only).
139. *Id.* at 1276–77.
140. *Id.* at 1277.
141. *Id.*

First, the police are state actors subject to the Fourth Amendment while private citizens are not,[142] and citizens have always been able to do things that the police cannot.[143] And to some extent, exigent circumstances already allow what Justice Ehrlich suggests.[144] More importantly, however, the typical domestic violence case is not a situation where a person is trying to enter someone else's home based upon suspicion of criminal activity. Instead, a person who is already lawfully inside the home—usually a resident herself—is trying to document a crime being committed against her.[145] What is truly "absurd" is turning the home into a sanctuary for abuse by sheer virtue of its location.

In any event, courts went on to apply the reasonable expectation of privacy test from *Inciarrano* in various situations outside of the home. They had no trouble finding that a person's criminal activity negated any privacy expectation they might otherwise have in their statements or conduct.[146] Still others relied on the public or quasi-public nature of the location where the incident took place to permit a recording even in the absence of any misconduct.[147] Conversely, the lack of any criminal activity in a more private setting meant that recordings could not be made without everyone's permission.[148] Some courts, however, suggested that

142. *See* Armstrong v. State, 46 So. 3d 589, 593–94 (Fla. 1st DCA 2010).

143. *See* State v. Delrio, 56 So. 3d 848, 851–52 (Fla. 2d DCA 2011) (confirming a finding by the trial that a utility company employee did not act as a law enforcement agent by entering the defendant's backyard).

144. *See* Kentucky v. King, 563 U.S. 452, 472 (2011) (holding that a warrantless entry to prevent the destruction of evidence—even of personal possession of marijuana—is lawful if the police do not create the exigency by an actual or threatened violation of the Fourth Amendment).

145. Using Justice Ehrlich's Fourth Amendment scenario, the situation is more akin to one where an officer was invited inside a home and then saw marijuana in plain view. The officer is not prohibited from seizing the evidence, and a victim of abuse should not be prohibited from recording it either. *See* Hall v. State, 395 So. 2d 1258 (Fla. 2d DCA 1981) (holding that where a deputy was invited inside the defendant's home and saw marijuana in plain view, he had a right and duty to seize the plants).

146. *See, e.g.*, Jatar v. Lamaletto, 758 So. 2d 1167 (Fla. 3d DCA 2000) (holding that the plaintiff lacked any expectation of privacy in his threats of extortion made during a meeting in the victim's office).

147. *See, e.g.*, Dep't of Agric. & Consumer Servs. v. Edwards, 654 So. 2d 628, 632–33 (Fla. 1st DCA 1995) (holding that there was no expectation of privacy based on the number of people present at the time of the search).

148. *See* Abdo v. State, 144 So. 3d 594 (Fla. 2d DCA 2014) (finding that an individual who was not a participant in any misconduct had a reasonable expectation of privacy in a video and audio recording made without his consent while inside his own vehicle); State v. Sells, 582 So. 2d 1244, 1244 n.1 (Fla. 4th DCA 1991) (holding that the other party's mere suspicion that their conversation might be recorded does not negate their privacy expectations, and noting that "the narrow 'criminal act' exception to the prohibition on interception which appellee draws from the language of *Inciarrano* is limited to cases with similar facts").

even criminal acts or incriminating statements that occurred inside the home may have been protected from surreptitious recording.[149]

But then Florida's Second District Court of Appeal issued its opinion in *McDade v. State*,[150] extending the criminal act exception and holding that a person had no reasonable expectation of privacy in recordings of such misconduct even in his own home.[151] The victim in that case was a child who had been raped at home by her stepfather for six years, beginning when she was ten.[152] During that time, she told her mother and others what was happening, but no one believed her.[153] At age sixteen, she secretly recorded an incriminating conversation she had with the defendant in their home that supported her prior accusations, and he was eventually charged with multiple crimes.[154] At trial, her mother testified on behalf of the defendant, there was no DNA or other physical evidence, and the case became a credibility contest between the victim and her abuser.[155] For those reasons, the recordings "were probably the most important evidence presented during this trial."[156] The defendant was convicted and the appellate court upheld the admission of the recordings, reasoning that an expectation of privacy in the conversation was not one which society was prepared to recognize as reasonable under *Inciarrano*.[157] The court noted that, similar to incidents of domestic violence, the rape of a child in her own home is a crime that "is so often difficult to detect" and that suppressing the recordings would be unfathomable.[158] Unfortunately, this protection for victims of abuse at home would be short-lived.

B. McDade *Ended a Victim's Protection Inside the Home*

After affirming McDade's conviction, the Second District certified a question of great public importance to the Florida Supreme Court on the

149. *See, e.g.*, Perdue v. State, 78 So. 3d 712 (Fla. 1st DCA 2012) (reversing the defendant's conviction for aggravated assault because the recording of a 911 dispatcher's call to his home where the incident was taking place did not fall within any of the exceptions to Chapter 934 and was inadmissible as evidence); Hentz v. State, 62 So. 3d 1184 (Fla. 4th DCA 2011) (holding that the recording of a cell phone conversation was illegal because the incriminating statements originated with the defendant who was in his home, even though the call itself was made by his friend who was at the police station); *Jatar*, 758 So. 2d at 1169.

150. 114 So. 3d 465 (Fla. 2d DCA 2013), *rev'd*, 154 So. 3d 292 (Fla. 2014).

151. *Id.* at 471.

152. *Id.* at 467.

153. *Id.* (explaining that she recanted on several occasions due to the fear of being deported).

154. *Id.* at 468.

155. *Id.* These aspects of the case are disturbingly similar to domestic violence cases.

156. *Id.*

157. *Id.* at 470.

158. *Id.* at 471.

issue of whether a surreptitious recording made in the defendant's home fell within the proscriptions of Chapter 934.[159] Exercising its discretionary jurisdiction, the Florida Supreme Court answered the question in the affirmative and held that none of the statutory exceptions in Chapter 934 applied or allowed conversations to be recorded simply because a person was the victim of a crime.[160] The court distinguished *Inciarrano* based upon the quasi-public nature of the premises, noting that the recording was done openly and the content did not qualify as "oral communications" under the statute.[161] It further narrowed the holding of *Inciarrano* by clarifying that it was the defendant's status as a trespasser that negated the expectation of privacy he may have had in any utterances, not that utterances associated with criminal activity in general are unprotected from surreptitious recordings.[162] It also briefly echoed Justice Ehrlich's Fourth Amendment concerns from his concurring opinion in *Inciarrano* that privacy expectations cannot hinge on the nature of the defendant's activities.[163] Because McDade's victim made the recordings without his consent in the bedroom of his own home, he had a reasonable expectation of privacy and the recordings were impermissibly intercepted under the clear and unambiguous language of the statute.[164] The court then quashed the decision of the Second District, denying victims the ability to record evidence of their mistreatment inside the abuser's home.[165] As a result, the tragic irony that allows an abuser to violate his victim's privacy at home while his remains shielded[166] is now endorsed by the law: The victim is not allowed to use the recording against her abuser, but the abuser and the government are allowed to use the recording against the victim.

1. The Evidence Cannot Be Used at Trial

The main problem after *McDade* is that surreptitious recordings of a victim's abuse inside the defendant's home cannot be used as evidence at the abuser's trial.[167] If the recording is made in violation of the statute, exclusion is mandatory and no good faith exceptions will save the

159. *Id.*

160. McDade v. State, 154 So. 3d 292, 294, 297 (Fla. 2014).

161. *Id.* at 298 (finding that the relevant excerpt of the recording used at trial captured the defendant's gunshots and then sounds of the victim dying rather than any incriminating conversation or statements).

162. *Id.* at 298–99.

163. *Id.* at 299; *see also supra* notes 138–45 and accompanying text.

164. *McDade*, 154 So. 3d at 298.

165. *Id.* at 300.

166. *See supra* notes 49–51 and accompanying text.

167. FLA. STAT. § 934.06 (2016).

evidence.[168] Even under the direction of a law enforcement officer, recordings can only be made to obtain evidence from the suspect, and the statutory exception does not apply to surreptitious recordings of mere witnesses.[169] Derivative use of such recordings is also prohibited.[170] To the extent some district appellate courts seemed to deny victims the ability to record inside the defendant's home before *McDade*, the problem has existed even longer in those regions of the state.[171] But at least other appellate courts could have been urged to rule differently and certify a conflict if necessary, a possibility which no longer exists.[172]

The unfortunate reality is that prosecutors throughout Florida have been unable to use recordings made by abuse victims when the abuser was not aware of, and was therefore unable to consent to, the recording. In one case, a woman's daughter recorded her mother being beaten in their home, but the evidence was suppressed because it was obtained without the defendant's knowledge or consent.[173] In other cases, suspects have used burner phones to harass their victims enough to constitute stalking, but prosecutors cannot file charges because the phones cannot be reliably traced to the suspects and the only other items of evidence are the victims' surreptitious recordings of the harassing calls.[174] Victims are told the recordings are inadmissible and that what they did could also constitute a crime.[175] In yet another case, the defendant approached a woman sitting in her car and told her that if he ever saw her with another man he would kill them both.[176] From past experience the woman was

168. *See* State v. Garcia, 547 So. 2d 628, 630 (Fla. 1989). *But see* Wood v. State, 654 So. 2d 218 (Fla. 1st DCA 1995) (discussing the statutory exception that applies when a person relies on a good faith determination—typically advice from a qualified third-party official—that the recording would be permissible).

169. *See* Atkins v. State, 930 So. 2d 678, 680 (Fla. 4th DCA 2006).

170. *See* Horning-Keating v. State, 777 So. 2d 438, 447–48 (Fla. 5th DCA 2001) (prohibiting deposition questions based upon information learned from illegal recordings). In addition, the constitutionality of the statute has been upheld when applied to undercover news gathering activities. Shelvin v. Sunbeam Television Corp., 351 So. 2d 723, 727 (Fla. 1977).

171. *See* cases cited *supra* note 149.

172. *See, e.g.*, Chapman v. Pinellas Cty., 423 So. 2d 578, 580 (Fla. 2d DCA 1982) (noting that trial courts throughout the state are bound by the decisions of other district courts of appeal unless the appellate court in the trial court's own district has ruled differently); *see also* Durham v. Palm Court, Inc., 558 So. 2d 59, 60 (Fla. 4th DCA 1990) (noting that the district appellate courts cannot bind each other).

173. E-mail from Sara Hedges, Assistant State Att'y, Nineteenth Judicial Circuit of Fla., to author (Nov. 13, 2015, 16:01 EST) (on file with author).

174. *See, e.g.*, E-mail from Elyse Targ, Assistant Chief of Domestic Crimes Unit, Eleventh Judicial Circuit of Fla., to author (Nov. 16, 2015, 10:40 EST) (on file with author).

175. *Id.*; *see also* discussion *supra* Subsection II.B.2.

176. E-mail from Gregory Thompson, Assistant State Att'y, Fifth Judicial Circuit of Fla., to author (Nov. 13, 2015, 12:45 EST) (on file with author) (more specifically, he said he would shoot the man and then put the other nine bullets into her brain).

able to sense when he was going to threaten her and she secretly recorded his statements, knowing that the police would not do anything without proof of the conversation.[177] But at the injunction hearing, the evidence was suppressed because the defendant did not consent to the recording, the permanent injunction was denied, and the temporary injunction was lifted.[178] Due in part to the inadmissibility of the recording, the criminal case could not be prosecuted as a felony and was eventually dropped.[179] Still other incidents where surreptitious recordings made by the victims could not be used as evidence have occurred in sexual battery cases[180] and where the individuals had a business relationship.[181]

2. The Victim Can Be Prosecuted

When the recording is made illegally, which as a result of *McDade* now includes incidents that occur in the abuser's home, the abuse victim can be prosecuted for committing a third-degree felony.[182] Only intentional recordings are covered under the statute and accidental or unintentional interceptions are excluded.[183] The threat of prosecution allows a potential defendant to invoke her Fifth Amendment right against self-incrimination when asked about the unlawful recording of a conversation.[184] As unthinkable as it might be to prosecute a victim for recording evidence of her abuse, it has happened. In Pennsylvania, another all-party consent state,[185] a high-school student who had been relentlessly bullied by other classmates made a surreptitious audio

177. *Id.*

178. *Id.*

179. *Id.* (noting that there were other credibility issues that factored into the decision as well).

180. *See, e.g.*, E-mail from Ed Griffith, Pub. Info. Officer, Miami-Dade Office of the State Att'y, Eleventh Judicial Circuit of Fla., to author (Nov. 13, 2015, 16:07 EST) (on file with author).

181. *See, e.g.*, E-mail from Elise Brawner, Assistant State Att'y, Nineteenth Judicial Circuit of Fla., to author (Nov. 19, 2015, 17:08 EST) (on file with author).

182. *See* FLA. STAT. § 934.03(4)(a) (2016).

183. Otero v. Otero, 736 So. 2d 771 (Fla. 3d DCA 1999). Of course, there is also an exception to the statutory exclusion of such recordings when the defendant is being prosecuted for violating the statute itself. *See* State v. Lockman, 525 So. 2d 1001, 1002 (Fla. 5th DCA 1988).

184. Roberts v. Jardine, 358 So. 2d 588, 588–89 (Fla. 2d DCA 1978) (holding that a respondent being sued civilly for illegally recording a conversation could not be compelled to answer interrogatories about that recording, nor could they be held in contempt for refusing to answer, due to the statute's criminal penalties); *see also* discussion *infra* Subsection II.B.3 (victim's civil liability for an illegal recording).

185. 18 PA. CONS. STAT. § 5704 (2016); *see* discussion *infra* Subsection III.B.2. It was also a Pennsylvania case that the Florida Supreme Court relied upon in *Walls* when it upheld the Florida legislature's decision to amend Florida's one-party consent laws and instead place greater importance on the privacy of conversations than any interests in recording them. *See* State v. Walls, 356 So. 2d 294, 296 (Fla. 1978) (quoting Commonwealth v. McCoy, 275 A.2d 28, 30 (Pa. 1971)).

recording of an incident on his iPad.[186] When his mother complained to school officials about the bullying and played the recording for them, they consulted with school district attorneys and called the police who then forced him to delete it because they believed it violated the state's wiretapping laws.[187] Formal charges were later filed against the student, but they were eventually dropped after the story made national headlines.[188] As written, Florida's statute would permit the same type of prosecution.[189]

3. The Victim Can Be Sued

Finally, adding insult to injury, the victim who illegally recorded an incident could be sued by the abuser.[190] The statute does not distinguish between married and unmarried individuals and is an exception to the doctrine of interspousal tort immunity, thus allowing one spouse to sue another for a violation.[191] In *Jatar v. Lamaletto*,[192] the victim of an extortion threat was sued by the extortionist for secretly recording the meeting where the demands were made.[193] This is particularly troubling for victims of domestic violence because their abusers often use the court system and retaliatory litigation as a method for continuing their control and abuse even after the victim has managed to escape the relationship.[194] The merits of the case and its eventual outcome are less important to the abuser than the twisted satisfaction they derive from being able to harass the victim, both through forced contact in the courtroom and its collateral

186. Tim Cushing, *Bullied Student Records Bullies, Gets Threatened with Felony Charges for Violating Wiretapping Law*, TECHDIRT (Apr. 14, 2014, 12:03 PM), https://www.techdirt.com/articles/20140411/16314926883/bullied-student-records-bullies-gets-threatened-with-felony-charges-violating-wiretapping-law.shtml.

187. *Id.*

188. Tim Cushing, *Finally, Someone Acts Like an Adult: District Attorney Drops Charges Against Bullied Teen Who Recorded His Tormentors*, TECHDIRT (Apr. 18, 2014, 5:33 PM), https://www.techdirt.com/articles/20140418/12201326960/finally-someone-acts-like-adult-district-attorney-drops-charges-against-bullied-teen-who-recorded-his-tormentors.shtml.

189. United States v. Nosal, 676 F.3d 854, 862 (9th Cir. 2012) ("The government assures us that, whatever the scope of the [statute at issue], it won't prosecute minor violations. But we shouldn't have to live at the mercy of our local prosecutor.").

190. *See* FLA. STAT. § 934.10(1) (2016).

191. Burgess v. Burgess, 447 So. 2d 220, 222–23 (Fla. 1984).

192. 758 So. 2d 1167 (Fla. 3d DCA 2000).

193. *Id.* at 1168 (affirming summary judgment in favor of the victim).

194. *See, e.g.*, Antoinette Bonsignore, *Domestic Violence Survivors Battle Within the Courts: Confronting Retaliatory Litigation*, TRUTHOUT (June 22, 2012), http://www.truthout.org/news/item/9915-domestic-violence-survivors-battle-within-the-courts-confronting-retaliatory-litigation (listing common examples of how abusers use litigation and the legal process against victims).

economic consequences, such as attorney's fees, missing work, and childcare expenses.[195]

McDade draws on the distinctions between a person's home and other less private locations, but a person's home should be a refuge from abuse, not a haven for abuse. As a result of the court's decision in *McDade*, Justice Ehrlich's concurrence in *Inciarrano* is now a reality: The abuser's right to privacy takes priority over the victim's right to safety and allows him to violate it with impunity. As bad as that may be for any victim, it is significantly worse for domestic violence victims who find it difficult to leave an abusive relationship[196]—let alone their own home—only to encounter doubt or suspicion when they try to tell others what has been happening behind closed doors.[197] They are trapped in a legalistic straitjacket because society demands better proof from them than mere verbal allegations,[198] but the law denies them the ability to get that proof using the technology at their fingertips.

III. A STATUTORY AMENDMENT TO PROTECT ABUSE VICTIMS

The legislature responded to the Florida Supreme Court's decision in *McDade* by creating a criminal act exception for victims who are minors.[199] This age-based distinction not only shut out the elderly and other vulnerable adults,[200] it also had unforeseen consequences that have left minors unprotected in some situations. Other all-party consent states have exceptions that allow any victim to record evidence of a crime in a location where one of the parties might otherwise have an expectation of privacy.[201] This Part concludes by proposing a draft amendment to Chapter 934 that would allow domestic violence victims in Florida to make recordings of their abuse that can be used as evidence.

A. *Chapter 2015-82: No Adults Allowed*

Just four months after the Florida Supreme Court issued its decision in *McDade*, the legislature unanimously passed an amendment to section 934.03 that allows a minor to secretly record a conversation to which they

195. *Id.*; *see also* WALKER, *supra* note 25, at 8.

196. *See* GREEN, *supra* note 34, at 45–51; JONES, *supra* note 11, at 200–01, 204.

197. *See* discussion *supra* Subsection I.C.1.

198. *See* discussion *supra* Subsection I.C.2.

199. Act of May 22, 2015, ch. 82, sec. 1, § 934.03(2), 2015 Fla. Laws 542 (codified as amended at FLA. STAT. § 934.03(2)(k) (2016)).

200. *See* Mary Twomey et al., *From Behind Closed Doors: Shedding Light on Elder Abuse and Domestic Violence in Late Life*, J. CTR. FOR FAMILIES, CHILD. & CTS., 2005, at 73, 75–76 (noting that most seniors live at home rather than in an institution, and how elder abuse shares the same cycle of violence and dynamics of power and control found in domestic violence cases).

201. *See* statutes cited *infra* note 231.

are a party.[202] The minor must have a reasonable basis for believing the recording will capture evidence of only a few specific crimes, not criminal activity in general:

> It is lawful under this section and ss. 934.04–934.09 for a child under 18 years of age to intercept and record an oral communication if the child is a party to the communication and has reasonable grounds to believe that recording the communication will capture a statement by another party to the communication that the other party intends to commit, is committing, or has committed an unlawful sexual act or an unlawful act of physical force or violence against the child.[203]

The bill was signed into law in May and it took effect July 1, 2015.[204] But the amendment does not make an exception for adults, and the restrictions of *McDade*, along with the imprecise contours of *Inciarrano* and the intensely fact-specific inquiries that it and other cases require, still apply with full force to anyone age eighteen and older.[205] Even more troubling, by imposing an age-based restriction on the ability to record under these circumstances, the law has failed to protect abused children who turn eighteen before recording or whose parents make a recording about abuse suffered by their child.[206]

B. *The Legislature Did Not Go Far Enough*

Abuse victims of all ages need the ability to record the criminal misconduct of their abusers wherever it may occur—especially inside the home. The Florida Supreme Court has said, "The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society."[207] Well-being and tranquility, indeed. For victims of domestic violence, neither of those necessities is present in the home, and it is the abuser's privacy that has

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202. § 934.03(2), 2015 Fla. Laws at 543.

203. *Id.*

204. *Id.*

205. *See* discussion *supra* Part II; *see also* Brugmann v. State, 117 So. 3d 39, 46–51 (Fla. 3d DCA 2013) (Rothenberg, J., dissenting from denial of rehearing en banc) (discussing the variety of factors that courts consider when determining whether a private recording violates Chapter 934).

206. E-mail from Gregory Thompson, *supra* note 176 (noting that this scenario is very common in child sex abuse cases).

207. State v. Mozo, 655 So. 2d 1115, 1117 (Fla. 1995) (quoting Carey v. Brown, 447 U.S. 455, 471 (1980)) (holding that the police are not permitted to intercept a person's cordless telephone conversations taking place inside their home without a warrant).

become disproportionately important in the overall analysis.[208] A statutory amendment to Florida's all-party consent laws permitting adults to record evidence of criminal acts would help protect victims of domestic violence, hold abusers accountable for their actions, and close the loophole that currently exists in the new exception for minors.

1. Secret Abuse Needs Surreptitious Recording for Effective Prosecution

Because of its secretive nature,[209] by failing to protect adults from domestic abuse the law also fails to protect children from its effects. An estimated fifty-three to sixty percent of men who abuse their intimate partners also abuse their children.[210] Even if they are not victims themselves, children experience severe psychological and emotional harm from exposure to domestic violence in the household.[211] Among other ripple effects, boys learn to resort to force to resolve conflicts, and girls develop a sense of worthlessness, depression, and a distrust of intimate relationships.[212] It also causes the children's performance in school to deteriorate[213] and undermines the mother's authority when they see the father setting an example of disrespect.[214]

Men abuse women because they know they can get away with it.[215] Allowing a victim to record and expose her abuser's behavior would help empower her and break the cycle of oppression.[216] The abuser would no longer be able to lie so easily in court or to the outside world. This would limit his ability to paralyze his victim with the fear of losing custody of their children,[217] or to use them as pawns and revictimize his partner.[218] A dissenting judge in the Second District's opinion in *McDade* said that "a jury using its common sense would have reached the same result

208. *See* discussion *supra* Section II.B; *see also supra* notes 46–51 and accompanying text.

209. *See* discussion *supra* Section I.B.

210. Lois Schwaeber, *Recognizing Domestic Violence: How to Know It When You See It and How to Provide Appropriate Representation*, *in* DOMESTIC VIOLENCE, ABUSE, AND CHILD CUSTODY, *supra* note 66, ch. 2, at 2-17; WALKER, *supra* note 25, at 248.

211. Claire V. Crooks et al., *Factoring in the Effects of Children's Exposure to Domestic Violence in Determining Appropriate Postseparation Parenting Plans*, *in* DOMESTIC VIOLENCE, ABUSE, AND CHILD CUSTODY, *supra* note 66, ch. 22, at 22-2 to -4.

212. WALKER, *supra* note 25, at 419.

213. JAFFE ET AL., *supra* note 36, at 23.

214. *Id.* at 55.

215. JONES, *supra* note 11, at 46.

216. *Id.* at 181.

217. GREEN, *supra* note 34, at 76, 103.

218. JAFFE ET AL., *supra* note 36, at 17–18, 20; STARK, *supra* note 29, at 251; *see also* E-mail from Elyse Targ, *supra* note 174 (explaining that domestic violence cases are unique because the parties are not strangers and the abuser is better able to collect negative character evidence to impeach the victim's credibility).

without the inadmissible evidence."[219] Unfortunately, that is not true for most domestic violence cases, where the victim's credibility is easily undermined and solid corroboration is necessary for a conviction.[220]

Even when no children are involved, recording the abuse will help prevent the abuser from making false allegations against the victim later on about what happened.[221] After experiencing the cycle of violence repeatedly, victims become attuned to their abuser's behavior and can accurately anticipate when they are likely to be victimized again.[222] They need the ability to record not only crimes involving physical violence—such as assault, battery, rape, kidnapping, and false imprisonment—but also other non-violent acts, including extortion,[223] theft or vandalism,[224] and filing a false police report.[225] If they are able to record lesser crimes, they may be able to interrupt the cycle before more serious beatings.[226] In addition, many physical attacks do not leave visible marks, and a recording may be the only evidence of what actually happened.[227] Even if the abuse does escalate to a serious physical attack, a recording will at least help eliminate the abuser's attempt to fabricate alternative explanations or shift the blame onto the victim for causing the incident.[228]

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219. McDade v. State, 114 So. 3d 465, 477 (Fla. 2d DCA 2013) (Villanti, J., concurring in part and dissenting in part), *rev'd*, 154 So. 3d 292 (Fla. 2014).

220. *See* discussion *supra* Section I.C.; *see also* Anne Bowen Poulin, *Credibility: A Fair Subject for Expert Testimony?*, 59 FLA. L. REV. 991, 1048 (2007) (discussing how expert testimony in domestic violence cases is necessary to help jurors overcome their preconceived notions of how battered women should behave); *supra* notes 171–77 and accompanying text.

221. MCQUEEN, *supra* note 70, at 77.

222. WALKER, *supra* note 25, at 91–94; Theresa M. Zubretsky et al., *The False Connection Between Adult Domestic Violence and Alcohol*, *in* HELPING BATTERED WOMEN: NEW PERSPECTIVES AND REMEDIES 222, 225 (Albert R. Roberts ed., 1996); *see also* Weiand v. State, 732 So. 2d 1044, 1054 (Fla. 1999) (discussing how expert testimony on the battered woman syndrome is often necessary to explain why an abuse victim's perceptions were reasonable where an outsider might fail to recognize or fully appreciate the warning signs), *superseded by statute*, FLA. STAT. §§ 776.012–.013, *as recognized in* Little v. State, 111 So. 3d 214 (Fla. 2d DCA 2013).

223. JONES, *supra* note 11, at 88–89, 100.

224. GREEN, *supra* note 34, at 88–91 (describing how abusers will hide or destroy a victim's possessions to prevent them from going to school, work, and job interviews, thus sabotaging their efforts to gain independence); *see* Albert R. Roberts & Beverly Schenkman Roberts, *A Comprehensive Model for Crisis Intervention with Battered Women and Their Children*, *in* HANDBOOK OF DOMESTIC VIOLENCE INTERVENTION STRATEGIES 365, 365 (Albert R. Roberts ed., 2002) (describing how one abuser stole his victim's money and food stamps); *see also supra* note 115 and accompanying text.

225. *See supra* notes 70–72 and accompanying text.

226. *See* discussion *supra* Subsection I.C.2.

227. *See supra* notes 92–97 and accompanying text.

228. MELOY & MILLER, *supra* note 33, at 59–60 (observing that men will orchestrate verbal confrontations as an excuse to use physical violence and the attacks escalate over time).

2. Other All-Party Consent States with Exceptions

Currently, twelve states have statutes that require the consent of all parties to a conversation before it can be recorded.[229] Three of those states allow a participant to an in-person conversation to record it with only one party's consent, but still require everyone's consent to record a phone conversation or when a non-participant eavesdropper wants to record the conversations of those around them.[230] Four additional states have criminal act exceptions that allow a person to record a conversation or incident when they believe it will capture evidence of specifically enumerated crimes.[231]

Pennsylvania's criminal act exception, which took effect in 2012, was recently used by a victim of domestic violence to secretly record her husband's threats and attacks that occurred inside the couple's home.[232] In that recording, their two children (ages two and four) can be heard begging their father to stop hurting their mother as he beat her, physically restrained her, threatened her with a knife, and filled the tub with water so that he could drown her.[233] He can also be heard saying that he would make her death look like an accident.[234] His wife took that evidence to the police when she reported another attack where he choked her, threw her down, dragged her outside by her feet, and locked her out of the

229. *See* KRISTEN RASMUSSEN ET AL., REP. COMM. FOR FREEDOM OF PRESS, REPORTER'S RECORDING GUIDE: A STATE-BY-STATE GUIDE TO TAPING PHONE CALLS AND IN-PERSON CONVERSATIONS 3 (2012), http://www.rcfp.org/rcfp/orders/docs/RECORDING.pdf.

230. *See* CONN. GEN. STAT. § 53a-187(a)(1)–(2) (2015) (defining "mechanical overhearing of a conversation" as the overhearing or recording of a conversation "by a person not present thereat" and without the consent of at least one participant to the conversation, while defining "wiretapping" as the overhearing or recording of a "telephonic . . . communication"); CONN. GEN. STAT. § 52-570d(a) (2015) (requiring the consent of all parties to a private telephone conversation before it can be recorded); Sullivan v. Gray, 324 N.W.2d 58 (Mich. Ct. App. 1982) (holding that their state's all-party consent statute only applied to someone who was not a party to the conversation being recorded); Lane v. Allstate Ins., 969 P.2d 938, 940 (Nev. 1998) (comparing statutes that treat in-person and telephone conversations differently when requiring consent to record).

231. *See* CAL. PENAL CODE § 633.5 (West 2015) (allowing exceptions for felonies involving violence against the person, extortion, kidnapping, bribery, and harassment); 720 ILL. COMP. STAT. 5/14-3(i) (2015) (allowing an exception for any criminal offense); 18 PA. CONS. STAT. § 5704(17) (2015) (allowing exceptions for crimes of violence); WASH. REV. CODE § 9.73.030(2)(b) (2015) (allowing exceptions for extortion, blackmail, bodily harm or other unlawful demands, kidnapping and harassment).

232. Michael Goldberg, *Man Charged in Domestic Assault Secretly Recorded by His Wife Waives Hearing*, REPORTER (Nov. 13, 2013, 6:46 PM), http://www.thereporteronline.com/general-news/20131113/man-charged-in-domestic-assault-secretly-recorded-by-his-wife-waives-hearing.

233. *Id.*

234. *Id.*

house.[235] After being arrested, he waived his preliminary hearings in both cases and was denied permission to return to the home.[236] The recording was a key piece of evidence that convinced the judge he was truly dangerous and unpredictable, despite his wife's later acquiescence and letters of support from his employer and church.[237] The judge also imposed supervised visitation with his children.[238] The prosecutor said the new law allowing such secret recordings was incredibly useful in domestic violence cases because, "much like 911 calls, they give you that glimpse of the way things really were in the moment."[239] Although at trial his wife testified for the defense and downplayed the significance of what happened, after listening to her recording of the incident the judge found her testimony to be "incredible" and "untrustworthy, motivated in part by fear" and convicted the defendant of assault, unlawful restraint, terroristic threats, possessing an instrument of crime, endangering the welfare of a child, corruption of a minor, false imprisonment, recklessly endangering another person, and harassment.[240]

California's criminal act exception allowed a person to record an incriminating telephone conversation with the individual who had previously threatened him and his family with physical violence.[241] At trial, the defendant unsuccessfully denied both the prior threats and her participation in the recorded phone call and was convicted.[242] Most noteworthy, the appellate court held that the applicable statute did not prohibit using the recording as evidence in the prosecution of offenses that were not enumerated in the statute.[243]

Lastly, Washington's criminal act exception applied to some, but not all, of the statements a defendant made during threatening conversations he had with his ex-girlfriend.[244] After telling him she wanted to end their relationship, he threatened to blow up her house and car.[245] Nonetheless,

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235. *Id.*

236. *Id.* The judge also refused to dissolve the no-contact order between him and his wife. *Id.*

237. *Id.*

238. *Id.*; *see also* discussion *supra* Subsection III.B.1.

239. Goldberg, *supra* note 232.

240. Carl Hessler Jr., *Telford Man Headed to Jail for Domestic Violence*, MERCURY (Jan. 13, 2015, 4:01 PM), http://www.pottsmerc.com/article/MP/20150113/NEWS/150119827. The defendant was sentenced to thirty days to twenty-three months in jail, followed by five years of probation. *Id.*

241. People v. Parra, 212 Cal. Rptr. 53, 55–56 (Ct. App. 1985).

242. *Id.* at 54–55.

243. *Id.* at 56 (noting some have likened this situation to a police officer lawfully performing a search incident to arrest and finding evidence related to another crime).

244. State v. Barnes, No. 39479–1–II, 2010 WL 3766574, at *3 (Wash. Ct. App. Sept. 28, 2010).

245. *Id.* at *1.

she agreed to drive him to a meeting he needed to attend, but because she feared for her safety she purchased a digital recorder to secretly record any conversations she had with him.[246] When she arrived at his house, he raped her twice, but she still drove him to his scheduled meeting.[247] On the return trip, he threatened to kill her and her cat because he loved her and insisted that they have sex one more time before their relationship could end.[248] When they reached home, he raped her again.[249] He was eventually convicted on several counts of rape and false imprisonment, but the appellate court reversed his convictions and remanded the case for a new trial because the trial court erred by allowing the entire recording into evidence.[250] The appellate court held that only those statements that met the threat or hostage holder exceptions under the statute were admissible as evidence.[251] While the sounds of an event, such as rape, were also admissible, statements that simply added context were not.[252]

These statutes and cases illustrate how criminal act exceptions that allow surreptitious recordings can paint a much more accurate picture of an incident, especially when the victim's role or later testimony seems inconsistent with her initial allegations. But they also demonstrate how limiting the exceptions to only a few violent crimes may still exclude critical evidence that is particularly necessary in domestic violence cases.[253]

C. *A Draft Amendment for Chapter 934*

Abuse victims need the ability to record a variety of criminal misconduct and any exception to Florida's all-party consent law should not be limited to a few violent acts. Nor should the exception distinguish, as some states do,[254] between in-person and telephone conversations.[255] Instead, the following amendment should be added to section 934.03(2) of the Florida Statutes to remedy the myriad of legal and societal obstacles faced by victims of domestic violence and to close the loophole in the existing exception that applies only to minors[256]:

246. *Id.*
247. *Id.*
248. *Id.*
249. *Id.*
250. *Id.* at *3.
251. *Id.*
252. *Id.*
253. *See supra* notes 223–25 and accompanying text.
254. *See supra* note 226 and accompanying text.
255. *See supra* notes 172–73 and accompanying text.
256. *See supra* notes 203–06 and accompanying text.

> (l) It is lawful under this section and ss. 934.04–934.09 for a person to intercept and record an oral communication if the person is a party to the communication and has reasonable grounds to believe that recording the communication will capture a statement by another party to the communication that the other party intends to commit, is committing, or has committed a crime.

This would allow abuse victims of all ages to capture admissible evidence of the wide range of harm inflicted upon them.[257] It would also allow parents and any other adult to record evidence of child abuse.[258] Moreover, it would avoid the weeds associated with a reasonable expectation of privacy analysis and codify the exception for evidence of criminal acts recorded outside the home.[259] And by broadening the exception to include all crimes, it lets victims record freely without the dilemma of deciding whether an incident qualifies as an enumerated exception and suffering all the collateral consequences if it does not.[260]

These recordings would also avoid a major evidentiary hurdle in court. Some of the most common forms of evidence used in domestic violence cases are 911 calls, excited utterances by the victim, and child-witness testimony.[261] All of these are forms of hearsay, and if the victim herself or child witness does not testify—and responding police officers or child counselors are called instead—they are subject to a *Crawford* analysis to determine if the statements are admissible.[262] In contrast, a video and audio recording of the defendant's criminal misconduct is admissible as an admission by a party-opponent and would not be subject

257. Of course, the exception would also be beneficial to victims of any crime and not exclusively to victims of domestic violence. *See* Weiand v. State, 732 So. 2d 1044, 1057 (Fla. 1999) (noting that it is inappropriate to distinguish between victims of domestic violence and other victims in deciding whether to extend legal protections), *superseded by statute*, FLA. STAT. §§ 776.012–.013, *as recognized in* Little v. State, 111 So. 3d 214 (Fla. 2d DCA 2013).

258. This would likely subsume the recent amendment for minors. FLA. STAT. § 934.03(2)(k) (2016). If, however, it is felt that minors should still be restricted as to what types of crimes they are allowed to record, the proposed amendment's language could be changed from "person" to "person 18 years of age or older, or an emancipated minor."

259. *See supra* note 205 and accompanying text.

260. *See* discussion *supra* Subsections II.B.1–.3.

261. Tesh, *supra* note 60, at 1–4.

262. *Id.* at 1; *see* Crawford v. Washington, 541 U.S. 36, 68 (2004) (holding that a testimonial statement by a declarant is not admissible unless the declarant is unavailable or unable to testify, and the defendant has had a previous opportunity to cross-examine the declarant); State v. Contreras, 979 So. 2d 896 (Fla. 2008) (applying *Crawford* to a child rape victim's statements made to an abuse counselor and finding that although the child was unavailable due to the extreme emotional and psychological harm she would suffer if forced to testify, the second prong was not satisfied because the defendant did not have an adequate opportunity for cross-examination).

to a *Crawford* analysis.[263] The abuser cannot complain about being unable to cross-examine himself.[264] He will be hoisted with his own petard.

CONCLUSION

We have popularized the phrase, "It's not what you know, it's what you can prove."[265] That is particularly true in court, and it is painfully true with cases of domestic violence. This is no longer about protecting the privacy of a phone call.[266] It is about turning a blind eye—or even blinding a seeing eye—to acts of abuse that are occurring at alarming rates throughout the state and across the nation.[267] Society claims that domestic violence is no longer a private matter,[268] but the law is effectively keeping it hidden behind closed doors by refusing to let victims record their abuse and by then making it exceedingly difficult to prove their allegations without corroboration.[269]

Florida courts have been calling on the legislature to revisit Chapter 934 in light of these criminal act exception cases ever since *Walls* and

263. FLA. STAT. § 90.803(18) (2016); State v. Johnson, 128 So. 3d 237, 239 (Fla. 4th DCA 2013) (holding that a video recording of a drug deal did not implicate *Crawford* because it captured the defendant committing the crime itself rather than someone else's after-the-fact narrative); *see also* CHARLES W. EHRHARDT, 1 EHRHARDT'S FLORIDA EVIDENCE § 801.4, at 931 n.2 (2015) (explaining that while the Federal Rules of Evidence exclude admissions by a party-opponent from the definition of hearsay altogether, the Florida Code categorizes them as an exception to the hearsay rule because that is how Florida courts have been accustomed to dealing with them). Statements made by the victim or children who are present during an incident would also be admissible to place the defendant's conduct and statements in context. Bowens v. State, 80 So. 3d 1056, 1058 (Fla. 4th DCA 2012) (holding that the surreptitious recording of an incriminating conversation between the defendant and his friend was admissible and did not violate *Crawford* because the defendant's statements were a party admission and his friend's statements were nontestimonial as part of a spontaneous event).

264. *See* Swafford v. State, 533 So. 2d 270, 274 (Fla. 1988) ("In contrast to other hearsay exceptions, admissions are admissible in evidence not because the circumstances provide special indicators of the statement's reliability, but because the out-of-court statement of the party is inconsistent with his express or implied position in the litigation."); Metro. Dade Cty. v. Yearby, 580 So. 2d 186, 188 (Fla. 3d DCA 1991).

265. TRAINING DAY (Warner Bros. 2001); LAW ABIDING CITIZEN (Overture Films 2009).

266. *Cf.* Christy S. Etheredge, Case Comment, *The Castle Doctrine: Extension of the Rule to Co-Occupants*, 52 FLA. L. REV. 695, 701–02 (2000) (discussing how the castle doctrine had long favored the property rights of aggressors over the safety of their victims who were co-occupants and observing that "while victims of domestic abuse previously had to give up their rights to the shelter of their homes to avoid depriving their abusers of that right, the law now recognizes that it is unreasonable, and often more dangerous, to force domestic violence victims into this position").

267. *See supra* notes 16–23 and accompanying text.

268. WALKER, *supra* note 25, at 313–14.

269. *See* discussion *supra* Subsection I.C.1.

right up through *McDade*.[270] When the Second District Court of Appeal issued its decision in *McDade*, Judge Chris Altenbernd had serious concerns about judicial modification of the statute despite the aid it would provide to crime victims and remarked, "I am left to wonder whether the law would be stronger if we simply had required the legislature in 1985 to re-examine the merits of the 1974 amendment creating the 'all parties' requirement in the statute."[271] And taking note of how ubiquitous consumer technology has become these days, he said:

> The huge advances in technology that have affected our society's view of privacy should prompt the legislature to revisit the 1974 amendment and to decide whether it would now be more prudent to return to a statute comparable to the federal statute and the statute in place in most other states.[272]

Even in his dissent, Judge Craig Villanti noted that, "In the almost forty years since this statutory amendment, the legislature has declined to carve out an exception to the statute for victims of crimes . . . . In a perfect world, the legislature would have amended section 934.06 to address the holding of *Inciarrano*."[273] When the Florida legislature changed our eavesdropping laws from a one-party consent rule to an all-party consent rule, there was almost no debate whatsoever on the matter.[274] Now more than forty years later, and in light of the new understanding of the complexities surrounding domestic violence, it is time for an amendment that would allow abuse victims of all ages to record what goes on inside the dungeon of the abuser's castle.

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270. McDade v. State, 154 So. 3d 292, 299 (Fla. 2014) ("It may well be that a compelling case can be made for an exception from chapter 934's statutory exclusionary rule for recordings that provide evidence of criminal activity . . . . But the adoption of such an exception is a matter for the Legislature."); State v. Inciarrano, 473 So. 2d 1272, 1276 (Fla. 1985) (Overton, J., concurring) ("I suggest that the legislature, in its next legislative session, review the need for, and the possible amendment of, this statutory provision."); State v. Walls, 356 So. 2d 294, 296 (Fla. 1978); Guilder v. State, 899 So. 2d 412, 419 (Fla. 4th DCA 2005) ("Courts must apply a statute as they find it, leaving to the legislature the correction of assorted inconsistencies and inequalities in its operation." (quoting State v. Aiuppa, 298 So. 2d 391, 404 (Fla. 1974))).

271. McDade v. State, 114 So. 3d 465, 473 (Fla. 2d DCA 2013) (Altenbernd, J., concurring specially), *rev'd*, 154 So. 3d 292 (Fla. 2014).

272. *Id.* at 475.

273. *Id.* at 476–77 (Villanti, J., concurring in part and dissenting in part).

274. State v. Tsavaris, 394 So. 2d 418, 422 (Fla. 1981).