

**HB**

**414**

24-LS1565C  
Wayne  
4/10/06

**CS FOR HOUSE BILL NO. 414( )**

**IN THE LEGISLATURE OF THE STATE OF ALASKA  
TWENTY-FOURTH LEGISLATURE - SECOND SESSION**

*4-11-06  
Cognell  
Work draft  
adopted*

**BY**

**Offered:  
Referred:**

**Sponsor(s): REPRESENTATIVE KOTT**

*EB mailout  
CS HB 414  
CROSS REC*

**A BILL**

**FOR AN ACT ENTITLED**

1 **"An Act relating to allowing a parent or guardian of a minor to intercept the private**  
2 **communications of the minor and to consent to an order authorizing law enforcement to**  
3 **intercept the private communications of the minor."**

4 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

5 **\* Section 1.** AS 12.37.030 is amended by adding a new subsection to read:

6 (b) In addition to exercising authority under (a) of this section, on  
7 consideration of an application relating to a private communication of a minor, the  
8 court may enter an ex parte order authorizing the interception of the private  
9 communication. The court may enter the order only if the court determines, on the  
10 basis of the application, that there is probable cause, which may include a finding that  
11 a parent of a minor has consented in good faith to the interception of a communication  
12 of the minor based on the parent's objectively reasonable belief that it is necessary for  
13 the welfare of the minor and is in the best interest of the minor. In this subsection,  
14 "minor" and "parent" have the meanings given in AS 42.20.390.

*"be based upon"*

*adopted  
am #1  
Berkecortz  
Rokelberg*

1 \* Sec. 2. AS 42.20.320(a) is amended to read:

2 (a) The following activities are exempt from the provisions of AS 42.20.300  
3 and 42.20.310:

4 (1) listening to a radio or wireless communications of any sort where  
5 the same are publicly made;

6 (2) hearing conversation when heard by employees of a common  
7 carrier by wire incidental to the normal course of their employment in the operation,  
8 maintenance, or repair of the equipment of the common carrier by wire, provided the  
9 information obtained is not used or divulged in any manner by the hearer;

10 (3) a broadcast by radio or other means whether it is a live broadcast or  
11 recorded for the purpose of later broadcasts of any function where the public is in  
12 attendance and the conversations that are overheard are incidental to the main purpose  
13 for which the broadcast is then being made;

14 (4) recording or listening with the aid of any device to an emergency  
15 communication made in the normal course of operations by a federal, state, or local  
16 law enforcement agency or institutions dealing in emergency services, including  
17 hospitals, clinics, ambulance services, fire fighting agencies, a public utility  
18 emergency repair facility, civilian defense establishment, or military installations;

19 (5) inadvertent interception of telephone conversations over party  
20 lines;

21 (6) a peace officer, or a person acting at the direction or request of a  
22 peace officer, engaging in conduct authorized by or under AS 12.37;

23 (7) interception, listening, or recording of communications by a peace  
24 officer, or a person acting under the direction or request of a peace officer, in an  
25 emergency where the communications are received from a device that intercepts the  
26 communications of a person

27 (A) barricaded and not exiting or surrendering at the direction  
28 or request of a peace officer, in circumstances where there is an imminent risk  
29 of harm to life or property;

30 (B) holding another person hostage; or

31 (C) threatening the imminent illegal use of an explosive;

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(8) the interception by a peace officer of an oral communication by use of an electronic, mechanical, or other eavesdropping device that is concealed on or carried on the person of the peace officer and that transmits that oral communication by means of radio to a receiving unit that is monitored by other peace officers, if

(A) the interception and monitoring occurs

(i) during the investigation of a crime or the arrest of a person for a crime; and

(ii) for the purpose of ensuring the safety of the peace officer conducting the investigation or making the arrest;

(B) the peace officer who intercepts the oral communication is a party to the communication and has consented to the interception; and

(C) the communication intercepted is not recorded;

*Does not require consent*

(9) the interception of a private communication to which a minor is a party by a parent of the minor if the parent is acting in good faith and has an objectively reasonable belief that the interception is necessary for the welfare of the minor and is in the best interest of the minor; this paragraph does not exempt from the provisions of AS 42.20.300 and 42.20.310 the interception of a private communication between a minor and the minor's attorney, the minor's guardian ad litem, or a child custody investigator; evidence obtained under this paragraph may be

(A) considered by a guardian ad litem or a child custody investigator only if the guardian ad litem or child custody investigator determines that the requirements of this paragraph have been satisfied;

(B) admitted in a judicial proceeding, subject to the Alaska Rules of Evidence, only if the judicial officer finds that the requirements of this paragraph have been satisfied; or

(C) admitted in an official proceeding that is not a judicial proceeding only if the presiding official finds that the requirements of this paragraph have been satisfied.

\* Sec. 3. AS 42.20.390 is amended by adding new paragraphs to read:

(11) "minor" means a child under 18 years of age who has not had the

1 disabilities of a minor removed as described in AS 09.55.590;

2 (12) "official proceeding" means a proceeding heard before a  
3 legislative, judicial, administrative, or other governmental body or official authorized  
4 to hear evidence under oath;

5 (13) "parent" means a natural person who is the minor's natural or  
6 adoptive parent, or who has been legally appointed as the minor's guardian, with  
7 parental rights that are not terminated by court order and who is not prohibited by  
8 court order from communicating with the minor.

# ALASKA STATE LEGISLATURE

**Chair:**  
Legislative Council

**Member:**  
Community and Regional Affairs  
Judiciary  
Labor and Commerce – Vice Chair



**Session:**  
Alaska State Capitol  
Juneau, AK 99801-1182  
Phone: (907) 465-3777  
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**Interim:**  
10928 Eagle River Road – Suite 234  
Eagle River, AK 99501-2133  
Phone: (907) 694-8944  
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**REPRESENTATIVE PETE KOTT**  
DISTRICT 17 – EAGLE RIVER

## Memorandum

To: Representative Norman Rokeberg Chairman  
House Rules Committee

From: Representative Pete Kott

Date: April 3, 2006

Re: HB 414 "An Act relating to allowing a parent or guardian of a minor to intercept the private communications of the minor and to consent to an order authorizing law enforcement to intercept the private communications of the minor."

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Chairman Rokeberg,

House Bill 414 was passed out of the House Judiciary Committee. I respectfully request that HB 414 be scheduled for a hearing in the House Rules Committee at your earliest possible convenience.

Thank you for your consideration.



# ALASKA STATE LEGISLATURE

*Chair:*  
Legislative Council

*Member:*  
Community and Regional Affairs  
Judiciary  
Labor and Commerce – Vice Chair



*Session:*  
Alaska State Capitol  
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Phone: (907) 694-8944  
Fax: (907) 694-8545

## REPRESENTATIVE PETE KOTT DISTRICT 17 – EAGLE RIVER

### Sponsor Statement For House Bill 414

The Committee Substitute for House Bill 414 will protect minors from predators and other insalubrious characters. HB 414 amends AS 12.37.030 to allow a parent or guardian of a minor to consent to the interception of communications of the minor under certain, specific circumstances. Specifically, where the parent of the minor has a good faith and objectively reasonable belief that it is necessary for the welfare, and in the best interest of the minor to do so, he or she may consent on behalf of the child to the interception of a communication by the minor. The parent's properly given consent may be utilized by a judge to grant an ex parte order permitting the proper authorities to monitor and intercept the minor's communications.

HB 414 also amends AS 42.20.320 to permit the parent of the minor in question to himself or herself intercept the communication without fear of criminal prosecution. Under current law, no person who is not party to the communication may intercept any portion of a communication between others. To do so constitutes a criminal offense in Alaska. Section 3 of HB 414 creates an exception that allows the parent of a minor child to intercept a minor child's communications.

With passage of this legislation, we allow parents and guardians to protect their children, and we provide them the tools to do so.

# FISCAL NOTE

**STATE OF ALASKA**  
**2006 LEGISLATIVE SESSION**

Fiscal Note Number: 1  
 Bill Version: CSHB 414(HES)  
 (H) Publish Date: 2/17/06

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: \_\_\_\_\_  
 Title Interception of Minor's Communication RDU Alaska Court System  
 Component Trial Courts  
 Sponsor Representative Kott  
 Requester \_\_\_\_\_ Component No. \_\_\_\_\_

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
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**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY2006) cost: 0.0  
 Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

**ANALYSIS:** (Attach a separate page if necessary)

The court system does not anticipate any fiscal impact from the passage of HB 414.

Prepared by: Doug Wooliver, Administrative Attorney Phone 463-4750  
 Division: Alaska Court System Date/Time 2-10-06 @ 8:45 am  
 Approved by: Doug Wooliver for Stephanie Cole, Administrative Director Date 2/10/2006  
 Agency: Alaska Court System



# FISCAL NOTE

**STATE OF ALASKA**  
**2006 LEGISLATIVE SESSION**

Fiscal Note Number: 2  
Bill Version: CSHB 414(JUD)  
(H) Publish Date: 3/28/08

Revision Date/Time (Note if correction): 3/10/06 / 11:29 a.m. Dept. Affected: Administration  
Title: An act relating to allowing a parent or guardian of a minor to intercept the private communication.. RDU: Legal and Advocacy Services  
Component: Office of Public Advocacy  
Sponsor: Representative Kott  
Requester: (H) JUD Component No. 43

**Expenditures/Revenues**

(Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0
Travel						
Contractual	0.0	0.0	0.0	0.0	0.0	0.0
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
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**FUND SOURCE**

(Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY2006) cost: 0.0

Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

**ANALYSIS:** (Attach a separate page if necessary)

This legislation allows a court to issue an ex parte order authorizing the interception of a private communication of a minor if a parent or guardian has consented to the interception in good faith based on an objectively reasonable belief that it is necessary for the welfare of the child or in the child's best interest. This legislation further exempts the interception of such communications from the Communication, Eavesdropping, and Wiretapping Act (AS 42.20.300-310). However, minors' communications with an attorney or guardian ad litem would not be exempted from this act.

It is not expected that this would have a fiscal impact on OPA.

Prepared by: Joshua P. Fink, Director Phone (907) 269-3500  
Division: Office of Public Advocacy Date/Time 3/10/06 at 11:29 a.m.  
Approved by: Mike Tibbles, Deputy Commissioner Date 3/13/2006  
Agency: Administration

# FISCAL NOTE

**STATE OF ALASKA**  
**2006 LEGISLATIVE SESSION**

Fiscal Note Number: 3  
 Bill Version: CSHB 414(JUD)  
 (H) Publish Date: 3/28/06

Revision Date/Time (Note if correction): 3/11/06 / 9:35 a.m. Dept. Affected: Administration  
 Title: An act relating to allowing a parent or guardian RDU: Legal and Advocacy Services  
of a minor to intercept the private communication.. Component: Public Defender Agency  
 Sponsor: Representative Kott  
 Requester: (H) JUD Component No.: 43

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0
Travel						
Contractual	0.0	0.0	0.0	0.0	0.0	0.0
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
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**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY2006) cost: 0.0  
 Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

**ANALYSIS:** (Attach a separate page if necessary)

This legislation allows a court to issue an ex parte order authorizing the interception of a private communication of a minor if a parent or guardian has consented to the interception in good faith based on an objectively reasonable belief that it is necessary for the welfare of the child or in the child's best interest. This legislation further exempts the interception of such communications from the Communication, Eavesdropping, and Wiretapping Act (AS 42.20.300-310). However, minors' communications with an attorney or guardian ad litem would not be exempted from this act.

It is not expected that this would have a fiscal impact on the Agency.

Prepared by: Quinlan Steiner, Director Phone (907) 269-3500  
 Division: Public Defender Agency Date/Time 3/11/06 / 9:35 a.m.  
 Approved by: Mike Tibbies, Deputy Commissioner Date 3/13/2006  
 Agency: Administration

# FISCAL NOTE

**STATE OF ALASKA**  
**2006 LEGISLATIVE SESSION**

Fiscal Note Number: 4  
 Bill Version: CSHB 414(JUD)  
 (H) Publish Date: 3/28/06

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: \_\_\_\_\_  
 Title: Interception of Minor's Communications RDU: Alaska Court System  
 Component: Trial Courts  
 Sponsor: Representative Kott  
 Requester: \_\_\_\_\_ Component No.: \_\_\_\_\_

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
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**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY2006) cost: 0.0

Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

**ANALYSIS:** (Attach a separate page if necessary)

The court system does not anticipate and fiscal impact from the passage of CSHB 414(HES).

Prepared by: Doug Wooliver, Administrative Attorney  
 Division: Alaska Court System  
 Approved by: Doug Wooliver for Stephanie Cole, Administrative Director  
 Agency: Alaska Court System

Phone 463-4750  
 Date/Time 3/13/06 @ 11:30 am  
 Date 3/13/2006

# FISCAL NOTE

**STATE OF ALASKA**  
**2006 LEGISLATIVE SESSION**

Fiscal Note Number: 5  
 Bill Version: CSHB 414(JUD))  
 (H) Publish Date: 3/28/06

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: Public Safety  
 Title: "An Act relating to allowing a parent or guardian of a minor to intercept the private communications..." RDU: Alaska State Troopers  
 Sponsor: Representative Kott Componen: AST Detachments  
 Requester: House Judiciary Committee Component No.: 2325

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
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**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY2006) cost: 0.0  
 Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

**ANALYSIS:** (Attach a separate page if necessary)  
 The proposed language in this legislation will not have a fiscal impact on the Department of Public Safety.

Prepared by: Lieutenant James Helgoe Phone 907-269-4532  
 Division: Alaska State Troopers Date/Time 3/13/06 10:13 AM  
 Approved by: Commissioner William Tandeske Date 3/13/2006  
 Agency: Department of Public Safety

# Legislative Research Services

Alaska State Legislature  
Legislative Affairs Agency  
Division of Legal and Research Services

State Capitol, Juneau, AK 99801  
Phone: 907-465-3991  
Fax: 907-465-3908

March 21, 2006

## Memorandum

TO: Representative Pete Kott

FROM: Chuck Burnham, Legislative Analyst

RE: Vicarious Consent in Georgia: Use and Misuse in Divorce Proceedings  
LRS Report 06.190

You asked about the potential misuse of the doctrine of "vicarious consent," which is the surreptitious interception of a child's communications without his or her consent by a parent or a third party with the parent's consent. Specifically, you asked if the Georgia courts had seen a dramatic increase in the use of recordings of the conversations of children by parents involved in divorce proceedings since the passage of the "parental exception" clause to the state's wiretapping laws.<sup>1</sup>

We found no evidence that the Georgia court system has been inundated with vicarious consent recordings in divorce proceedings since the state's wiretapping laws were amended in the year 2000 to allow parents to record their child's conversations in certain circumstances.<sup>2</sup>

As you know, generally, in the absence of a court order, intercepting written or oral communications without the permission of at least one party to that communication is against the law. The federal government and 49 states (all but Vermont) have laws regarding wiretapping and the interception of communications.<sup>3</sup> Georgia is, however, the only state we found that has successfully included vicarious consent in statute as a legitimate exception to the prohibitions on interception of communications established under those laws.<sup>4</sup> Although laws allowing vicarious consent are not common, a number of courts have, nonetheless, interpreted state and federal statutes to allow parents, or a third party with parental permission, to intercept a child's communications if the parent takes such action with an objectively good faith belief that doing so is necessary and in the best interests of the child.<sup>5</sup>

It could be argued that jurisdictions without vicarious consent statutes are at greater risk of having parents misuse vicarious consent in divorce proceedings than those in Georgia. In jurisdictions where the courts have recognized vicarious consent as a legitimate exception to wiretapping prohibitions, the acceptable parameters

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<sup>1</sup> This is a follow-up to LRS Report 06-130

<sup>2</sup> We searched the Lexis database of Georgia court cases and the Newsbank database of Georgia newspapers using the terms "vicarious consent," "wiretapping," and "parent AND record OR recording."

<sup>3</sup> The federal wiretap statute was enacted in 1968 as part of the Omnibus Crime Control and Safe Streets Act. Courts have held that wiretap laws must include, at a minimum, the prohibitions on intercepting communications that are included in federal law.

<sup>4</sup> We include, as Attachment A, Georgia Code § 16-11-66(d)

<sup>5</sup> *Thompson v. Delaney* 838 F. Supp. 1535 (D. Utah 1993)

of the practice are wholly judicial constructions that are being developed on a case-by-case basis in the absence of guidance from the legislatures in those jurisdictions. By contrast, Georgia statute 16-11-66(d) specifically states that communications intercepted by parents can be used in court proceedings if the communication "contains evidence of criminal conduct involving [their] child as a victim or an attempt, conspiracy, or solicitation to involve such child in criminal activity." This language appears to exclude the use of recordings made by parents in divorce proceedings unless the communication in question involves some degree of criminality. Thus, the benefit of codifying vicarious consent into statute may be that the intent of the legislature can be made clear rather than relying solely on the judgment of the courts.

I hope you find this information to be useful. Please do not hesitate to contact us if you have questions or need additional information.



# LEGISLATIVE RESEARCH REPORT

FEBRUARY 6, 2006



REPORT NUMBER 06.130

## VICARIOUS CONSENT: PARENTAL CONSENT FOR INTERCEPTION OF CHILD COMMUNICATIONS

PREPARED FOR REPRESENTATIVE PETE KOTT

BY CHUCK BURNHAM, LEGISLATIVE ANALYST

You asked about parental consent for the interception of child communications. Specifically, you wanted to know which states have codified such exceptions into their wiretapping laws. In addition, you asked about court decisions that upheld this practice, which, in legal terminology, is known as "vicarious consent."

Generally, in the absence of a court order, intercepting written or oral communications without the permission of at least one party to that communication is against the law. The federal government and 49 states (all but Vermont) have laws regarding wiretapping and the interception of communications.<sup>1</sup> Georgia is, however, the only state we found that has successfully included vicarious consent in statute as a legitimate exception to the prohibitions on interception of communications established under those laws.<sup>2</sup>

Federal law and many states' laws allow what is known as a "one-party" exception under which a participant in a communication may record that interaction without the knowledge or permission of other parties.<sup>3</sup> In recent years, in circumstances where the court determines such action is in the best interest of the child, a number of courts have extended the one-party exception to include the interception by parents of communications involving their children in circumstances where the parents believe their authority as custodial parent, or the safety of a child, is being threatened.

<sup>1</sup> The federal wiretap statute was enacted in 1968 as part of the Omnibus Crime Control and Safe Streets Act. Courts have held that states' wiretap laws must include, at a minimum, the prohibitions on intercepting communications that are included in federal law.

<sup>2</sup> We include, as Attachment A, Georgia Code § 16-11-66(d).

<sup>3</sup> The person recording must, however, be generally known by the other parties to be involved in the communication in question. In other words, the recording party must not be eavesdropping in the literal sense.

In 1993, the U.S. District Court for the District of Utah became the first to judicially address the issue of vicarious consent. In the case, Denise Delaney recorded conversations between her children and the children's father, who Ms. Delaney was divorcing. The father brought suit under federal wiretapping laws whereupon Ms. Delaney admitted she made the recordings, but claimed her actions were necessary because her former husband was interfering with her ability to raise the children to whom she was awarded custody. The court determined that as long as the guardian of the child acts on an "objectively reasonable" good faith basis, that guardian has a right to consent on behalf of her minor children to the recording of phone conversations in order to fulfill the guardian's statutory mandate to act in the best interests of the child.<sup>4</sup>

In recent years, a small number of court cases have expanded this practice to include its use in criminal proceedings. Most commonly, these have been cases in which parents record a child's telephone conversations with a non-family adult who, the parents believe, may be putting the child in harm's way by either sexually abusing or otherwise involving the child in criminal activity. Overall, however, the number of cases involving vicarious consent—particularly the number of such criminal cases—is relatively small.

In the Summer 2005 edition of the *Seattle University Law Review*, Daniel R. Dinger, a prosecuting attorney from Ada County, Idaho, published "Should Parents Be Allowed to Record a Child's Telephone Conversations When They Believe the Child Is in Danger?: An Examination of the Federal Wiretap Statute and the Doctrine of Vicarious Consent in the Context of a Criminal Prosecution." This article, which we include as Attachment B, provides a statutory and judicial history of the vicarious consent doctrine. Further, Mr. Dinger offers common criticisms of the doctrine and argues strongly for the adoption of vicarious consent exceptions to wiretapping prohibitions in both state statutes and the courts.

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I hope you find this information to be useful. Please do not hesitate to contact us if you have questions or need additional information.

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<sup>4</sup> *Thompson v. Delaney* 838 F. Supp. 1535 (D. Utah 1993). This and all information regarding court cases in this report are from Daniel R. Dinger, "Should Parents Be Allowed to Record a Child's Telephone Conversations When They Believe the Child is in Danger? An Examination of the Federal Wiretap Statute and the Doctrine of Vicarious Consent in the Context of a Criminal Prosecution," *Seattle University Law Review*, 28-955, Summer 2005.

**Attachment A**

Georgia Code § 16-11-66(d).

1 of 1 DOCUMENT

OFFICIAL CODE OF GEORGIA ANNOTATED  
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\*\*\* Current Through the 2005 Regular Session \*\*\*  
\*\*\* Annotation: Current Through October 11, 2005. \*\*\*

TITLE 16. CRIMES AND OFFENSES  
CHAPTER 11. OFFENSES AGAINST PUBLIC ORDER AND SAFETY  
ARTICLE 3. INVASIONS OF PRIVACY  
PART 1. WIRETAPPING, EAVESDROPPING, SURVEILLANCE, AND RELATED OFFENSES

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

*O.C.G.A. § 16-11-66 (2005)*

§ 16-11-66. Interception of wire, oral, or electronic communication by party thereto; consent requirements for recording and divulging conversations to which child under 18 years is a party; parental exception

(a) Nothing in *Code Section 16-11-62* shall prohibit a person from intercepting a wire, oral, or electronic communication where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(b) After obtaining the consent required by this subsection, the telephonic conversations or electronic communications to which a child under the age of 18 years is a party may be recorded and divulged, and such recording and dissemination may be done by a private citizen, law enforcement agency, or prosecutor's office. Nothing in this subsection shall be construed to require that the recording device be activated by the child. Consent for the recording or divulging of the conversations of a child under the age of 18 years conducted by telephone or electronic communication shall be given only by order of a judge of a superior court upon written application, as provided in subsection (c) of this Code section, or by a parent or guardian of said child as provided in subsection (d) of this Code section. Said recording shall not be used in any prosecution of the child in any delinquency or criminal proceeding. An application to a judge of the superior court made pursuant to this Code section need not comply with the procedures set out in *Code Section 16-11-64*.

(c) A judge to whom a written application has been made shall issue the order provided by subsection (b) of this Code section only:

- (1) Upon finding probable cause that a crime has been committed,
- (2) Upon finding that the child understands that the conversation is to be recorded and that such child agrees to participate, and
- (3) Upon determining that participation is not harmful to such child.

A true and correct copy of the recording provided for in subsection (b) of this Code section shall be returned to the superior court judge who issued the order and such copy of the recording shall be kept under seal until further order of the court.

(d) The provisions of this article shall not be construed to prohibit a parent or guardian of a child under 18 years of age, with or without the consent of such minor child, from monitoring or intercepting telephonic conversations of such minor child with another person by use of an extension phone located within the family home, or electronic or other communications of such minor child from within the family home, for the purpose of ensuring the welfare of such minor child. If the parent or guardian has a reasonable or good faith belief that such conversation or communication is evidence of criminal conduct involving such child as a victim or an attempt, conspiracy, or solicitation to involve such child in criminal activity affecting the welfare or best interest of such child, the parent or guardian may disclose the content of such telephonic conversation or electronic communication to the district attorney or a law enforcement officer. A recording or other record of any such conversation or communication made by a parent or guardian in accordance with

this subsection that contains evidence of criminal conduct involving such child as a victim or an attempt, conspiracy, or solicitation to involve such child in criminal activity shall be admissible in a judicial proceeding except as otherwise provided in subsection (b) of this Code section.

**HISTORY:** Ga. L. 1967, p. 844, § 1; Code 1933, § 26-3006, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1993, p. 565, § 1; Ga. L. 1994, p. 97, § 16; Ga. L. 2000, p. 491, § 4.

**NOTES:**

**LAW REVIEWS** —For note on 1993 amendment of this section, see *10 Ga. St. U.L. Rev.* 109 (1993)

For comment on: *Mitchell v. State*, 239 Ga. 3, 235 S.E.2d 509 (1977); see 29 *Mercer L. Rev.* 351 (1977)

**JUDICIAL DECISIONS**

**ANALYSIS**

General Consideration

Conversations in Furtherance of Crime

**GENERAL CONSIDERATION**

**WHEN THIRD PARTY MAY INTERCEPT, RECORD, AND DIVULGE A CONVERSATION.** — *O.C.G.A. 16-11-66* allows a third party to intercept, record, and divulge conversation, (1) where parties to conversation consent, or (2) where message is a crime or is directly in furtherance of a crime and one party to conversation consents. *Mitchell v. State*, 239 Ga. 3, 235 S.E.2d 509, on remand, 142 Ga. App. 802, 237 S.E.2d 243 (1977), for comment, see 29 *Mercer L. Rev.* 351 (1977).

**DISCLOSURE UNDER FORMER PARAGRAPH (B)(7) OF O.C.G.A. § 16-11-64** was not required where consent of one party is received under *O.C.G.A. § 16-11-66*. *Luck v. State*, 163 Ga. App. 657, 295 S.E.2d 584 (1982)

**CHILDREN'S TELEPHONE CALLS.** — *O.C.G.A. § 16-11-66* does not allow parents to vicariously consent to interceptions of their children's telephone calls. *Bishop v. State*, 241 Ga. App. 517, 526 S.E.2d 917 (1999).

A child can not give consent to the recording of the child's phone calls either by implication or by subsequent ratification. *Bishop v. State*, 241 Ga. App. 517, 526 S.E.2d 917 (1999).

**FINDING OF CONSENT NOT ERRONEOUS WHERE THERE IS CONFLICTING EVIDENCE.** —The denial of defendants' motion to suppress the admission of the two tape recordings of their conversations with an informant made on the ground that the informant did not consent to the conversations being recorded is not clearly erroneous where the evidence on this issue was in conflict, with several law officers testifying that the informant was fully aware of what the informant was doing and was not coerced into consenting to the conversations and the recording thereof and the informant's testimony, while somewhat equivocal, indicated the contrary. *Ramsey v. State*, 165 Ga. App. 854, 303 S.E.2d 32 (1983).

**FORMER CODE 1933, § 26-3006 (SEE O.C.G.A. § 16-11-66) DEALT SOLELY WITH INTERCEPTION AND ACTS FOLLOWING INTERCEPTION.** *Mitchell v. State*, 239 Ga. 3, 235 S.E.2d 509, on remand, 142 Ga. App. 802, 237 S.E.2d 243 (1977), for comment, see 29 *Mercer L. Rev.* 351 (1977).

**FORMER CODE 1933, § 26-3006 (SEE O.C.G.A. § 16-11-66) DID NOT PROHIBIT ACTUAL PARTIES TO CONVERSATION FROM RECORDING OR DIVULGING IT.** *Mitchell v. State*, 239 Ga. 3, 235 S.E.2d 509, on remand, 142 Ga. App. 802, 237 S.E.2d 243 (1977), for comment, see 29 *Mercer L. Rev.* 351 (1977); *Fetty v. State*, 268 Ga. 365, 489 S.E.2d 813 (1997).

**INVOLVEMENT IN DIVORCE ACTION IS NOT EQUIVALENT OF IMPLIED CONSENT** to have one's telephone line tapped. *Kendrick v. State*, 123 Ga. App. 785, 182 S.E.2d 525 (1971).

**CITED in** *Farmer v. State*, 228 Ga. 225, 184 S.E.2d 647 (1971); *Ansley v. State*, 124 Ga. App. 670, 185 S.E.2d 562 (1971).



*Cauley v. State*, 130 Ga. App. 278, 203 S.E.2d 239 (1973); *Adams v. State*, 130 Ga. App. 362, 203 S.E.2d 314 (1973); *Cross v. State*, 233 Ga. 960, 214 S.E.2d 374 (1975); *Cross v. State*, 136 Ga. App. 400, 221 S.E.2d 615 (1975); *United States v. Ransom*, 515 F.2d 885 (5th Cir. 1975); *Connally v. State*, 237 Ga. 203, 227 S.E.2d 352 (1976); *Williams v. State*, 142 Ga. App. 764, 236 S.E.2d 893 (1977); *Mitchell v. State*, 142 Ga. App. 802, 237 S.E.2d 243 (1977); *State v. Birge*, 240 Ga. 501, 241 S.E.2d 213 (1978); *O'Dillon v. State*, 245 Ga. 342, 265 S.E.2d 18 (1980); *Drake v. State*, 245 Ga. 798, 267 S.E.2d 237 (1980); *Ford v. State*, 160 Ga. App. 707, 288 S.E.2d 39 (1981); *Green v. State*, 250 Ga. 610, 299 S.E.2d 544 (1983); *Stephenson v. State*, 171 Ga. App. 938, 321 S.E.2d 433 (1984); *Peugh v. State*, 175 Ga. App. 90, 332 S.E.2d 384 (1985); *Norris v. State*, 176 Ga. App. 164, 335 S.E.2d 611 (1985); *Hall v. State*, 176 Ga. App. 428, 336 S.E.2d 291 (1985); *Duren v. State*, 177 Ga. App. 421, 339 S.E.2d 394 (1986); *Martin v. State*, 179 Ga. App. 551, 347 S.E.2d 247 (1986); *Reeves v. State*, 192 Ga. App. 12, 383 S.E.2d 613 (1989); *Lawrence v. State*, 195 Ga. App. 320, 393 S.E.2d 475 (1990); *Kemp v. State*, 201 Ga. App. 629, 411 S.E.2d 880 (1991).

#### CONVERSATIONS IN FURTHERANCE OF CRIME

**ONE-PARTY CONSENT REQUIREMENT RENDERS EXCEPTION CONSTITUTIONAL.**—Requirement of consent of one party ensures that overhearing by third parties is by divulgence of one party to conversation, which is constitutionally permissible, and not by surreptitious interception unbeknownst to any party to conversation, which is constitutionally impermissible. *Goodwin v. State*, 154 Ga. App. 46, 267 S.E.2d 488 (1980).

**APPLICABILITY TO FACE-TO-FACE ORAL COMMUNICATION**—One-party consent provision of former Code 1933, § 26-3006 (see O.C.G.A. § 16-11-66) was applicable to face-to-face oral communication. *Orkin v. State*, 236 Ga. 176, 223 S.E.2d 61 (1976); *Brooks v. State*, 141 Ga. App. 725, 234 S.E.2d 541 (1977).

Face-to-face communications are included in the consent exceptions to the electronic surveillance prohibitions of former Code 1933, § 26-3006 (see O.C.G.A. § 16-11-66). *Thornton v. State*, 139 Ga. App. 483, 228 S.E.2d 919 (1976).

Face-to-face conversations were intended by legislature to be included in consent exceptions contained in former Code 1933, § 26-3006 (see O.C.G.A. § 16-11-66). *Humphrey v. State*, 231 Ga. 855, 204 S.E.2d 603, cert. denied, 419 U.S. 839, 95 S. Ct. 62, 42 L. Ed. 2d 66 (1974).

**SCOPE OF SECTION**—The legislature intended former Code 1933, § 26-3006 (see O.C.G.A. § 16-11-66) to govern specifically conversations or communications arranged or anticipated by one of the parties for purpose of interception, recording, and divulging. *Goodwin v. State*, 154 Ga. App. 46, 267 S.E.2d 488 (1980).

**ONE-PARTY CONSENT MAY BE GIVEN TO LAW ENFORCEMENT OFFICERS.**—Former Code 1933, § 26-3006 (see O.C.G.A. § 16-11-66) allowed law enforcement officers to intercept, record, and divulge a conversation, where at least one party thereto consents, and where conversation is a crime or is in furtherance of a crime. *Goodwin v. State*, 154 Ga. App. 46, 267 S.E.2d 488 (1980).

**SECTION APPLICABLE WHERE CONSENTING PARTY IS A POLICE OFFICER.**—Former Code 1933, § 26-3006 (see O.C.G.A. § 16-11-66) was intended to cover situations in which conversation was between two private parties, one of whom consented to interception by some third party, most likely a law enforcement agency. This does not mean that if one party to conversation was a police officer who had consented that the section cannot apply. *Cross v. State*, 128 Ga. App. 837, 198 S.E.2d 338 (1973).

**MERE FACT THAT ONE PARTY TO CONVERSATION RECORDS IT DOES NOT VITIATE ITS EVIDENTIARY VALUE.**—Anyone who makes a statement to another knows that person to whom it was made may repeat it to others who may use it against the person; mere fact that person to whom statement was directed made a recording without knowledge of person recorded does not vitiate its evidentiary value. *Quaid v. State*, 132 Ga. App. 478, 208 S.E.2d 336 (1974).

**DIVULGING CONVERSATION BY MEANS OF RADIO TRANSMITTING EQUIPMENT.**—State agent may divulge contents of conversations with accused by carrying radio equipment which simultaneously transmits conversations to other agents monitoring transmission frequency, and police officers who are simultaneously listening to conversation through electronic amplification of conversation may testify as to what they have heard. *Goodwin v. State*, 154 Ga. App. 46, 267 S.E.2d 488 (1980).



TAPED TESTIMONY OF INCESTUOUS-RAPE VICTIM'S INITIATED CONVERSATION with assailant found admissible. See *Legg v. State*, 207 Ga. App. 399, 428 S.E.2d 87 (1993), *Cofield v. State*, 216 Ga. App. 623, 455 S.E.2d 342 (1995).

#### RESEARCH REFERENCES

ALR.—Opening, search, and seizure of mail, 61 ALR2d 1282.

What constitutes an "interception" of a telephone or similar communication forbidden by the Federal Communications Act (47 U.S.C. § 605) or similar state statutes, 9 ALR3d 423.

Permissible surveillance, under state communications interception statute, by person other than state or local law enforcement officer or one acting in concert with officer, 24 ALR4th 1208.

Title Note

Chapter Note

Article Note

Part Note

## Attachment B

Daniel R. Dinger, "Should Parents Be Allowed to Record a Child's Telephone Conversations When They Believe the Child Is in Danger?: An Examination of the Federal Wiretap Statute and the Doctrine of Vicarious Consent in the Context of a Criminal Prosecution," *Seattle University Law Review*, 28-955, Summer 2005

FOR JUDICIAL HISTORY, SEE  
PAGES 6-12.

THE REMAINDER OF THE ARTICLE PROVIDES  
HISTORY OF FEDERAL LAW AND THE  
ARGUMENTS FOR AND AGAINST  
VICARIOUS CONSENT EXCEPTIONS.

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28 Seattle Univ. L. R. 955

**LENGTH:** 36343 words**ARTICLE:** Should Parents Be Allowed to Record a Child's Telephone Conversations When They Believe the Child Is in Danger?: An Examination of the Federal Wiretap Statute and the Doctrine of Vicarious Consent in the Context of a Criminal Prosecution**NAME:** Daniel R. Dinger \***BIO:**

\* Deputy Prosecuting Attorney, Ada County Prosecuting Attorney's Office, Boise, Idaho, B.A., Brigham Young University, 1998, J.D., J. Reuben Clark Law School, Brigham Young University, 2001. The views expressed in this article are those of the author and do not necessarily represent the views of the Ada County Prosecutor's Office.

**SUMMARY:**

... On February 28, 1997, the mother of a Georgia teenager picked up a telephone in her home and found that her daughter, then thirteen years old, was engaged in conversation with Kyle Richard Bishop. ... However, under the doctrine of vicarious consent, the parent is deemed to have vicariously consented to the interception and recording of a conversation on behalf of the minor child. ... In addressing the vicarious consent doctrine, some commentators have further suggested that allowing one parent to make and use a surreptitiously recorded telephone conversation between the other parent and a child, or a child and a third party, will lead to significant family discord, and may also cause a child to resent one or both parents for their interception and use of the communication. ... The vicarious consent doctrine is a legally viable doctrine in the sense that its application is consistent with both statutory and case law in the area of eavesdropping and child privacy rights, as well as with the legislative history of Title III. ... As one author wrote, "Congress entrusts parents with a right to decide on their children's behalf in many situations, so consenting to wiretapping of a telephone conversation seems a natural extension of those parental rights." ...

**TEXT:**

## [\*955] I. INTRODUCTION

On February 28, 1997, the mother of a Georgia teenager picked up a telephone in her home and found that her daughter, then thirteen years old, was engaged in conversation with Kyle Richard Bishop. n1 While it is not unusual for a thirteen-year-old girl to talk on the telephone, the conversation that the young girl's mother overheard that day was not a typical teenage conversation. In fact, the conversation was very much atypical for two reasons. First, Bishop was a thirty-eight-year-old man who, along with his wife, lived across the street from the young girl. n2 Second, the conversation involved both talk of a sexual nature and discussions of killing the young girl's parents. n3

Concerned for her daughter's safety and well-being, the young girl's mother contacted law enforcement and informed them of what she had overheard. n4 The authorities immediately launched an investigation of [\*956] Bishop, but it stalled as quickly as it started because the young girl denied that anything inappropriate had occurred between her and Bishop. n5 Not satisfied, the girl's parents took matters into their own hands. Specifically, "within hours of the police interview, the victim's parents went to Radio Shack and purchased a tape recorder to record all of the phone calls to and from their home. After installing the equipment, the parents recorded numerous phone conversations between Bishop and the victim." n6 Copies of these conversations were later turned over to law enforcement. These tapes, in conjunction with the young victim's testimony "that she had engaged in sexual acts with Bishop," n7 ultimately led to Bishop's indictment on charges of child molestation, aggravated child molestation, and aggravated sexual battery. n8

As the case against Bishop proceeded, prosecutors sought to use the taped conversations as evidence against him.<sup>n9</sup> In response, Bishop filed a challenge to the prosecution's use of the tapes, arguing that they were recorded in violation of Georgia law.<sup>n10</sup> The trial court denied Bishop's motion.<sup>n11</sup> In so doing, it relied on a legal doctrine known as the doctrine of vicarious consent.<sup>n12</sup> Though the trial court was ultimately overruled on the issue, based on the language of a specific Georgia statute,<sup>n13</sup> it expressed a belief that has been adopted by a small handful of federal and state courts.<sup>n14</sup> Specifically, the trial court adopted the view that a parent can surreptitiously tape record a minor child's telephone conversations with a third party — and do so without violating federal and state wiretap statutes — if the parent has a good faith and objectively reasonable basis for believing that recording the conversations is in the minor child's best interest.<sup>n15</sup>

This Article will address the little-used but important doctrine of vicarious consent, in particular, this Article will argue that the doctrine should be more widely accepted by the criminal courts. Part II gives a brief overview of the federal wiretap statute, its state law counterparts, and the doctrine of vicarious consent that has emerged as courts have [<sup>957</sup>] interpreted federal and state wiretap legislation. Part III addresses the doctrine's viability and, as referenced above, argues that it should be accepted by the criminal courts. Specifically, Part III argues that when a parent records a child's telephone conversations with a third party out of a true concern for the child and under a belief that doing so is in the child's best interest, those recordings should be available for use during a criminal prosecution as evidence against both the third party and, if necessary, the child whose parents recorded the conversations. Finally, Part IV briefly addresses important procedural issues arising when criminal courts accept the vicarious consent doctrine, and Part V concludes by summarizing the policies, issues, and answers presented herein.

## II. BACKGROUND

The judicially created doctrine of vicarious consent has developed over the last ten years through a series of little-referenced but significant federal and state court decisions.<sup>n16</sup> These court decisions, though relatively few in number, have uniformly held that parents who secretly, but with appropriate motivations, record a child's telephone conversations can avoid civil and criminal liability under federal and state wiretapping laws that generally prohibit such action.<sup>n17</sup> This section addresses those federal and state laws, the creation and nature of the vicarious consent doctrine, and the various criticisms that have been leveled against it.

### A. The Federal Wiretap Statute

Enacted in 1968 as Title III of the Omnibus Crime Control and Safe Streets Act, the federal wiretap statute governs the interception and capture of wire and other specified communications.<sup>n18</sup> As stated by the United States Supreme Court, the purpose of Title III is "to prohibit, on the pain of criminal and civil penalties, all interceptions of oral and wire communications, except those specifically provided for in the Act."<sup>n19</sup> Because the doctrine of vicarious consent necessarily involves parental interception and capture of a child's communications, understanding the basics of Title III is a prerequisite to understanding the doctrine itself. [<sup>958</sup>] Specifically, to fully understand the ramifications of the vicarious consent doctrine, what is needed is a basic understanding of Title III's history, combined with an overview of the process for obtaining a valid wiretap, the penalties associated with violations of the federal wiretap statute, the consent exception to the general prohibition of wiretapping, and the applicability of Title III in domestic situations.

#### 1. A Brief History of the Federal Wiretap Statute

As stated above, Congress enacted the federal wiretap statute in 1968 as Title III of the Omnibus Crime Control and Safe Streets Act. Prior to Title III's existence, wiretapping by both law enforcement and private citizens was governed by the Federal Communications Act of 1934.<sup>n20</sup> In 1986, nearly twenty years after its enactment, Congress amended and updated Title III to keep pace with technological advancements in the area of wiretapping and eavesdropping.<sup>n21</sup> The original act, which was passed to assist law enforcement in the investigation and prosecution of organized crime and to protect the privacy rights of United States citizens against the unwarranted interception of telephonic and other communications,<sup>n22</sup> was a response to two key decisions by the [<sup>959</sup>] United States Supreme Court. In the first case, *Berger v. New York*,<sup>n23</sup> the Supreme Court ruled that Fourth Amendment protections apply to the electronic eavesdropping of oral communications such that conversations intended to be private are protected by the Fourth Amendment.<sup>n24</sup> The *Berger* Court further "delineated the constitutional criteria that electronic surveillance legislation should contain."<sup>n25</sup> In the second case, *Katz v. United States*,<sup>n26</sup> the Court held that when there is a reasonable expectation of privacy, intercepting a telephone conversation in a public telephone booth constitutes a search and seizure for the purposes of the Fourth Amendment.<sup>n27</sup> Title III was enacted to provide for compliance with these two rulings

and the constitutional standards that they set forth for the lawful interception of covered communications. n28

## 2. An Overview of Title III

In its current form, Title III is a very complex piece of legislation that addresses many different aspects of legal and illegal wiretapping. With respect to the doctrine of vicarious consent, however, only a few portions of the legislation are particularly relevant. These portions of the law, which include the basic process for obtaining a valid wiretap, the penalties associated with violations of Title III, and the one-party consent exception to the general prohibition against wiretapping, are discussed below.

### a. Obtaining a Legally Valid Wiretap

As stated by the United States Supreme Court, Title III "prescribes the procedure for securing judicial authority to intercept wire communications in the investigation of specified serious offenses." n29 Title III also identifies the types of interceptions that are lawful and those that are not in an effort to "safeguard privacy in oral and wire communications while [\*960] simultaneously articulating when law enforcement may intercept such communications." n30

The Supreme Court provided an overview of the way in which wiretaps are authorized under the federal wiretap statute in its decision in *United States v. Giordano*:

Judicial wiretap orders must be preceded by applications containing prescribed information. The judge must make certain findings before authorizing interceptions, including the existence of probable cause. The orders themselves must particularize the extent and nature of the interceptions that they authorize, and they expire within a specified time unless expressly extended by a judge based on further application by enforcement officials. Judicial supervision of the progress of the interception is provided for, as is official control of the custody of any recordings or tapes produced by the interceptions carried out pursuant to the order. n31

In addressing this detailed procedure for obtaining a valid wiretap, the Supreme Court also noted that wiretaps are not available in all cases or as an initial method of investigation. n32 With respect to these limitations, the Court wrote the following:

The Act . . . not only limits the crimes for which intercept authority may be obtained but also imposes important preconditions to obtaining any intercept authority at all. Congress . . . evinced the clear intent to make doubly sure that the statutory authority be used with restraint and only where the circumstances warrant the surreptitious interception of wire and oral communications. These procedures were not to be routinely employed as the initial step in criminal investigation. Rather, the applicant must state and the court must find that normal investigative procedures have been tried and failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous. n33

Finally, the Supreme Court pointed out that under Title III, wiretaps can only be requested by certain specified persons:

The Act plainly calls for the prior, informed judgement of enforcement officers desiring court approval for intercept authority, and investigative personnel may not themselves ask a judge for authority to wiretap or eavesdrop. The mature judgement of a particular, responsible [\*961] Department of Justice official is interposed as a critical precondition to any judicial order. n34

In addressing these detailed procedural requirements, the Supreme Court has held that strict compliance with the procedures set forth in the statute is required for . . . wiretap to be considered lawful. n35

### b. The Civil, Criminal, and Evidentiary Penalties Associated with Violating Title III

Title III violations stemming from one person recording another person's telephone conversations can result in the imposition of criminal, civil, and evidentiary penalties against the violator. On the issue of penalties, the legislative history stresses that the prohibitions of Title III "must be enforced with all appropriate sanctions." n36 In addressing these "sanctions" the legislative history reads as follows: "Criminal penalties have their part to play. But other remedies must be afforded the victim of an unlawful invasion of privacy. Provision must be made for civil recourse for dangers. The perpetrator must be denied the fruits of his unlawful actions in civil and criminal proceedings." n37 "Each of these objectives," the drafters concluded, "is sought by the proposed legislation." n38

With respect to criminal penalties, Title III provides that "whoever violates [the prohibition against intercepting the specified communications] shall be fined under this title or imprisoned not more than five years, or both." n39 The



issue of civil penalties is slightly more complex. The statute provides that "any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity, other than the United States, which engaged in that violation such relief as may be appropriate." n40 In defining what "relief may be appropriate, the law provides that "appropriate relief includes: (1) such preliminary and other equitable or declaratory relief as may be appropriate, (2) [actual or statutory damages] and punitive damages in appropriate [\*962] cases, and (3) a reasonable attorney's fee and other litigation costs reasonably incurred." n41 Finally, any evidence obtained during a wiretap made in violation of Title III is not admissible in a criminal or civil trial, or in a number of other types of hearings:

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence 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 United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter. n42

These three distinct types of penalties are independent of one another such that any person who violates Title III can potentially be subject to all three types of penalties for a single violation of the law. n43 At the same time, however, they also work in conjunction with one another to "form . . . an integral part of the system of limitations designed to protect privacy" n44 and "serve to . . . curtail the unlawful interception of wire and oral communications." n45

### *c. The One-Party Consent Exception*

As stated above, Title III prohibits "all interceptions of oral and wire communications, except those specifically provided for in the Act." n46 One important exception — the exception at issue in cases involving the doctrine of vicarious consent — is the one-party consent exception. In brief, the one-party consent exception holds that if one party to a communication consents to a recording of that communication, there is no violation of Title III. n47

[\*963] It shall not be unlawful . . . for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State. n48

Under this important exception, as stated above, one participant in a "wire, oral, or electronic communication" can record the communication without violating Title III. n49 So too can a third party who has been given prior consent by one of the parties to the conversation. n50 Significantly, the statute does not require that the person making the recording notify the other participants that a recording is being made or that the conversation is being intercepted. n51

### 3. The Federal Wiretap Statute & Domestic Wiretapping

The doctrine of vicarious consent, as will be discussed more fully, is a legal doctrine that addresses a parent's ability to intercept a child's telephone conversations — a type of domestic wiretapping — without violating Title III. n52 Yet, the language of the federal wiretap statute does not expressly address the applicability or nonapplicability of Title III to domestic or interfamily wiretap situations. n53 This omission has led to some confusion in the application of Title III. Since its passage, and even during the time that Congress debated its enactment, legislators, courts, and commentators have argued about whether the federal wiretap statute applies in domestic or interfamily wiretapping situations, including situations involving parent-child wiretapping. n54 These debates have resulted [\*964] in a circuit split on the issue, with two federal circuits holding that inter-family wiretapping is outside the reach of the statute and its penalties, while four circuits have held that the law prohibits both domestic and nondomestic wiretapping alike. n55 More succinctly put, "the general applicability of the Wiretap Act in the domestic realm remains unclear." n56 This is a problem because, according to some estimates, "nearly 80 percent of reported wiretapping matters involve wiretaps within the family context." n57

### [\*965] 4. State Wiretap Statutes

In addition to being subject to the federal wiretap statute and its prohibitions and procedures, all but one of the fifty states have enacted their own wiretapping laws to govern the recording of telephone and other conversations. n58 With respect to a consent exception to the prohibition against recording telephone and other communications, a significant number of state wiretap statutes follow the federal model and contain a one-party consent exception. n59 For example, Ohio's wiretap statute is [\*966] similar to the federal statute. Under Ohio law, it is illegal for any person to



"intercept, attempt to intercept, or procure another person to intercept or attempt to intercept a wire, oral, or electronic communication." n60 The law, however, includes a one-party consent exception:

This section does not apply to . . . [a] person . . . who intercepts a wire, oral, or electronic communication, if the person is a party to the communication or if one of the parties to the communication has given the person prior consent to the interception, and if the communication is not intercepted for the purpose of committing a criminal offense or tortious act . . . or for the purpose of committing any other injurious act. n61

Similar to the federal statute, Ohio law provides for civil remedies against those who violate its wiretap statute. n62 Texas also provides for a one-party consent exception:

A person commits an offense if the person . . . intentionally intercepts, endeavors to intercept, or procures another person to intercept or endeavor to intercept a wire, oral, or electronic communication. . . . It is an affirmative defense to prosecution . . . [that] the person is a party to the communication or if one of the parties to the communication has given prior consent to the interception. n63

Under this code section, which provides an affirmative defense in the form of a one-party consent requirement, it is a criminal offense to make an unauthorized interception of another person's wire, oral, or other electronic communication. n64

Since Title III's passage, courts have held that states may adopt wiretap laws that are more stringent than federal law, but states "may not adopt standards that are less restrictive." n65 As such, while most states [\*967] have adopted one-party consent exceptions to their wiretap statutes, a small handful of states have adopted a more stringent form of the statute, one which requires the consent of both parties to a conversation before it can be lawfully recorded. n66 California's statute provides a good example of this two-party consent requirement:

Every person who, intentionally and without the consent of *all parties* to a confidential communication, by means of any electronic . . . recording device, eavesdrops upon or records a confidential communication . . . shall be punished by a fine not exceeding two thousand five hundred dollars (\$ 2,500), or imprisonment in the county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment. n67

Under California's statutory scheme, more severe penalties apply when a person has a prior conviction for wiretap violations. n68 Civil penalties are also available to those persons "injured by a violation" of California's wiretap law. n69

As it has developed, the vicarious consent doctrine is available only in those jurisdictions that enact one-party consent exceptions. The doctrine is only applicable in these specific jurisdictions because its sole purpose, as discussed below, is to allow a parent or guardian to record a child's telephone conversations without the child or, in particular, the person with whom the child is speaking, becoming aware of the interception; necessarily, it is made without the consent of the party to whom the child is speaking. n70

#### [\*968] *B. Parental Recording of a Minor Child's Telephone Conversations and the Doctrine of Vicarious Consent*

The doctrine of vicarious consent, a legal doctrine created by judicial decision, addresses a parent's ability to consent to a recording of a child's telephone communications on the child's behalf, without running afoul of federal or state wiretap laws. This section addresses the principles underlying the doctrine, its specific development over the last decade, and the response that critics of the doctrine have made to its acceptance by a small handful of state and federal courts.

##### 1. The Doctrine of Vicarious Consent and Its Underlying Principles

The basic premise of the doctrine of vicarious consent is that a parent can avoid liability for violations of the federal wiretap statute or its state law counterparts that might otherwise attach when he or she surreptitiously records a minor child's telephone conversations with a third party without gaining prior consent from the child or the third party. As stated above, the federal and state wiretap statutes generally prohibit such recordings. n71 However, under the doctrine of vicarious consent, the parent is deemed to have vicariously consented to the interception and recording of a conversation on behalf of the minor child. As such, the recording is therefore considered to be one to which one of the parties to the conversation — specifically the minor child — has consented, thereby satisfying the one-party consent exception and protecting the parents from civil or criminal liability. n72

The doctrine of vicarious consent is not codified in Title III, but was created by judicial decision. n73 As such, the doctrine's details are found in those state and federal decisions that have accepted the concept of vicarious consent in the

context of the one-party consent exception. The most fundamental requirement, as explained below, is that the parent who records the conversation must do so under a good faith and reasonable belief that he or she is acting in the child's best interest. n74

## 2. The Cases Through Which the Doctrine Has Developed

The doctrine of vicarious consent has slowly developed over the last decade as courts have adjudicated cases that, in one way or another, involve a parent who has surreptitiously recorded one or more of a minor [\*969] child's telephone conversations with either the other parent or a third party. n75 To date, the majority of courts to address the issue have done so in the context of either custody disputes or civil tort claims for alleged violations of the federal wiretap statute arising from custody disputes. n76 A small handful of criminal courts have also addressed the issue, all in the context of a parent recording a child's telephone conversations with a third-party adult who is not a member of the immediate family. n77 Of these criminal courts, some have adopted the doctrine of vicarious consent and have further allowed prosecutors to use the recorded conversations at the trial of one of the parties to the conversation. n78 Other courts, however, have rejected the doctrine and therefore have not allowed such a use of the recordings. n79

### a. *The Development of the Concept of Vicarious Consent*

The first court to present and address the issue of vicarious consent was the United States District Court for the District of Utah in the 1993 case of *Thompson v. Dulaney*. n80 *Thompson* arose out of a custody dispute between the parents of two young children. n81 While the divorce and custody issues underlying the case were adjudicated in Utah state court, James Thompson, the noncustodial parent, filed suit in federal court alleging that the custodial parent, Denise Dulaney, had violated various portions of Title III. n82 Specifically, Thompson alleged that Dulaney illegally tape recorded conversations between Thompson and his children during the pendency of the aforementioned divorce and custody proceedings. n83 Dulaney freely admitted that she had taped Thompson's conversations with their children — the conversations were even used as evidence in the custody dispute — but argued that it was not illegal for her to do so because Thompson "was interfering with her relationship with the children to whom she was awarded custody." n84 Dulaney further argued that she was within her rights to record the conversations because she needed [\*970] to monitor and document that interference in order to effectively and appropriately protect her children. n85

The court's creation and discussion of the doctrine of vicarious consent arose in the context of a ruling on Dulaney's motion for summary judgment. n86 In what the court itself described as a "very narrow [holding] limited to the particular facts of this case," n87 it held the following:

As long as the guardian has a good faith basis that is objectively reasonable for believing that it is necessary to consent on behalf of her minor children to the taping of the phone conversations, vicarious consent will be permissible in order for the guardian to fulfill her statutory mandate to act in the best interests of the child. n88

Noting that the case presented a "unique legal question of first impression," n89 the court recognized the existence of a right of vicarious consent in the case before it because of its concerns regarding parents' ability to protect very young children "who lack *both* the capacity to consent and the ability to give actual consent." n90 It further noted the following: "In this case, or perhaps a more extreme example of a parent who was making abusive or obscene phone calls threatening or intimidating [\*971] minor children, vicarious consent is necessary to enable the guardian to protect the children from further harassment. . . ." n91 Protection of a young child, the court concluded, is the reason that the principle of "vicarious consent is necessary." n92

In holding as it did, the court stressed the importance of divining parental motivations. n93 In ruling on Dulaney's motion for summary judgment, the court wrote that whether or not Dulaney would be permitted to rely on the vicarious consent exception "requires a factual resolution of what Denise Dulaney's purpose' was in intercepting the communication." n94 The court later added that "the viability of the consent defense is contingent on a resolution of [Dulaney's] purpose in intercepting these communications." n95 Because it determined that there existed factual issues regarding Denise Dulaney's motivation, the court, while accepting the principle of vicarious consent, denied Dulaney's motion for summary judgment. n96

After the district court handed down its ruling in *Thompson v. Dulaney*, the doctrine of vicarious consent was reshaped in subsequent court rulings from myriad jurisdictions. One such ruling came from the Court of Civil Appeals of Alabama in its 1996 decision in *Silas v. Silas*, n97 which involved a father who made recordings of telephone conversations

between his child and the child's mother. n98 In *Silas* the court referenced *Thompson* and adopted that court's reasoning, while issuing a slightly narrower holding. n99

The tapes were subsequently produced to and listened to by the guardian ad litem and the court-appointed psychologist, Dr. Karl Kirkland. Dr. Kirkland testified that the tapes showed verbal abuse of the minor child by the mother and that the verbal abuse was damaging to the minor child.

Based on the foregoing, we conclude that the father had a good faith basis that was objectively reasonable for believing that the minor [\*972] child was being abused, threatened, or intimidated by the mother; therefore it was permissible for the father to vicariously consent on behalf of the minor child to the taping of the telephone conversations. n100

While it is not fully clear, the holding in *Silas* appears to potentially narrow the application of the doctrine to situations in which there is a good faith basis for believing that the child is "being abused, threatened, or intimidated" by the other parent. n101 In *Thompson* there was no such specific limitation, but only a general statement of reasonable parental concern for the child's best interests. n102

Another major court decision on the vicarious consent doctrine was the Sixth Circuit's ruling in the case of *Pollock v Pollock*. n103 the first federal appellate-level court to address the doctrine. *Pollock* arose from a civil suit filed by Samuel Pollock alleging that his ex-wife Sandra violated the federal wiretap statute by tape recording a number of conversations that took place, over a few weeks' time, between their daughter Courtney and Samuel and his new wife, conversations that "occurred in the context of a bitter and protracted custody dispute." n104 Neither Samuel, his new wife, nor Courtney consented to the recordings. n105 Sandra justified the recordings by arguing that "she believed that Courtney was being subject to emotional and psychological pressure by Samuel and Samuel's wife, Laura, whereby Samuel was trying to get Courtney to do whatever she could to convince [Sandra] to let Courtney primarily live with Samuel." n106 Sandra further claimed that her sole motivation in recording her daughter's telephone conversations with her father was Sandra's concern for Courtney's well-being. n107 Samuel, as expected, argued that Sandra had a different motivation — retaliation. n108 Specifically, he argued that "Sandra was angry that Courtney had taped a conversation between herself and Sandra with Samuel and Laura's consent, and wanted to return the favor by taping Courtney's conversations with Sam and [Laura]." n109 After Samuel filed suit, Sandra filed a motion to dismiss, [\*973] which the court treated as a summary judgment motion. n110 The district court granted Sandra's motion, and Samuel appealed. n111

In ruling on the aforementioned dispute, the Sixth Circuit accepted and then expanded the reach of the doctrine of vicarious consent as set forth in *Thompson*. n112

After [a] review of relevant case law, we agree with the district court's adoption of the [vicarious consent] doctrine, provided that a clear emphasis is put on the need for the "consenting" parent to demonstrate a good faith, objectively reasonable basis for believing such consent was necessary for the welfare of the child. Accordingly, we adopt the standard set forth by the district court in *Thompson* and hold that as long as the guardian has a good faith, objectively reasonable basis for believing that it is necessary and in the best interest of the child to consent on behalf of his or her minor child to the taping of telephone conversations, the guardian may vicariously consent on behalf of the child to the recording. Such vicarious consent will be exempt from liability under Title III, pursuant to the consent exception contained in 18 U.S.C. § 2511(2)(d). n113

As stated above, in holding as it does, the Sixth Circuit expands the reach of the vicarious consent doctrine beyond that set forth in *Thompson*. n114 Specifically, the *Pollock* court held that the doctrine applies not only to young children, but also to children much older than those involved in *Thompson*. n115 The children caught in the middle of *Thompson* were three and five — a fact to which the *Thompson* court attached great significance. n116 In *Pollock*, however, the child whose telephone conversations were secretly recorded was fourteen years of age. n117

In expanding the application of the doctrine of vicarious consent to include older children, the court seemingly does away with the *Thompson* court's staunch reliance on the fact that the children at issue in that case "were children who lacked both the capacity to [legally] consent and the ability to give actual consent." n118 In so doing, it relied on its own district court's decision: "We are not inclined to view [the child's] own [\*974] ability to actually consent as mutually exclusive with her mother's ability to consent on her behalf." n119 Furthermore, with respect to the issue of age: "It would be problematic . . . for the Court to attempt to limit the application of the doctrine to children of a certain age, as not all children develop emotionally and intellectually on the same timetable, and we decline to do so." n120 In short,

*Pollock* expanded the doctrine's applicability to a greater number of people by refusing to limit it to cases involving very young children. n121

Though its holding expands the number of children to which the doctrine applies, the court does issue a warning to would-be wiretappers, writing that "we stress that . . . this doctrine should not be interpreted as permitting parents to tape any conversation involving their child simply by invoking the magic words: 'I was doing it in his/her best interest.'" n122 Instead, the court stresses, recognition and acceptance of the vicarious consent doctrine requires "that a clear emphasis [be] put on the need for the consenting' parent to demonstrate a good faith, objectively reasonable basis for believing that such consent was necessary for the welfare of the child." n123

In addition to their acceptance of the vicarious consent doctrine, the *Thompson*, *Silas*, and *Pollock* decisions all share a significant factual similarity — they all involve one parent who recorded conversations between a child and the other parent. More specifically, none of the three decisions addresses the issue of a parent who records a child's telephone conversations with a third party who is not a family member. It was not until the criminal courts began to accept the vicarious consent doctrine that recordings involving non-family members began to appear as part of the case law governing the doctrine.

#### [\*975] *b. The Doctrine of Vicarious Consent in the Criminal Context*

A small number of reported cases have carried the doctrine of vicarious consent from the civil to the criminal arena, allowing for the use of recorded telephone conversations in the prosecution of an adult criminally charged, in one way or another, with victimizing a child. n124 The typical scenario in these cases involves parental taping of a conversation between a child and a non-family member who is later discovered to be sexually abusing the child, and a subsequent legal challenge to the use of those recordings in the prosecution of the abuser. n125

The case of *Commonwealth v. Barboza* n126 provides a good example of the way in which courts have applied the doctrine of vicarious consent in the context of these criminal prosecutions. *Barboza*, a criminal prosecution, involved allegations that George Barboza had sexually molested a young boy named Tom, the son of one of Barboza's employees. n127 Initially Barboza and Tom's family had little contact, but in 1993 Tom's family moved to the town where Barboza lived. n128 At that point, the families "began meeting frequently, and on some weekends, Tom would stay overnight with [Barboza] at his home." n129 Tom also spent time with Barboza at Barboza's second home in Florida during February of 1995. n130

Tom's relationship with Barboza continued to develop, and in 1996 Tom's parents "began to feel uneasy about their son's close relationship" with Barboza. n131 Specifically, during 1996, Tom's family visited Barboza in Florida. n132 During that visit Tom "had little interaction with his parents," furthermore, Tom "stayed in one hotel room with [Barboza], while his parents and their other son stayed in a second room." n133 As the court's opinion illustrates, the relationship continued to develop after the vacation:

[Tom's parents] were further disconcerted when Tom announced that it was his intention after he graduated from high school to live [\*976] with [Barboza] in Florida. After the family returned from Florida in December, 1996, [Barboza] called Tom on a regular basis. The parents noticed that when Tom spoke with [Barboza] on the telephone, he would be unusually quiet, and sometimes even denied afterwards that he had spoken to [Barboza]. n134

Determining that things had gone far enough, Tom's parents decided to investigate Barboza's relationship with their son. n135 To this end, "Tom's father ordered a tape recorder that he had seen advertised in a magazine in order to record secretly telephone conversations at his house." n136 Tom's parents never told their sons that the tape recorder had been installed, and thereafter "four telephone calls between Tom and [Barboza] were recorded." n137 In each of these conversations, the court wrote, Barboza "declared that he loved Tom, and in at least the last three conversations, there [were] references to masturbation." n138 Additionally, in the second of the recorded telephone calls Barboza mentioned "making love" with Tom. n139

Upon discovering that Barboza was having sexual contact with his son, Tom's father turned the recordings over to law enforcement and criminal charges were filed against Barboza. n140 During the course of Barboza's trial, and following a partial denial of a motion to suppress the recordings, the prosecution was permitted to play two of the recordings to the jury, which ultimately convicted Barboza of four counts of rape of a child under sixteen and two counts of indecent assault and battery on a child under fourteen. n141 In ruling on the suppression issue, the judge stated that "there's no question



... that the [parents'] primary concern was their son and that everything they did was not to assist law enforcement ... but to try to figure out what was going on and what's right for their son and for their family." n142 Because it found that the recordings were made out of a concern for family rather than a desire to assist law enforcement, the court concluded that two of the four recordings — both made prior to law enforcement being informed of the situation — were [\*977] admissible at trial. n143 The other two recordings, made after police were contacted, though not at their request, were suppressed because "under the circumstances, silence by the police made the parents unwitting agents of the police for the purposes of continuing to record telephone calls from [Barboza]." n144 On appeal, Barboza argued that the trial court should have suppressed the two tape recordings the jury had heard, as well as other evidence that he alleged was obtained after the recordings were made and provided to law enforcement. n145 The Massachusetts Appeals Court divided its discussion of Barboza's claim into two distinct parts. The first was an analysis of the suppression issues under the Massachusetts state wiretap statute, n146 and the second was a similar analysis under the federal wiretap law. n147

The court began its analysis under the Massachusetts statute by appropriately pointing out that Massachusetts is a two-party consent state, meaning that "the Massachusetts wiretap statute ... requires both parties to consent to the recording of telephone calls for the recording to be legal." n148 As such, when Tom's father recorded Barboza's conversations with Tom, which was done without Barboza's knowledge or consent, it was clearly illegal under Massachusetts law. n149 This fact notwithstanding, the appellate court determined that the trial court was correct in denying Barboza's motion to suppress under the Massachusetts statute because it was private conduct, not government conduct, that produced the recordings that helped secure Barboza's rape and other convictions. n150 Quoting the Massachusetts Supreme Judicial Court, the *Barboza* court noted that "exclusionary rules generally are intended to deter future police conduct in violation of constitutional or statutory rights," n151 and determined that "we see no reason why the [exclusionary] rule should protect [Barboza] from the consequences of the unlawful interception by a private citizen, a father, acting in the privacy of his own home, without any government involvement, to protect his child from sexual exploitation." n152

[\*978] Of more pertinence to this article is the *Barboza* court's analysis of the suppression issue under the federal wiretap statute. n153 With respect to the application of federal law and the one-party consent exception contained in Title III, the court, with very little discussion, concluded that "a recording by parents of their own minor son talking on the telephone in their own home, motivated by concerns that he was being sexually exploited by an adult, does not violate Title III." n154 In deciding the issue as it does, the court briefly referenced the Sixth Circuit's decision in *Pollock* as well as a handful of other cases that have approved the doctrine of vicarious consent, and then relied on their authority to refute Barboza's arguments. n155 Significantly, the court also went beyond the scope [\*979] of *Pollock* and *Thompson* and noted that "we do not read the Federal cases as limiting the parents' rights to intercept calls to those from family members," meaning the court appears open to the idea that parents can also record a child's telephone conversations with non-family members under the doctrine of vicarious consent without running afoul of the prohibitions of Title III. n156

#### [\*980] *c. Rejecting the Doctrine of Vicarious Consent*

Not all courts that have addressed the issue of parental taping of a child's phone conversations have adopted the doctrine of vicarious consent. A small number of courts have rejected the doctrine altogether and held that parental recording of a child's phone conversations does not fall within the consent exception to Title III or its state law equivalents.

The first court to raise and then reject the doctrine of vicarious consent was the Michigan Court of Appeals in the case of *Williams v. Williams*. n157 The *Williams* case, similar to *Thompson v. Dalaney*, involved an appeal of a Michigan state trial court's ruling on a motion for summary judgment in a tort action filed by one former spouse against another. n158 Specifically, Brenda Williams filed suit against her former husband, Brent Williams, when she discovered that he had secretly recorded some telephone conversations that she had engaged in with their son, Jason Williams, while Jason was living with Brent. n159 Brenda Williams' three-count lawsuit alleged violations of the federal wiretapping act and Michigan's eavesdropping statute, and also included a claim based on the common law tort of invasion of privacy. n160 Both parties filed motions for summary judgment in connection with the case. n161

In ruling on the motions for summary judgment, the trial court ruled in favor of Brent Williams, holding that there was no genuine issue of material fact and that Brent had a right to consent to the recording of the phone calls on behalf of his son. n162 In short, the trial court applied the doctrine of vicarious consent. Brenda Williams appealed the lower [\*981] court's decision and the Michigan Court of Appeals reversed. n163 In reversing the trial court, the appellate court addressed both the federal wiretap statute and Michigan's eavesdropping statute. n164 In so doing, the court framed the issue as follows:

The sole issue presented by plaintiff on appeal is an issue of first impression for this Court: whether a custodial parent of a minor child may consent on behalf of the child to the interception of conversations between the child and another party and thereby avoid liability under the Michigan eavesdropping statute and the federal wiretapping act. n165

The court further framed the issue in terms of statutory interpretation, writing that "we must decide whether these references to consent may be construed so broadly as to include the type of vicarious consent exception advocated by defendants." n166

As stated above, the Court of Appeals reversed the trial court, and in so doing, rejected the vicarious consent doctrine. n167 With respect to the applicability of the vicarious consent doctrine to the federal wiretapping statute, the court rejected the doctrine because, contrary to the Utah District Court's decision in *Thompson*, the Michigan court chose to adopt a narrow reading of the consent exception. n168 The court held as follows.

However, the federal wiretapping act is silent with regard to the types of consent that Congress contemplated. The exception to the federal statute simply provides for consent by "one of the parties to the communication." This language gives us no indication that Congress intended to create an exception for a custodial parent of a minor child to consent on the child's behalf and tape record telephone conversations between the child and a third party. Were it the intent of Congress to create a safe harbor from liability for custodial parents recording the conversations of their children, it, too, could have easily done so. Instead, the federal wiretapping act states that any exceptions to its prohibitions are "specifically provided in this chapter." This Court will not speculate with regard to the probable intent of Congress beyond the words expressed in the statute. n169

[\*982] The court then employed a similarly narrow reading of the state statute, rejecting the vicarious consent doctrine because the state legislature had not specifically adopted it. n170 In rejecting the doctrine, the court also addressed decisions such as *Thompson* that accepted the doctrine, holding that despite the benefits that it was able to provide, any acceptance of vicarious consent would be left to the state legislature. n171

The appellate court's rejection of the vicarious consent doctrine did not end the appeals of the trial court's decision to adopt the doctrine. Specifically, the Michigan Court of Appeals' decision in *Williams* was appealed to the Michigan Supreme Court. n172 The Michigan Supreme Court did not decide the issue, but remanded the case back to the Michigan Court of Appeals for reconsideration in light of *Pollock*, which the Sixth Circuit decided after the Michigan appellate court initially rejected the principle of vicarious consent. n173 On remand, the court reluctantly held that, depending on the facts of the case, the vicarious consent doctrine potentially applied to the federal statute and the claim based on Title III. n174 The court then remanded the case back to the trial court to make a factual determination of whether vicarious consent excused Brent Williams' actions. n175 With respect to the state law claim, however, the court held strong to its prior decision and rejected the claim of vicarious consent.

[\*983] This court is not compelled to follow federal precedent or guidelines in interpreting the Michigan eavesdropping statute. We remain convinced by the statutory analysis in our prior opinion that if the Legislature had intended [to allow a parent to vicariously consent on behalf of a minor child to the recording of telephone conversations between the minor and a third party] then it could have included such an exception in [the law]. n176

Thus the court held that the vicarious consent doctrine did not apply in Michigan's state courts. n177

The most recent rejection of the vicarious consent doctrine came from the Washington Supreme Court in its 2004 decision in *State v. Christensen*. n178 In *Christensen*, the court addressed the admissibility of evidence obtained by defendant Christensen's minor girlfriend's mother during a surreptitious interception of a phone call between Christensen and his girlfriend. n179

The *Christensen* case began when San Juan County Sheriff Bill Cumming suspected Oliver Christensen of the robbery of an elderly woman. n180 Because Sheriff Cumming "believed that evidence of the robbery might be found in the house of Christensen's then-girlfriend, Lacey Dixon," he contacted Lacey's mother, referred to by the court as Mrs. Dixon, "and obtained her consent to search her home for evidence of the crime." n181 While no evidence was found in the home, Sheriff Cumming nonetheless asked Mrs. Dixon to "keep a lookout for any evidence of the crime that might surface." n182 Mrs. Dixon did just that, and when Christensen later called for her daughter, she "handed the cordless



handset to her daughter, who took it upstairs into her bedroom and closed the door," and then Mrs. Dixon "activated the speakerphone function of the cordless telephone system." n183 Thereafter, the court wrote, "Mrs. Dixon took notes from the conversation she overheard, in which Christensen acknowledged to Lacey that he was aware that police suspected him of the robbery and that he knew the whereabouts of the purse, but not that he had taken part in the robbery." n184 Neither Lacey nor her boyfriend, Christensen, "knew of, or consented to, Mrs. Dixon listening to their conversation." n185 [\*984] At Christensen's trial, Mrs. Dixon was permitted to testify as to the contents of the conversation that she had overheard. n186 That testimony, in conjunction with other evidence, aided the prosecution in securing a conviction for second-degree robbery. n187

On appeal, the Washington Supreme Court addressed, among other things, the State's assertion that the court should adopt the vicarious consent doctrine and therefore find Mrs. Dixon's actions and her testimony admissible. n188 Based on the fact that Washington's wiretap law requires two-party consent before a lawful interception can occur, the court rejected the argument:

The State also suggests that there should be an implied exception to the act in the case of minor children, arguing that children have a reduced expectation of privacy because parents have an absolute right to monitor all telephone calls coming into the family home. The federal wiretap statute, which makes interception of communications legal where *one* party consents, has been interpreted to permit parents acting to protect the welfare of a child, to consent vicariously for their child to the recording of their child's conversations. The Washington act, with its all-party consent requirement, contains no such parental exception and no Washington court has ever implied such an exception. We decline to do so now. n189

After additional discussion of the Washington Legislature's view that individual privacy trumps "law enforcement's ability to gather evidence without a warrant," n190 the court, without reference to the fact that the interception at issue was made by a private citizen instead of a law enforcement officer acting on behalf of the state, determined that Mrs. Dixon's trial testimony was improperly admitted and a retrial without that evidence was ordered. n191

In looking at the *Christensen* case in the context of the vicarious consent doctrine — and thereby ignoring that Washington is a two-party consent state n192 — it is entirely possible that a court in a one-party consent jurisdiction would still find the doctrine inapplicable under the facts of the case. A court would likely so find because Mrs. Dixon's primary motive in recording the conversations between her daughter and Christensen [\*985] appears to be the assistance of law enforcement, and not necessarily the assistance and protection of a child in need. n193 Nonetheless, the Washington Supreme Court made its decision without putting any credence in or being willing to accept the doctrine of vicarious consent n194 and, therefore, attempting to fit the facts of the case with the doctrine was unnecessary.

Another case which one can read as a rejection of the vicarious consent doctrine is the North Carolina case of *State v. Shaw*. n195 Decided in 1991 — two years before the *Thompson* court first invoked the doctrine and well before the Michigan or Washington state court decisions in *Williams* and *Christensen* — *Shaw* addresses a situation in which a mother surreptitiously recorded a child's telephone conversation regarding drug use and then turned that recording over to law enforcement. n196 Prior to addressing the admissibility of the recordings at trial, the North Carolina Court of Appeals recited the facts of the case. n197 After noting that Eddie Lee Shaw had "pled guilty to the charge of felonious possession of a controlled substance" n198 after a motion to suppress the drugs was denied, the court relayed the facts as follows:

The search warrant in this case was issued to Detective John Moore. Detective Moore's application for the warrant and his accompanying affidavit relied on the contents of a tape-recorded telephone conversation between defendant and another young man to establish probable cause to believe that defendant was in possession of a controlled substance. The other man's mother had obtained the tape recording on her own initiative, apparently by attaching a microcassette tape recorder to a telephone extension line in her house. She called the police after listening to the recorded conversation, part of which involved the speakers' plans to get together about "shrooms," the street name for mushrooms (psilocybin). The mother played the tape for Detective Moore and identified the speakers as her son and defendant. Evidence at the suppression hearing suggested that the woman's son and defendant did not know about, and had not consented to, the taping of their phone conversation. n199

[\*986] As stated above, when the *Shaw* court issued its 1991 decision, the doctrine of vicarious consent had yet to be invented or invoked. n200 As such, the court never expressly or directly addressed the issue. Its holding, however, supports the idea that had the doctrine been presented, the court would have rejected it. n201

In *Shaw*, the state unsuccessfully attempted to persuade the court that the recordings were lawfully obtained under the telephone extension exception found in Title III. n202 In rejecting the state's position, the court repeatedly emphasized "that Title III is to be interpreted from its plain language" n203 and that "there is no express exception for electronic surveillance between family members." n204 The court concluded with the following:

Because [prior case law] directs us to interpret Title III by its express language, rather than by examination of legislative history or interpretation of congressional intent, the case law authority [regarding the telephone extension exception] presented by the State is inapplicable in North Carolina to the facts in this case. The United States Supreme Court has similarly observed that "the purpose of the [wiretapping] legislation . . . was effectively to prohibit . . . all interceptions of oral and wire communications, except those specifically provided for in the Act."

We conclude, therefore, that the activity by the mother is prohibited by Title III, which states that any exceptions to its prohibitions are "specifically provided in this chapter." n205

Because of the *Shaw* court's emphasis on the statute's express language and its refusal to accept authority which allows for parent-child wiretapping, n206 one can make a strong argument that the *Shaw* court would have rejected any proffering of the vicarious consent doctrine.

Finally, in *West Virginia Department of Health and Human Resources ex rel. Wright v. David L.*, n207 the Supreme Court of Appeals of West Virginia, in a very fact-specific ruling, declined to apply the vicarious [\*987] consent doctrine in a specific set of circumstances. n208 In *David L.*, a custody dispute, the issue of vicarious consent arose when David L., father of three children, used his mother, the children's paternal grand-mother and babysitter, to place a voice-activated tape recorder in the children's bedroom so that he could record their conversations with their mother, Jill L. n209 The children were living with their mother at the time. n210 In addressing the vicarious consent doctrine, which David L. argued protected his conduct, the court wrote the following:

We do not disagree with the reasoning in *Thompson*; however, we determine the facts of the present case are different from the facts of *Thompson*. . . . In the present case . . . Jill L., not David L., was awarded temporary custody of the children during the divorce proceedings. [Additionally] the recordings occurred in Jill L.'s house, not David L.'s house, and he had absolutely no dominion or control over Jill L.'s house where he procured his mother's assistance to hide the tape recorder. Thus, under the specific facts of the case before us, we hold a parent has no right on behalf of his or her children to give consent under [the state or federal wiretap laws] to have the children's conversations with the other parent recorded while the children are living in the other parent's house. n211

In so holding, the court did not reject the vicarious consent doctrine itself, but simply rejected its application in the case at bar because of its particular facts and circumstances and the way that the recordings were intercepted. n212

These courts have not been the only governmental entities to address, and either accept or reject, the vicarious consent doctrine. In addition to *Thompson*, *Pollock*, and the other courts that have accepted the doctrine, one state has codified it in response to the outcome of the aforementioned *Bishop* case.

### 3. Statutory Adoption of the Doctrine

The Georgia Legislature responded to the Court of Appeals' rejection of the vicarious consent doctrine in *Bishop* by amending that state's consent exception to expressly include the doctrine of vicarious consent. n213 [\*988] As currently codified, Georgia's statute provides that the parent or guardian of a minor child is not prohibited from surreptitiously intercepting the child's telephone conversations when the interception is done "for the purpose of ensuring the welfare of such minor child." n214 Furthermore, [\*989] when the parent or guardian has a reasonable or good faith belief that the recording is evidence of criminal conduct, the parent or guardian can, under Georgia's statutory scheme, lawfully turn that recording over to either law enforcement or the prosecuting attorney, and it can further be used as evidence during a judicial proceeding. n215 To date no other jurisdictions have successfully codified the doctrine of vicarious consent as a specific part of a state wiretap statute. n216

The aforementioned courts that have rejected the vicarious consent doctrine are not its only detractors. In addition to courts, many commentators have also criticized the doctrine. n217

#### C. Critics and Their Attacks on the Doctrine

Not everyone who has addressed the doctrine of vicarious consent has given it a favorable response. In addition to its rejection by some courts, n218 many commentators have leveled a myriad of criticisms against the doctrine. Common criticisms include a belief that the doctrine (1) is subject to misuse and abuse by scheming parents; (2) allows for an invasion of the child's privacy; (3) fails to recognize the child's right to make his or her own choices; and (4) will result in interfamily discord and resentment when a child finds out that his or her parents have been secretly recording private telephone conversations. Another common criticism is that the language of Title III does not specifically recognize or articulate [\*990] that a parent has the right to consent on behalf of a child — the reason why the court in *Williams* rejected the doctrine. n219

#### 1. The doctrine is subject to misuse and abuse by conniving parents.

Perhaps the foremost criticism of the vicarious consent doctrine is the belief that some parents who seek to invoke the doctrine may not actually have the child's best interest in mind when recording his or her telephone conversations, but may harbor ulterior motives instead. As one author wrote, "there is great potential for abuse of this exception." n220 This is of particular concern in those cases that involve contentious custody disputes and deteriorating families, as do "the majority of the reported parental wiretapping cases." n221 One author, commenting on the doctrine's potential misuse, wrote:

What divorcing parents believe is best for their children can be inherently self-motivated during child custody battles. In other words, "there are . . . a number of possible conflicts between the motives or interests of parents and the best interests of their children." One study lists several possible motives for seeking child custody: narcissism, vengeance against one's former spouse, child support money, mitigation of amount of child supports, desire to demonstrate that the parent cares, and furtherance of career goals.

It is thus questionable whether parents objectively can decide what is best for their children at a time when [they are or may become] "jealous, angry, or distraught." n222

This concern was echoed by the *Williams* court, which wrote that "we are also cognizant that granting a parent the ability to consent on behalf of a child in this context is likely to have widespread implications and may encompass surreptitious actions by parents with less than laudable motives." n223

[\*991] Adding to this concern is the fact that in some cases, conclusively proving or disproving that a parent truly acted in what he or she believed was the child's best interest — and without any ulterior motive — can be almost impossible. As one concerned author insightfully wrote, "when parents assert that they acted in the best interests of their children when recording a conversation, courts have no way to accurately check the assertion." n224 Along these lines, it is also possible that a parent might, in an attempt to avoid liability under Title III, "claim that the action was undertaken to protect the best interests of the child" n225 when that is not actually the case. In other words, a well-researched lawyer may be able to present evidence to the effect and argue that a parent was acting in a child's best interest at the time he or she recorded the child's conversation, when in fact the parent's motives were very different.

The *Pollock* case provides a good example of how this criticism might arise in the context of a real case. In *Pollock*, the ultimate issue of contention between the parties was custody of fourteen-year-old Courtney. n226 The girl's mother had recorded a handful of telephone conversations between her daughter and the girl's father. n227 When the civil suit for alleged Title III violations arose, the mother claimed that in recording the conversations she was acting out of concern for her daughter's well-being. n228 Courtney and her father, however, claimed that the true motive was a combination of retaliation and revenge on the part of the mother for previous instances of recording by Courtney and her father, and a desire to "overhear Courtney's confidential attorney client conversations with her lawyer." n229 After addressing these disputed facts and the vicarious consent doctrine, the Sixth Circuit ultimately refused to grant summary judgment in the matter. n230 The court wrote:

Given the conflicting evidence offered by the parties, we find that there is a dispute as to material facts, making this case inappropriate [\*992] for summary judgment. Thus, as in *Thompson*, while the doctrine of vicarious consent is properly adopted, there are questions of material fact as to Sandra's motivation in taping the conversations, and this issue should be submitted to a jury. n231

It is certainly possible, and probably even likely, that in this and other similar cases a jury would find it difficult to decide whether "the action was undertaken to protect the best interests of the child" n232 or whether such a claim is simply an attempt to avoid liability under Title III. Hence the criticism of the vicarious consent doctrine.

#### 2. The doctrine undermines a child's right to privacy

A second concern that some have expressed in relation to the doctrine of vicarious consent is that "the privacy interest[s] of both parent and child [are] seriously eroded by the [recognition] of a vicarious consent exception." n233 On this point, one commentator discussing the *Pollock* decision wrote:

A related problem with the vicarious consent doctrine is that it fails to address a minor's right to privacy. It is generally recognized among psychologists that a lack of privacy is detrimental to the development of the child. Scholars have spoken of the importance that increased privacy has on a child's development, noting a connection between deviant behavior and an invasion of privacy. n234

An application of the vicarious consent doctrine does result in some invasion of a child's privacy because parents who surreptitiously intercept telephone conversations will become privy to anything discussed in those conversations, including information about the child that is both positive and negative, personal and not personal. Because parents cannot predict which topics their child might discuss in advance of making or listening to a recording, they may learn more about the child than just what problems the child is experiencing or what dangerous situations the child might be in, thus going beyond the scope or intent of the vicarious consent doctrine.

[\*993] 3. The doctrine fails to recognize a child's right and ability to make his or her own choices

Another criticism leveled at the doctrine of vicarious consent is that it does not recognize, but instead ignores, the fact that as children grow older, their ability to consent to certain things or to make important decisions regarding their own lives increases. One commentator, addressing this issue in general and the *Pollock* decision in particular, wrote the following:

The first problem with the Sixth Circuit's decision revolves around [the child's] age and the consent issues it raises. In the other courts that adopted the doctrine, the child was much younger, usually under the age of ten years old. At the age of fourteen, assuming that she is mentally and emotionally mature, a child should have a greater capacity to consent on issues that affect her than someone who is a pre-teenager. Furthermore, studies conducted in the 1970s have shown that by the age of fourteen or fifteen, most children will demonstrate full adult competence and are therefore capable of providing informed consent. This raises the question, then, of whether it serves the interests of justice to allow a parent to fictitiously claim that she vicariously consented for her child, when her child is of both the age and maturity to consent for herself. n235

Therefore, the author concludes, "one of the weaknesses in *Pollock* is that it fails to adequately address the issue of a child's evolving capacity to consent, free from parental guidance, for herself." n236

As the author seems to indicate, this is a criticism that becomes more valid as the age of the child increases, n237 and is a criticism with which the *Thompson* court, based on its direct focus on the age of the children, would likely agree.

4. The doctrine may result in interfamily discord or resentment.

In addressing the vicarious consent doctrine, some commentators have further suggested that allowing one parent to make and use a surreptitiously recorded telephone conversation between the other parent and a child, or a child and a third party, will lead to significant family discord, and may also cause a child to resent one or both parents for their [\*994] interception and use of the communication. On this topic, one commentator wrote as follows:

The invasion of a child's privacy interest can have an extremely negative impact on the child's relationship with the parent who conducted the interception. The impact may not occur immediately, due to the child's age at the time of the electronic interception, but may occur years later when the child is old enough to understand the breach of his or her privacy interest. n238

In this vein, some have expressed that the doctrine may cause distrust within the family unit. As one author wrote, "contrary to protecting the child's best interest, there is a possibility that the vicarious consent doctrine could actually lead to the further deterioration of the family unit by creating an atmosphere of distrust" n239 between family members. Such a situation was clearly evident in the *Pollock* case, where fourteen-year-old Courtney appears to have resented her mother for intercepting Courtney's conversations with her father. n240

5. There is no express exemption in the statute.

A final argument that some critics of the vicarious consent doctrine have made is that, because there is no express domestic exemption in Title III, courts cannot create such an exemption. n241 In other words, these critics argue that



Congress would have included an express exception for domestic wiretapping if it had wanted to do so. n242 A handful of courts, addressing the issue of interspousal wiretapping (as opposed to parent-child wiretapping) have made just such an argument. n243 While this criticism is generally focused on cases involving a spouse who intercepts the other spouse's communications, it is applicable to the vicarious consent doctrine because the vicarious consent cases involve a form of domestic wiretapping. Similarly, critics argue that if Congress had wanted a vicarious consent exception, it would have created one. n244 Such was the position of the *Williams* court:

[\*995] [The language of Title III] gives us no indication that Congress intended to create an exception for a custodial parent of a minor child to consent on the child's behalf and tape record telephone conversations between the child and a third party. Were it the intent of Congress to create a safe harbor from liability for custodial parents recording the conversations of their children, it, too, could have easily done so. n245

Those who have made this argument have relied on sources such as the legislative history of Title III itself, which states that "[a] broad prohibition is imposed on private use of electronic surveillance, particularly in domestic relations and industrial espionage." n246 Interpreting this statement and the language of the statute literally, these courts and commentators have concluded that "there is no express exception for electronic surveillance between family members." n247 These courts and commentators have further argued that "there is no room in Title III for implied exceptions" such as the vicarious consent exception, as "the only exceptions to the prohibition against unauthorized interception of telephone conversations are those specifically listed in the statute." n248

Despite the existence of these concerns, a growing number of courts have adopted the vicarious consent doctrine since its advent in the 1993 *Thompson* decision. n249 As the doctrine continues to gain acceptance in both state and federal courts, judges in all jurisdictions should hold that the doctrine is valid in the criminal context as well as the family law context. Courts addressing the issue should further hold that prosecutors can use recordings of conversations secretly intercepted by parents in accordance with the principles of the doctrine in the prosecutions of either the minor child whose parents made the recording or a parent or other third party with whom the child has had an intercepted conversation.

### III. APPLYING THE DOCTRINE OF VICARIOUS CONSENT IN CRIMINAL PROSECUTIONS

When applied in situations involving criminal activity, the doctrine of vicarious consent can be an important tool for both concerned and loving parents and prosecutors. Courts facing situations in which a parent [\*996] has surreptitiously recorded a child's telephone conversations should recognize and accept a parent's right and authority to record their children's telephone conversations when a parent reasonably believes that their child is either a victim of a crime or is about to engage in criminal activity. Furthermore, criminal courts faced with the issue should hold that prosecutors can use those recordings as admissible evidence in prosecuting one or both of the parties to the conversation — including the child for whom the parent gave vicarious consent — in the event that a criminal case goes to trial.

The courts should so hold for three reasons. First, all courts should accept the vicarious consent doctrine because it is a legally viable doctrine in the sense that it is consistent with the language and legislative history of Title III. Furthermore, these same courts should accept the doctrine because it provides a legitimate benefit to society. Second, criminal courts should accept the vicarious consent doctrine because the doctrine's underlying principle — that of the protection of children — is clearly consistent with an application of the doctrine in the criminal context. Third, criminal courts should accept an application of the doctrine in the criminal context because a number of the criticisms leveled against the doctrine in the civil context are not as significant when it is applied in the criminal context, meaning a use in the criminal context is potentially more palatable to critics than a use in the civil realm.

#### *A. Defending the Doctrine: Why the Doctrine of Vicarious Consent is Both a Legally Viable and Socially Beneficial Doctrine*

A handful of courts and commentators have criticized the vicarious consent doctrine for the reasons stated above. n250 These criticisms notwithstanding, the doctrine of vicarious consent is a legally viable and socially beneficial doctrine, particularly when applied in the context of providing evidence for use in a criminal prosecution. As such, criminal courts should recognize the doctrine and hold that it is an acceptable use of parental authority. After so holding, these courts should further recognize the right of prosecutors to use recordings made in accordance with the principles of the vicarious consent doctrine during the trial of a party to the intercepted communication.

##### 1. The doctrine of vicarious consent is a legally viable doctrine.

The vicarious consent doctrine is a legally viable doctrine in the sense that its application is consistent with both

statutory and case law in [\*997] the area of eavesdropping and child privacy rights, as well as with the legislative history of Title III. Specifically, the doctrine is consistent with Title III and its legislative history in that the legislative history contains evidence of congressional intent to both exempt parental eavesdropping from the law and to allow courts to interpret the consent exception in a very broad manner that would allow for an application of the doctrine. Additionally, the doctrine is consistent with the principle that children have a diminished privacy interest in life's affairs such that the child's right to privacy is not excessively or unlawfully violated when a protective and concerned parent surreptitiously intercepts one or more of a child's telephone conversations.

*a. There is evidence of congressional intent to exempt parental eavesdropping from the law*

The doctrine of vicarious consent is legally viable because evidence indicates a congressional intent to exempt parental eavesdropping from Title III. On this subject, a handful of courts that have addressed the issue of vicarious consent have found that the legislative history to Title III provides evidence of such intent. In *Schieb v. Grant*, n251 for example, the Seventh Circuit Court of Appeals held that "we cannot attribute to Congress the intent to subject parents to criminal and civil penalties for recording their minor child's phone conversations out of concern for the child's well-being." n252 A few years later in *Campbell v. Price*, the Federal District Court for the Eastern District of Arkansas agreed, holding that "the Court is of the opinion that Congress did not intend to tread into the waters of domestic relations in situations . . . where a custodial parent is clearly acting in the good faith belief that his action furthers the best interests of his minor child." n253 In so holding, each of these courts referenced congressional testimony by one Professor Herman Schwartz, who testified before Congress that "now, we can see in certain circumstances where [the extension phone exception] makes some sense. I take it nobody wants to make it a crime for a father to listen in on his teenage daughter or some such related problem." n254 In referencing this statement, these courts have "found this statement . . . reflective of the general understanding of those involved in the legislative process regarding the [\*998] scope of the statute in situations involving parental eavesdropping on a minor child." n255

With respect to congressional intent and legislative history, it is important to distinguish between parent-child wiretapping and interspousal wiretapping, as they are "qualitatively different" n256 from one another. As referenced above, a number of courts have found that Title III prohibits interspousal wiretapping, or one spouse intercepting another spouse's telephone or other covered communications. n257 In doing so, these courts have referenced the legislative history of Title III and statements contained therein that refute the existence of an interspousal exception to the prohibitions of Title III. n258 That legislative history, however, seems to focus primarily on interspousal wiretapping, not parent-child wiretapping, and apart from Professor Schwartz's statement that "nobody wants to make it a crime for a father to listen in on his teenage daughter or some such related problem," n259 the legislative history contains a distinct "lack of testimony concerning parental wiretapping." n260 In short, there is nothing inconsistent about prohibiting interspousal wiretapping yet allowing parent-child wiretapping.

This position — that the prohibitions of Title III prohibit interspousal but not parent-child wiretapping — is one that has been accepted by at least two federal circuits. Specifically, in *Heggy v. Heggy* n261 and *United States v. Jones*, n262 the Tenth and Sixth Circuits held that Title III covers and therefore prohibits interspousal wiretapping. n263 These same circuits, however, in the aforementioned *Thompson* and *Pollock* decisions, have also held — without overruling *Heggy* and *Jones* — that the doctrine of vicarious consent is a viable legal doctrine. n264 Other courts have recognized [\*999] a distinction between interspousal and parent-child wiretapping as well. In *State v. Capell*, n265 for example, the Oregon Court of Appeals wrote the following:

Finally, the recording of conversations by a parent in the interest of a son's well-being simply is not the kind of concern that Congress had when it focused on interception of communications by private individuals. Rather, its concern was with wiretapping for purposes of commercial espionage and marital litigation. n266

In so holding, the court makes a very clear distinction between parent-child wiretapping and interspousal wiretapping done for the purpose of marital litigation, holding that Congress intended to prohibit one while allowing the other. n267 Based on these holdings, a strong argument can be made that the statements in the legislative history refuting the existence of an interspousal wiretapping exception are not inconsistent with Professor Schwartz's view of the law, referenced above, n268 and therefore that the vicarious consent doctrine is consistent with the underlying intent of Title III. In short, "applying the theory of vicarious consent in the parent-child context produces the most consistent result while respecting Congressional intent." n269

*b. The consent exception to Title III is to be interpreted broadly.*



Courts interpreting Title III have held that the existing one-party consent exception, which again allows an interception of a covered communication when one party to the communication consents to the interception, should be interpreted broadly. The *Thompson* court, for example, specifically held that "it is clear from case law that Congress intended the consent exception to be interpreted broadly." n270 Similarly, in *United States v. Amen*, n271 the Second Circuit Court of Appeals recognized that the consent needed to invoke the one-party consent exception can be either express or implied. n272 Specifically, the court held that "the legislative history shows that Congress intended the consent requirement to be construed broadly" and that "the Senate Report specifically says in relation to section 2511(2)(c): Consent may be expressed or implied." n273 [\*1000] In so holding, these courts have recognized that Congress did not enumerate all the ways that consent could be given under the one-party consent exception. They further illustrate that it is permissible to make reference to the legislative history when interpreting the one-party consent exception as that is exactly what the *Amen* court did in referencing the aforementioned Senate Report. n274 Such a view of the consent exception is consistent with the viability of the vicarious consent doctrine because the doctrine is not specifically enumerated in the statute and those courts that have accepted the doctrine have justified doing so by referencing those portions of the legislative history that reference the ability of a parent to intercept a child's telephone and other communications. n275 In short, when the consent exception is "construed broadly" there is more than enough room for the vicarious consent doctrine.

*c. The doctrine recognizes and is consistent with the long-accepted parental right to decide what is best for a child.*

It is a long-standing principle of law that parents have a right to decide what is best for their children — a view supported by those situations in which the law recognizes that a child needs parental consent in order to engage in a particular activity. n276 In this vein, many have argued that the courts should recognize that right by staying out of the majority of parent-child matters and refraining from making decisions on behalf of capable and responsible parents that go to the issue of how to raise a child. As one author wrote, "deference to parental decisions about their children stands as the nearly universal exception from self-determination under the Constitution." n277 In addressing the issue of a parent's right to consent for a child, another author noted that "supporters of parental consent on behalf of the child argue that the rights associated with being a parent are fundamental and basic rights; therefore, parents should be afforded wide latitude in making decisions for children, as they are in the best position to determine their child's needs." n278

[\*1001] The doctrine of vicarious consent is consistent with this long-accepted view of parental autonomy as it allows a parent to tape record a child's telephone conversations without fear of civil or criminal liability, and without the child's knowledge or approval, when the parent believes that doing so will further the child's best interest. n279 Specifically, it allows a parent to act on behalf of and make a decision for a child in consenting to an interception of a communication, and thereby shows some deference to parents in making certain decisions for their children. As one author wrote, "Congress entrusts parents with a right to decide on their children's behalf in many situations, so consenting to wiretapping of a telephone conversation seems a natural extension of those parental rights." n280 This is not to say that children do not have the ability to make choices on their own, and the doctrine does not seek to take away a child's opportunity to make his or her own choices in many areas of life. It simply recognizes the principle that "parental rights can be superior to children's rights, especially in light of the parents' responsibilities for the care and upbringing of their children." n281 In short, the vicarious consent doctrine acknowledges that in certain situations parents have a right to act on their children's behalf, even when such action goes against the child's wishes.

*d. A child has a diminished privacy interest in life's affairs that is not violated by the doctrine of vicarious consent.*

The doctrine of vicarious consent is legally viable because it allows parents to act without significantly violating a child's limited right to privacy. Though children have a right to privacy, that right is less significant than the right to privacy enjoyed by adults. In other words, there are areas in which children have a diminished right to privacy. The Eighth Circuit, addressing this issue, has stated that "not all constitutional rights have been made equally applicable to minors as to adults, and it is well established that the activities of children may be more tightly regulated than those of adults. In particular, a state may determine that a child is not possessed of full capacity for individual choice." n282 Addressing this same issue of a child's right to privacy and the vicarious consent doctrine, one author wrote the following:

[\*1002] While a fictitious consent may seem violative of privacy rights, commentators believe that children, while entitled to privacy, do not generally have the same expectations that adults do. Instead, it is often assumed that a parent will act in the best interests of the child, even if this means that the child's right to privacy is violated. n283

One of the benefits of the vicarious consent doctrine is that when it is appropriately applied — in situations in which

the parent truly is acting in what he or she believes to be the child's best interest — the child's right to privacy is generally only violated when the child truly is in a dangerous or difficult situation. When applied in these circumstances, the doctrine generally does not allow parents to intercept telephone calls to find out about a child's romantic interests, plans for the weekend, or other personal issues that do not present the child with a substantial potential for harm. In other words, it does not allow a parent to engage in a wholesale recording of a child's telephone conversations. Instead the parent is only permitted to intercept the child's communications, and therefore encroach upon the child's privacy, and do so without civil or criminal liability, when there can be a showing of parental concern for the child's well-being. n284 On this topic one commentator wrote the following:

By adopting the vicarious consent doctrine [in *Pollock*] the Sixth Circuit has effectively limited the number of cases where a parent can escape liability for recording his child's conversations. Under the "extension phone" exemption, parents were released from liability without any determination into their motives behind the recording. *Pollock* instead examines these motives, calling for a case-by-case determination that a parent had an objectively reasonable concern, and was acting in the best interest of the child. If the parent did not have such a concern, then he will be subjectively liable under the Federal Wiretapping Statute. By using a "good faith, objectively reasonable basis" for determining that a parent's consent was necessary, the Sixth Circuit subjects a parent's actions to much stricter scrutiny than was previously available. n285

Such a subjection of parental actions to a stricter scrutiny is appropriate because it protects the child's right to privacy in all situations except those that present a danger to the child, thus protecting the child's physical and emotional well-being, as well as the child's right to an appropriate level of privacy. This is particularly true when the parent is required to prove to a judge or jury that he or she was truly motivated by [\*1003] concern for the child. If a parent is unable to provide such proof, civil and criminal liability can attach, thus giving parents an incentive to invoke the doctrine only when its terms are truly met. In short, by permitting privacy to be compromised in only those situations in which it is necessary to protect the child, the vicarious consent doctrine allows for a more palatable and necessary invasion of privacy.

In summary, the vicarious consent doctrine is a legally viable doctrine because it recognizes and is consistent with the language and legislative history of Title III, those court decisions that have held that the consent exception should be interpreted broadly, and the long-accepted parental right to decide what is best for a child. For these reasons, courts addressing the legality of the doctrine should not hesitate to adopt it in appropriate situations.

## 2. The vicarious consent doctrine is a righteous or socially beneficial doctrine.

The vicarious consent doctrine is a righteous doctrine in the sense that recognition of the doctrine provides a significant benefit to society. The doctrine is beneficial to society because, in addition to assisting parents in fulfilling their obligation to promote their children's best interests, it helps to protect children against the undue influence of others. Furthermore, when parents act in an effort to further the welfare of their children, the doctrine protects them from the civil and criminal penalties that attach to violations of Title III and its state law counterparts.

*a. The doctrine protects and assists parents in fulfilling their parental obligation to protect their children against the undue influence of others.*

The vicarious consent doctrine is a socially beneficial doctrine because its underlying purpose is to protect children from the undue and unseemly influence of others, whether it be a parent, a sibling, or a non-family member who is seeking or would seek to negatively influence the child. Courts have recognized that there are times "when a child is under significant criminal influence by another and such criminal influence poses a genuine risk which is not recognized by a child of tender years," n286 and the doctrine aids concerned parents in protecting their children from these types of situations.

In this regard, it is a generally accepted principle of law that parents have a duty to protect their minor children. n287 This is because juveniles [\*1004] "often lack the experience, perspective, and judgment to recognize and avoid the choices that could be detrimental to them." n288 This duty to protect includes, but is not limited to, the obligation to "assess the daily risks the child confronts, and to make choices regarding the most appropriate and reasonable manner to protect the child," n289 as well as a more general "obligation to protect their children by assuring that they stay out of trouble and are kept safe from harm." n290 In some jurisdictions this duty is codified or set forth in case law. In Alabama, for example, the courts have held that "parents have a common law duty to protect their minor children." n291 The United States Supreme Court has also referenced a parental obligation to promote a child's best interests. n292 Perhaps the most significant aspect of the doctrine of vicarious consent — one that supports the view that the doctrine is a righteous

and socially beneficial doctrine — is that it assists parents in fulfilling this obligation or duty to protect their children and provides them with yet another effective way to learn and understand their children's needs and life situations. On this issue one commentator wrote the following:

Life is vastly different now than it was even a decade ago. Children are falling prey to dangerous temptations such as sex, drugs, alcohol, smoking, and gangs, and juvenile violence and crime have risen over the years. "Many changes have taken place in society that challenge the original presumption that parents are able to control their children effectively." Allowing parents to wiretap their children's phone conversations can help them gain access to information that might provide their children with appropriate medical or psychological treatment. Although some critics may argue that parents can be involved in their children's lives by remaining involved and focused in their children's daily activities, this criticism ignores the fact that many children have difficulty communicating with their parents. Resorting to surveillance tactics to keep children out of danger is a measure that clearly falls within the boundaries of parental [\*1005] duties, authority and care. In order for parents to exercise such authority, it is necessary that they not be subject to the risk of suit at the hands of their children. n293

As the author states, recognizing a vicarious consent exception will allow parents to monitor their children when doing so is in the children's best interest without subjecting the parent to civil and criminal liability, and will continue to do so as long as the parents' actions are based on a reasonable belief that such monitoring is necessary. n294

The facts of the cases that have adopted the principle of vicarious consent demonstrate how the doctrine achieves its aim of assisting parents in protecting their children. In *Bishop*, for example, the trial court adopted the doctrine with a view toward allowing parents to protect their children from sexual predators. n295 The same is true of the Massachusetts Appeals Court in the *Barboza* case. n296 In each of these cases, the surreptitious recording of telephone conversations, done in accordance with the principles of the vicarious consent doctrine, assisted the parents in pulling their children out of dangerous situations in which they were being both physically and emotionally victimized. n297 Had the parents in those cases been held criminally or civilly liable for recording their children's conversations with two dangerous sexual predators, their ability to protect their children would have been seriously curtailed. In other words, the principles underlying the vicarious consent doctrine assisted the parents in fulfilling their parental obligation to protect their children and promote their children's best interests without subjecting the parents to the penalties associated with violations of Title III.

Even critics of the doctrine will admit that it assists parents in protecting their children. For example, one court that flatly rejected the vicarious consent doctrine admitted that the doctrine potentially provides protection to children in need. n298 Specifically, the *Williams* court wrote that "we, too, can admittedly perceive situations where depriving a parent of the ability to vicariously consent for a child may deprive the child [\*1006] of the parent's ability to protect the child." n299 By assisting parents in protecting children against sexual predators and other unseemly people, the doctrine provides a very significant benefit to society.

*b. The doctrine of vicarious consent protects parents who act in an effort to help their children.*

The doctrine of vicarious consent is a socially beneficial and useful doctrine because it protects parents who act in an effort to protect their children. As stated above, the vicarious consent doctrine assists parents in protecting their children against dangerous people who would seek to take advantage of them. n300 Additionally, the doctrine also protects the parents as they attempt to act in a child's best interest. In the *Barboza* case, for example, the Massachusetts courts chose to apply the vicarious consent doctrine. n301 In doing so they not only assisted in protecting a vulnerable child, but also indirectly held that since the interception was not unlawful, the child's parents were not subject to any criminal or civil liability for their actions. n302 If the courts had ruled the other way, refusing to apply the doctrine and stating that the parents did not have a right to intercept their child's phone conversations with Barboza, they may very well have opened the door to a civil suit in which Barboza sought civil penalties against Tom's parents. n303 Additionally, a different ruling rejecting the vicarious consent doctrine and invoking the three types of penalties available for violations of Title III might also have made the same protective parents subject to criminal liability and might have disallowed the use of key evidence in the criminal case. n304 Had the court done so, the true winner in the whole case would have been Barboza, the perpetrator and sexual predator, and the losers would have been Tom's loving and protective parents — a clearly unfair and unfavorable result.

By ruling as it did, however, the Massachusetts court essentially ensured that Barboza's victim's parents were protected

from any civil or criminal actions based on violations of Title III, and thereby agreed with the Seventh Circuit Court of Appeals which, as referenced above, held that "we cannot attribute to Congress the intent to subject parents to [\*1007] criminal and civil penalties for recording their minor child's phone conversations out of concern for the child's well-being." n305 In short, in recognizing the doctrine, the court provided the parents some much needed protections as well as enhancing their ability to protect their young child from a dangerous sexual predator.

The doctrine of vicarious consent is both a legally viable and a socially valuable doctrine, and as such it should be accepted by all courts that have the opportunity to address a situation in which the doctrine might be of assistance to concerned and appropriately acting parents. And while the doctrine is both viable and righteous in all contexts, it is particularly so when the doctrine is applied in criminal cases. n306 For these reasons, criminal courts in particular should rush to accept the doctrine.

#### *B. The Underlying Principles of the Doctrine of Vicarious Consent Support Its Application in Instances of Suspected Criminal Activity*

As stated above, the doctrine of vicarious consent is based on a belief that parents have a right to protect their children from harm or injury, even if doing so requires them to make decisions on behalf of a child or temporarily invade a child's privacy. n307 Applying the doctrine to situations in which a parent suspects criminal activity or intent by one party to a conversation or the other is in no way inconsistent with these principles. In fact, such an application of the doctrine of vicarious consent is appropriate given that the concerns involved are very much consistent with the underlying principles of the doctrine. In this vein, the application of the doctrine of vicarious consent should be available both when a parent suspects that his or her own child is a victim of criminal activity and when a parent has reason to believe that his or her own child is planning or engaging in criminal activity. It should be available when the child is a criminal actor or is planning to become a criminal actor because criminal activity on the part of the child can be as harmful to the child as victimization by another person's criminal act.

##### 1. The Doctrine of Vicarious Consent When the Child Is a Victim of a Crime

At the core of the doctrine of vicarious consent is a desire to protect an at-risk child and to further his or her best interests. n308 As such, the doctrine is an easy fit in those situations in which a parent suspects that a [\*1008] child has been, is, or is about to become the victim of any type of crime, whether at the hands of the other parent or a third party. This is because, as stated above, recording a child's telephone conversations without a fear of criminal or civil liability may very well aid the parent in confirming that a child is in danger and discovering the source of that danger. n309 As one author wrote, "few people can deny that a child has a right to be protected from abuse, and that the best person to provide that protection is usually a parent." n310 Certainly in the *Barboza* case, referenced above, recording their son's conversations with Barboza assisted Tom's parents in putting an end to his victimization and initiated the prosecution of a dangerous man. The same is true in the *Bishop* case, referenced at the beginning of this article, and is or could be true in countless other situations.

Whether a child is being sexually abused, provided alcohol or illegal drugs, or may soon be the victim of some sort of violence, the victimization of a child can have significant negative effects on the child. These effects can be physical, mental, economic, or emotional in nature, and can affect the child in both the long and short term. n311 Any parent who has his or her child's best interests in mind will desire to spare that child any and all of these negative effects that accompany victimization by a criminal actor, and since the vicarious consent doctrine may help parents to ascertain that their child is in trouble, it is a perfect fit for these types of situations.

##### 2. The Doctrine of Vicarious Consent When the Child Is the Criminal Actor

If a parent has a right to record a child's telephone conversations when he or she believes that doing so will assist in protecting the child from another person's criminal acts, then a parent should also be permitted to record a child's telephone conversations when the parent believes that the child is engaging in criminal activity and thereby potentially victimizing someone else. While such recording does compromise the child's privacy, parents should be permitted to do so under the doctrine of vicarious consent for a number of reasons.

First, parents have a duty to protect their children from the dangers, penalties, and stigmas associated with criminal activity, all of which will [\*1009] negatively affect the child. n312 Parents also have a duty to protect society from a child's potentially harmful criminal actions. n313 When parents record a child's telephone conversations in an attempt to protect the child and the community from the negative effects of criminal activity, they are promoting the best interests of



their child and therefore the requirements of the vicarious consent doctrine will generally be met.

Furthermore, many jurisdictions make parents financially responsible for the criminal and negligent acts of their children, meaning parents have a financial interest in what their children do. n314 Allowing parents to intercept a child's communications in accordance with the standards set forth in *Thompson and Pollock* will further assist parents in protecting against the accumulation of financial liabilities. For these reasons, when the standards of the doctrine of vicarious consent are met, parents who surreptitiously intercept a child's telephone and other covered communications should not be found to be in violation of Title III, but should be permitted to monitor and investigate their children's actions in this manner. Furthermore, when prosecutors come into possession of such recordings they should be permitted to use the recordings in the prosecution of the child.

*a. Parents have a duty to protect their children from the dangers, stigmas, and penalties associated with criminal activity.*

The United States Supreme Court has stated that "society has a legitimate interest in protecting a juvenile from the consequences of his criminal activity." n315 These "consequences" come in many forms, as engaging in criminal behavior can be physically, mentally, and emotionally dangerous for young people. n316 The use of drugs, for example, can ruin a child's life both physically and mentally. n317 Additionally, buying and [\*1010] selling drugs can be a dangerous game. n318 Drug debts are very often enforced with violence and intimidation, n319 and a child or the family of a child can be in serious danger if the child associates with drug dealers who are willing to engage in violence or intimidation. n320 Avoiding dangerous [\*1011] situations that can arise when one commits these types of crimes is definitely in the best interest of any child. A parent who is able to ascertain that something like this is going on through recorded telephone conversations made in accordance with the principles of the doctrine of vicarious consent can then take the necessary steps to help the child—steps that otherwise might not be taken.

In addition to the dangers of drug use and interacting with drug dealers, other criminal behavior by minor children can put them in danger as well. For example, in some jurisdictions running away from home is considered a criminal offense, n321 and it is well documented that there are serious dangers that often accompany running away from home. n322 Danger can also attend property crimes, alcohol-related crimes, and violent crimes, as well as other crimes. n323

[\*1012] Parents have a duty to protect their children from these types of dangers, n324 and recording telephone conversations under the guidance of the doctrine of vicarious consent assists parents in performing that duty.

As long as the guardian has a good faith basis that is objectively reasonable for believing that it is necessary to consent on behalf of her minor children to the taping of the phone conversations, vicarious consent will be permissible in order for the guardian to fulfill her statutory mandate to act in the best interests of the child. n325

If a parent has a good faith basis to believe that a child is engaging in criminal activity that can bring harm to the child, and if the parent further believes that recording the child's conversations will assist in preventing or minimizing that harm, it is reasonable that the parent should exercise that privilege without violating the federal wiretap statute or any of its state counterparts. Such an exercise should be protected by the doctrine of vicarious consent in the criminal context just as it is in the family law context.

There are also penalties associated with criminal activity, and it is arguable that any concerned parent would hope his or her child could avoid even the possibility of being subject to those penalties. Juvenile detention, while important to purposes of community safety and accountability, is not an ideal place for a child to reside. Addressing the issue of detention in the state of New York, one family court judge wrote the following:

[\*1013] Then again, Juvenile Center, as much as we might try, is not the most pleasant place in the world. If you put them in detention, you are liable to be exposing these youngsters to all sorts of things. They are liable to be exposed to assault, they are liable to be exposed to sexual assaults. You are taking the risk of putting them together with a youngster that might be much worse than they, possibly might be, and it might have a bad effect in that respect. n326

Three United States Supreme Court justices agreed with these concerns in their dissent in *Schall v. Martin*, n327 writing that "the impressionability of juveniles may make the experience of incarceration more injurious to them than to adults, all too quickly juveniles subjected to preventive detention come to see society at large as hostile and oppressive and to regard themselves as irremediably delinquent." n328

Furthermore, some crimes committed by juveniles are deemed to be so serious that they can be charged in or waived into adult court where the penalties are generally much more severe. In Idaho, for example, the crimes of murder, attempted murder, robbery, rape, certain types of arson, and delivery of a controlled substance within one thousand feet of a school, among other crimes, are considered to be auto-waiver offenses, meaning if a juvenile fourteen years of age or older commits one of those crimes the case can be filed directly in adult court. n329 Additionally, other crimes can be transferred or waived to adult court if the act was committed after the juvenile reached the age of fourteen and a juvenile judge finds that the juvenile system cannot adequately deal with the juvenile and the crime that has been committed, or a transfer to adult court is otherwise [\*1014] appropriate. n330 That being the case, the juvenile bypasses the juvenile justice system and its lesser maximum penalties and becomes subject to adult penalties and incarceration in adult facilities. n331 Federal law also provides that in certain enumerated circumstances a juvenile appropriately found to be under federal jurisdiction can be proceeded against as an adult. n332

[\*1015] Criminal activity by a minor can also result in the imposition of other penalties, such as the suspension of a drivers license, imposition of fines and fees, community service, limitations on movement throughout the community, temporary or long-term removal from the family home, registration as a sex offender, full or partial waiver of a minor's Fourth Amendment right against unreasonable searches and seizures, and imposition of restitution. n333 If permitted to be applied in the criminal context, the vicarious consent doctrine would protect a parent from criminal or civil liability under Title III when that parent records a child's telephone conversations under a reasonable belief that doing so will somehow allow the parent to prevent the minor from committing a crime that would subject the child to these significant penalties. As the protection of the child's best interests is the hallmark of the vicarious consent doctrine, n334 [\*1016] it is clearly applicable in such a scenario. In fact, not only is it applicable, but its application can benefit both parent and child.

Finally, the stigma of a criminal conviction can significantly affect a child's life. While juvenile records are not as readily accessible as adult criminal records, they are not completely sealed in all states. n335 As such, when a potential employer or educational institution becomes aware of an applicant's criminal past, that fact might affect the child's chances at getting the job or getting into the school to which the child applies. Opportunities for military service may also be limited by a juvenile criminal record. As avoiding these consequences is in the child's best interests, criminal courts should hold that the doctrine of vicarious consent be made available to parents seeking to protect their children from these stigmas.

*b. Parents have a duty to protect both their children and the community at large from the negative effects that criminal activity has on society and the victims of crimes.*

Criminal activity affects more than the child who chooses to commit the crime. n336 Criminal activity also affects society in a number of different ways, and parents arguably have a duty to protect not only their child, but society as well from the negative effects of criminal acts committed by the child. n337 The effects of criminal activity on society include, among other things, increased insurance rates and premiums from insurance payouts following criminal activity, an increased need for law enforcement and other emergency services, physical and emotional injury to crime victims, costs associated with various victim services agencies, and large increases in state and local spending to prosecute and house criminals. n338 The vicarious consent doctrine will not solve all of society's ills, however, if it gives even a handful of parents the ability to protect their children from victimization and protect society from criminal acts committed by their children, it will have shown its worth as a legal principle. One commentator, addressing the role that the vicarious consent doctrine can play in these situations, wrote the following:

Many people blamed the parents of the students who committed the [Columbine High School] shootings, and were incredulous that the [\*1017] parents were unaware their children were planning such an elaborate scheme in their own home. Parental wiretapping is a reasonable solution in response to society's growing concern for the increasing violence that seems to be prevalent among today's youth. The dramatic increase in schoolyard violence strongly indicates that parents need to exercise authority and monitor their children's activities without fear of liability. Parental wiretapping provides the perfect tool to assist them. n339

Allowing parents the opportunity to monitor their children's activities and telephone conversations when they believe it is necessary to promote the child's best interest will provide parents with the ability to curtail criminal activity before it injures the child and society.

*c. The possibility of parental liability for a child's criminal acts gives parents a right to closely monitor their children's*



activities.

In addition to the parental duty to protect the child from the dangers, penalties, and stigmas associated with criminal activity, that parents can be held responsible for their children's criminal acts gives parents a right to do some investigation into their children's actions. The doctrine of vicarious consent allows such an investigation without sacrificing the child's right to privacy any more than is reasonably necessary to protect the child.

When it comes to criminal activity, parents are often held at least partially responsible — either financially or criminally — for acts committed by their children. In some states, this assignment of financial responsibility is affixed by statute. For example, California law requires that upon conviction for certain graffiti-related crimes, "if a minor is personally unable to pay any fine levied for [the crimes] the parent or legal guardian of the minor shall be liable for payment of the fine." n340 Similarly, Idaho law states that "unless the court determines that an order of restitution would be inappropriate or undesirable, it shall order the [offending] juvenile or his parents or both to pay restitution to or make whole any victim who suffers an economic loss as a result of the juvenile's conduct." n341 Texas is another state that has adopted a parental liability law. Texas' law reads:

A parent or other person who has the duty of control and reasonable discipline of a child is liable for any property damage proximately [\*1018] caused by: (1) the negligent conduct of the child if the conduct is reasonably attributable to the negligent failure of the parent or other person to exercise that duty; or (2) the wilful and malicious conduct of a child who is at least 10 years of age but under 18 years of age. n342

Many other jurisdictions have enacted similar laws. n343

In addition to financial liability, many jurisdictions impose criminal liability if a parent is found to have contributed to the delinquency of a child by means of neglect or otherwise. Under Kentucky law, for example, a "parent, guardian or other person legally charged with the care or custody of a minor is guilty of endangering the welfare of a minor when he fails or refuses to exercise reasonable diligence in the control of such child to prevent him from becoming a . . . delinquent child." n344 Missouri law provides another example of parental liability:

A person commits the crime of endangering the welfare of a child in the second degree if . . . being a parent, guardian, or other person legally charged with the care or custody of a child less than seventeen years old, he recklessly fails or refuses to exercise reasonable diligence in the care or control of such child to prevent him from coming within the provisions of the state's juvenile criminal laws. n345

Oklahoma has a parental responsibility law, which legislates that any parent who "knowingly and willfully . . . causes, aids, abets, or encourages any minor to be in need of supervision . . . [or] shall by any act or omission to act have caused, encouraged, or contributed to the . . . need of supervision of the minor . . . shall be deemed guilty of a misdemeanor." n346 Oklahoma law also provides for criminal liability if a parent fails to comply with a court's order for juvenile probation. n347 These types [\*1019] of parental liability laws have been in existence in the United States in various forms for more than one hundred years. n348

Because parents can be held financially and otherwise liable for criminal acts committed by their children, parents should be permitted to closely monitor their children's activities when they believe that doing so is in the child's best interest. This should include a right to record phone conversations between their child and an outside party when the principles of the vicarious consent doctrine are met. By allowing parents this type of opportunity, they will have a better chance to stop their children from engaging in criminal behavior that might ultimately affect the parent either financially or criminally, while still allowing their children to have a reasonable degree of privacy. n349

### 3. Applying the doctrine in the criminal context helps protect society from dangerous criminals.

One of the more significant benefits of applying the doctrine of vicarious consent in the criminal context, and thereby allowing for the use of intercepted telephone and other communications during a criminal trial, is that doing so can provide considerable protections to society. Permitting prosecutors to use recordings made in conformance with the principles of the vicarious consent doctrine would benefit society in a number of ways. Doing so will assist in protecting society from dangerous sexual predators or other criminals who would seek to take advantage of young children in one way or another. When, for whatever reason, victims do not disclose sexual abuse, as was the case in *Barboza and Bishop*, such abuse can be difficult to detect and properly investigate. n350 Recognizing the vicarious consent doctrine, and allowing parents to invoke it when the circumstances appropriately dictate, will assist parents in identifying those persons who are victimizing their children. Furthermore, sexual abuse cases such as *Barboza and Bishop* can be difficult to prosecute, and

allowing prosecutors to use these legally created recordings can only help in their efforts to take dangerous criminals off our streets — a benefit to everyone. In short, recognizing the doctrine of vicarious consent will "make . . . it easier to identify and locate the person(s) responsible for attempting to involve a child in criminal activity affecting the welfare or best interest of such child, as well as prosecute [\*1020] any person(s) responsible for engaging in criminal conduct involving such child as a victim." n351 The same is true when other types of crimes — such as drug-related crimes, property crimes, and violent crimes — are involved as well. n352

Conversely, by not recognizing the doctrine of vicarious consent, courts can potentially injure those they intend to protect. There is little doubt that "the absence of a vicarious consent doctrine could endanger children whose needs for protection would go unmet without it." n353 The *Williams* court, which rejected the doctrine, said as much in its opinion, stating that "we, too, can admittedly perceive situations where depriving a parent of the ability to vicariously consent for a child may deprive the child of the parent's ability to protect the child." n354 Additionally, by not allowing prosecutors to use recorded conversations as evidence, a court would actually provide an evidentiary benefit to the criminal, whose rights were in no way violated by state or private action as the parents who made the recording were acting on their own and the recordings were intercepted lawfully. In short, there is a significant possibility that not recognizing the vicarious consent doctrine will have negative effects on society in general and children in particular in that it will provide criminals with a better chance of escaping responsibility for their crimes.

As stated above, the vicarious consent doctrine is very much consistent with the language and congressional intent of Title III, as well as those long-standing principles of law that recognize the right and duty of parents to make certain decisions for and protect their children. n355 Additionally, the doctrine is consistent with and helps further the goals of protecting children and society from criminals, criminal acts, and the devastating consequences that can result when a child is either the victim or perpetrator of a crime. n356 When all these things are considered, it becomes clear that the vicarious consent doctrine and the criminal law intermingle and compliment each other to the degree that they can work together to benefit society without unnecessarily violating a child's right to privacy. For these reasons, criminal courts in both the state and federal systems should recognize the vicarious consent doctrine and when the situation arises such that communications are intercepted in conformance [\*1021] with the doctrine, permit the use of intercepted communications as evidence during the course of a criminal trial.

### *C. The Problems Associated with a Civil Use of the Doctrine Are Not As Significant When the Doctrine Is Applied in Criminal Cases*

As referenced in Part II C of this article, a number of criticisms have been leveled against the doctrine of vicarious consent, particularly as it has been used in civil custody disputes. While many of those criticisms have merit with respect to civil cases, they do not all carry over into the area of criminal prosecutions that are based in part upon telephone conversations surreptitiously recorded by a concerned parent. To put it another way, at least some of the criticisms or problems associated with a custody dispute or other civil use of the doctrine are not as significant when the doctrine is applied in a purely criminal case, and for that reason criminal courts should be willing to accept the vicarious consent doctrine.

#### 1. The doctrine is subject to misuse by conniving parents.

As stated above, one of the major criticisms leveled against the doctrine of vicarious consent, particularly in the civil context, is that it is subject to misuse by conniving or self-serving parents. n357 In the case of a custody dispute following the dissolution of a marriage or other child-bearing relationship, it is easy to see how parents fighting one another for the custody or for the perceived love of a child might have hard feelings toward the other parent — feelings that would interfere with or at least play into a parent's decision to intercept a child's phone conversations with the other parent. The facts of *Thompson* and *Pollock* lend credence to this view. Both cases involved custody disputes, and there were strong feelings of contempt between the bickering parents, which resulted in accusations of wrongdoing and impure motives in regard to the recording of the conversations at issue. The *Pollock* court noted this:

According to Samuel and Laura, Sandra was not motivated by concern for Courtney when she recorded the phone conversations. Instead, they contended that Sandra was angry that Courtney had taped a conversation between herself and Sandra with Samuel and Laura's consent, and "wanted to return the favor by taping Courtney's conversations with Sam and [Laura]." Laura further contends that . . . "Sandra's predominant motive in eavesdropping on the [\*1022] children's calls was to overhear Courtney's confidential, attorney-client conversations with her lawyer." n358

When proof of such motives exists, the doctrine of vicarious consent would not apply to protect the parent who is making tape recordings of a child's phone conversations. And in child custody situations, determining the real motivation behind a recording can be extremely difficult and alleging misuse of the doctrine can be extremely easy. In short, the use of the doctrine in the civil context does lend itself to the possibility of misuse by ill-motivated parents, or, at the very least, potentially harmful allegations of misuse. n359

The situation is different in those circumstances in which a parent records conversations between a child and a non-family member out of concern that the child is being victimized or is engaging or thinking about engaging in criminal behavior. In *Barboza*, for example, the minor's parents were both involved in the recording of his conversations with Barboza, and, as the court noted, "everything they did was . . . to try to figure out what was going on and what's right for their son and for their family." n360 It is apparent from the court's description of the facts and the motivations underlying the making of the recordings that there was no misuse of the doctrine by conniving or bickering parents in the *Barboza* criminal case as was alleged in the *Pollock* civil case. n361 There were no attempts by the parents to undermine one another or gather information to be used against the other spouse. n362 There was simply concern for the well-being of a child who was being abused by a sexual predator. n363 The same was true in the *Bishop* case, as that too was not a civil dispute between parents but a situation where parents were working together to protect a child. n364 In short, if a parent who suspects that a child is either a victim or an actor in the commission of a crime surreptitiously [\*1023] intercepts some of that child's telephone conversations in accordance with the principles of the vicarious consent doctrine — meaning it is done in an attempt to further the child's best interest and protect the child from either victimization or the negative effects that criminal activity can have on the criminal actor — it is more likely than not that the parent will be doing so not in an attempt to misuse or abuse the doctrine and get back at the other parent, but in an attempt to find out what is going on with a child so that the child can ultimately be protected from further victimization.

Furthermore, one of the issues brought up by critics of the doctrine in regard to misuse is the difficulty of proving whether or not a parent has good or pure motives. n365 In a *Barboza*-type situation, it should be much easier for a parent to make a showing of good faith because there is no custody dispute between parents to cloud the issue. Conversely, it should also be much more difficult for an abuser to show bad faith by the parent. In the *Barboza* case, for example, it is much easier to define parental motivations than it is in the *Pollock* case. And in those cases where the child is believed to be or is found to be the criminal actor, it would also be unlikely that there existed any bad faith on the part of the parent. At the very least, when there is concern that a child is engaging in criminal behavior, a parent who seeks to learn of the behavior will rarely be doing so in an attempt to get back at the minor child's other parent, at the child, or at the person with whom the child is conversing. For this reason, an appropriate application of the doctrine in the criminal context is far less problematic with respect to the possibility of parental misuse than it might be in a civil context.

## 2. The doctrine fails to recognize a child's right and ability to make his or her own choices.

Some critics have argued that the doctrine of vicarious consent fails to recognize a child's right and ability to make his or her own decisions or choices. n366 This can be true in the civil context when the child is in the middle of a custody battle and choices loom regarding which parent the child should live with — a potentially life-changing decision for the child — or over which parent is more fit to care for children. This argument is not as strong in the context of criminal activity as it is in other contexts, however, as children, like adults, do not have an inherent right [\*1024] to choose to engage in criminal activity. n367 For example, in situations such as those at issue in the *Bishop* or *Barboza* cases, n368 a child cannot legally choose or consent to have sexual intercourse with an adult, as the law generally recognizes that it is illegal for adults to have sexual contact with minors. n369 Similarly, the law will not recognize a minor child's right to choose to distribute illegal drugs, steal or destroy property belonging to someone else, or physically injure another person. n370 While people can lawfully go into a court of law and address custody issues and the child's views and choices with respect to that issue, they cannot do so with respect to a choice to commit criminal acts. In short, allowing a use of the vicarious consent doctrine in the criminal context — in cases in which a parent is seeking to protect a child from victimization or from the results of his or her own criminal activity — the minor child does not have any lawful choices taken away. In other words, the use of the doctrine in that context does not take away any choices that the law recognizes that the child has a right to make.

## 3. The doctrine may result in interfamily discord or resentment.

One legitimate criticism of the vicarious consent doctrine, addressed above, is that its application may result in interfamily discord. n371 If a child wishes to engage in criminal behavior or is consenting to victimization at the hands of a third party, it is possible that interfamily discord or resentment could be an immediate result of a parent recording a

child's telephone conversations. This, admittedly, is as true in the criminal context as the civil context. However, when the child is sufficiently removed from the dangerous situation, or as the child matures later in life and realizes the danger (he or she was in, those feelings will hopefully [\*1025] change. The *Bishop* case provides an example of the change of heart that can potentially take place in these types of situations. In *Bishop*, the thirteen year-old victim initially refused to cooperate with law enforcement and "denied that she and Bishop had engaged in any illicit behavior." n372 Later on, however, after she had been removed from the situation and Bishop was no longer able to exert any influence over her, "the victim specifically testified that . . . she was glad her parents made the tapes." n373 Because recordings made in the criminal context, unlike civil contexts, generally will not involve a parent sneaking around and trying to find information about the child's views on custody or attempting to gather evidence of abuse by the other parent, it is at least possible that a child will one day have an easier time seeing that the parent have pure motives and thereby accepting their decision as a correct one. At the very least, that is the case when comparing the situations found in *Bishop* and *Pollock*.

#### IV. PROCEDURAL ISSUES AND THE USE OF THE VICARIOUS CONSENT DOCTRINE IN A CRIMINAL PROSECUTION

Because the taping of conversations that fit within the parameters of the doctrine of vicarious consent is legal in those jurisdictions that recognize the doctrine, prosecutors should be permitted to use those recordings in criminal proceedings, including proceedings against the child for whom the parents consented. This is because those recordings are deemed lawfully made and are not the result of inappropriate government action. n374 However, because such a recording would be presumptively illegal save for the fact that the circumstances are such that the doctrine of vicarious consent applies, n375 prosecutors should bear the burden of proving that the core elements of the doctrine are met before a recording can be deemed admissible in a trial or other hearing. Specifically, when the admissibility of the recordings is challenged, prosecutors should be required to provide the court with proof that the recordings were made by a parent because of concern for a minor child's welfare and a belief that doing so would promote the child's best interests, and not for some other inappropriate reason. n376 When prosecutors are unable to do so, courts [\*1026] should appropriately refuse to allow the admission of those recordings at a criminal trial. When the prosecutor is able to do so, however, courts should recognize the fact that the recordings were not illegally made and therefore should be deemed admissible at a criminal trial.

#### V. CONCLUSION

In 1993, in the case of *Thompson v. Dulaney*, the United States District Court for the District of Utah held for the first time that a parent or guardian can surreptitiously record a minor child's telephone conversations without violating Title III when the parent has a good faith and objectively reasonable belief that doing so is in the best interest of the child. n377 Since that time a small handful of courts and one progressive state legislature have adopted this holding, which has become known as the doctrine of vicarious consent. n378 While the doctrine has its critics, it is a legally viable and socially beneficial doctrine that should be more widely utilized throughout the United States in both the federal and state legal systems. n379 In particular, until more states follow the lead of the Georgia Legislature and codify the doctrine of vicarious consent, n380 it should be more widely accepted by the criminal courts such that prosecutors should be permitted to use surreptitiously intercepted communications in criminal trials when the recording is obtained in accordance with the doctrine.

Criminal courts should recognize the doctrine and allow use of surreptitiously recorded conversations for a handful of reasons. First, as stated above, the doctrine is both legally viable and socially beneficial. n381 The doctrine is legally viable in the sense that its acceptance is consistent [\*1027] with the legislative history to Title III and the view that the one-party consent exception contained in Title III should be interpreted broadly. n382 Additionally, the doctrine recognizes and is consistent with the long-standing principle that parents have a right to decide what is best for their children, even if it causes the children to suffer some invasion of privacy. n383 The doctrine is socially beneficial in that it provides some degree of protection to both children and parents who wish to look out for their children's best interests. n384 Second, criminal courts should recognize the doctrine of vicarious consent because it helps to further the goals of criminal law without causing an excessive violation of a child's or a defendant's privacy. n385 Specifically, the doctrine assists law enforcement and prosecutors in prosecuting dangerous criminals and, at the same time, works to protect children and society from the dangers, penalties, and other negative effects of criminal activity. n386 And because recordings that meet the standards of the doctrine are deemed lawfully obtained, the criminal's right to privacy in the original communication is in no way violated. Finally, while critics argue that the doctrine is flawed, its problems are not nearly as significant when the doctrine is applied in the criminal cases as they are in those civil cases in which the doctrine



is applicable. n387

For these reasons, until more legislatures codify the doctrine, criminal courts faced with the issue of dealing with a surreptitiously recorded telephone conversation between a minor child and another person should choose to accept the vicarious consent doctrine in such a way that parents and prosecutors can use the telephone conversations to protect both the minor child and society as a whole.

**FOOTNOTES:**

n1 *Bishop v. State*, 526 S.E.2d 917, 918 (Ga. Ct. App. 1999).

n2 *Id.*

n3 *Id.*

n4 *Id.*

n5 *Id.*

n6 *Id.*

n7 *Id.* at 919.

n8 *Id.*

n9 *Id.*

n10 *Id.*

n11 *Id.*

n12 *Id.* at 920.

n13 *Id.* at 919.

n14 See *infra* Part II B 2.

n15 *Bishop*, 526 S.E. 2d at 920.

n16 See *infra* Part II B.

n17 See *infra* Part II B 2.

n18 Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (codified as amended at 18 U.S.C. §§ 2510-2522 (2000)).

n19 *United States v. Giordano*, 416 U.S. 505, 515 (1974). The stated purpose of Title III, as found in its legislative history, is to "prohibit[] all wiretapping and electronic surveillance by persons other than duly authorized law enforcement officials engaged in the investigation of specified types of major crimes after obtaining a court order, with exceptions provided for" in the code. S. REP. No. 1097 (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2113.

n20 Title III was enacted, in part, because of concerns that the Federal Communications Act did not adequately protect the privacy rights of the American people. See S. REP. No. 1097 (1968), reprinted in 1968 U.S.C.C.A.N.

2112, 2154.

n21 The amendment was part of the Electronic Communications Privacy Act of 1986. See Shana K. Rahavy, Note, *The Federal Wiretap Act: The Permissible Scope of Eavesdropping in the Family Home*, 2 J. HIGH TECH. LAW 87, 87 (2003).

n22 See *Gelbard v. United States*, 408 U.S. 41, 48 (1972) (holding that the overriding concern of the drafters of Title III was the protection of privacy). See also Rahavy, *supra* note 21, at 87 (writing that Title III was enacted to "better articulate a balance between the privacy rights of individuals and the legitimate needs of law enforcement").

Title III's legislative history also addresses this issue, stating that the "dual purpose" of the legislation is to "protect[] the privacy of wire and oral communications" and to "delineate on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized." S. REP. NO. 1097 (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2153. In this regard, one major impetus for the passage of Title III was the concern that advances in technology had led to more widespread invasions of personal privacy. Congress addressed this concern in the legislative history:

The tremendous scientific and technological developments that have taken place in the last century have made possible today the widespread use and abuse of electronic surveillance techniques. As a result of these developments, privacy of communication is seriously jeopardized by these techniques of surveillance. Commercial and employer-labor espionage is becoming widespread. It is becoming increasingly difficult to conduct business meetings in private. Trade secrets are betrayed. Labor and management plans are revealed. No longer is it possible, in short, for each man to retreat into his home and be left alone. Every spoken word relating to each man's personal, marital, religious, political, or commercial concerns can be intercepted by an unseen auditor and turned against the speaker to the auditor's advantage.

*Id.* at 2154. Unlike the Fourth Amendment, which prohibits unreasonable searches and seizures by government actors, the restrictions found in Title III apply to government and private persons alike.

n23 388 U.S. 41 (1967).

n24 *Id.* at 63.

n25 S. REP. NO. 1097 (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2153. The Supreme Court found New York's eavesdropping statute to be unconstitutional as it was "too broad in its sweep [and] result[ed] in a trespassory intrusion into a constitutionally protected area." *Berger*, 388 U.S. at 44.

n26 389 U.S. 347 (1967).

n27 *Id.* at 353.

n28 On this issue, the legislative history specifically states that "this proposed legislation conforms to the constitutional standards set out in *Berger v. New York* and *Katz v. United States*." S. REP. NO. 1097 (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2113 (citations omitted).

n29 *United States v. Giordano*, 416 U.S. 505, 507 (1974).

n30 Rahavy, *supra* note 21, at 88 (citing *Gelbard v. United States*, 408 U.S. 41, 48 (1972)).

n31 *Giordano*, 416 U.S. at 514-15.

n32 *Id.* at 515.

n33 *Id.*



n34 *Id.* at 515-16.

n35 *See id.* at 527 ("We think Congress intended to require suppression where there is failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of the intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device").

n36 S. REP. NO. 1097 (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2156.

n37 *Id.*

n38 *Id.*

n39 18 U.S.C. § 2511(4)(a) (2000)

n40 *Id.* § 2520(a).

n41 *Id.* § 2520(b). The law provides that the complaining party can collect statutory or actual damages but not both.

In [an] action under this section [that does not involve the private viewing of an unscrambled private satellite video communication or an unscrambled radio communication] the court may assess damages whichever is the greater of — (A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or (B) statutory damages of whichever is the greater of \$100 a day for each day of violation or \$10,000

*Id.* § 2520(c)(2).

n42 *Id.* § 2515.

n43 S. REP. NO. 1097 (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2185

n44 *Id.*

n45 *Id.*

n46 *United States v. Giordano*, 416 U.S. 505, 515 (1974).

n47 18 U.S.C. § 2511(2)(d) (2000)

n48 *Id.*

n49 *See id.*

n50 *See id.*

n51 *See id.*

n52 *See infra* Part II B.1.

n53 Deana A. Labriola, Comment, *Parent-Child Wiretapping: Is Title III Enough?*, 50 *CATH. U.L. REV.* 429, 430 (2001).

n54 One author summarized the positions of both sides as follows:

Despite its roots in combating organized crime, some commentators argue that Congress intended that the Act include domestic wiretapping within its purview. These commentators cite Congress's failure to make any exception for domestic wiretapping as support for this proposition. In addition, Professor Robert Blakey, widely recognized as the author of the Federal Wiretapping Statute, was concerned that the Act as first drafted was deficient in that it relied on the Commerce Clause, and would therefore fail to protect individuals from wiretapping resulting from marital litigation. Congress's subsequent revision of the Statute to include a different constitutional justification can be seen as evidence of its intent that the Act reach domestic communications, in addition to those of organized crime. Furthermore, several senators spoke of the problem of domestic wire-tapping during the debates on the Right of Privacy Act, the early version of the Statute. Senator Long, for one, stated that the three largest areas of snooping in the nongovernmental field included "(1) industrial, (2) divorce cases, and (3) politics." Other senators also spoke of the broad prohibition that the Statute placed upon wiretapping in areas such as domestic relations.

However, one can also argue that the record from hearings before the House Judiciary Committee reflects an additional intent to allow for a certain degree of parental wiretapping. For example, Professor Herman Schwartz, testifying before the House, stated that "I take it nobody wants to make it a crime for a father to listen in on his teenage daughter or some such related problem." Courts have since interpreted this to mean that Congress did not mean to subject parents to civil and criminal penalties for recording their children's phone calls out of concern for their child's well-being.

Juleann Karkosak, Note, *Tapping into Family Affairs: Examining the Federal Wiretapping Statute As It Applies to the Home*, *Pollock v. Pollock*, 68 U. CIN. L. REV. 995, 999-1000 (2000) (citations omitted). See also Labriola, *supra* note 53, at 447-53.

n55 The two circuits that have found interspousal wiretapping to be outside the purview of Title III are the Second and Fifth circuits. See *Anonymous v. Anonymous*, 558 F.2d 677, 677 (2nd Cir. 1977) ("We . . . assume that nobody wants to make it a crime' for a father to listen in on conversations between his wife and his eight year old daughter, from his own phone, in his own home. The fact that appellee here taped the conversations which he permissibly overheard, we find . . . to be a distinction without a difference."), *Simpson v. Simpson*, 490 F.2d 803, 805 (5th Cir. 1974) ("We are of the opinion that Congress did not intend [to have Title III extend] into areas normally left to states, those of the marital home and domestic conflicts."). Those which have reached a contrary finding include the Fourth, Sixth, and Tenth circuits. See *Heggy v. Heggy*, 944 F.2d 1537, 1539 (10th Cir. 1991) ("The district court below held that Title III . . . does apply to interspousal wire-taps. We agree with the district court, and join the majority of federal circuit courts in holding that Title III does provide a remedy for such wiretapping"), *Pritchard v. Pritchard*, 732 F.2d 372, 374 (4th Cir. 1984) ("We find that Title III prohibits all wiretapping activities unless specifically excepted. There is no express exception for instances of willful, unconsented to electronic surveillance between spouses. Nor is there any indication in the statutory language or in the legislative history that Congress intended to imply an exception to facts involving interspousal wiretapping."); *United States v. Jones*, 542 F.2d 661, 673 (6th Cir. 1976) ("The plain language of the section and the Act's legislative history compels interpretation of the statute to include interspousal wiretaps").

n56 Rahavy, *supra* note 21, at 87.

n57 Allan H. Zerman & Cary J. Mogergerman, *Wiretapping and Divorce: A Survey and Analysis of the Federal and State Laws Relating To Electronic Eavesdropping and Their Application in Matrimonial Cases*, 12 J. AM. ACAD. MATRIM. LAW 227, 228 (1994). For additional discussion on the issue of whether there exists an interspousal exception to the federal wiretap statute from the stand-point of one who believes that there is no such exception, see Scott J. Gluck, *Is Your Spouse Taping Your Telephone Calls? Title III and Interspousal Electronic Surveillance*, 41 CATH. U. L. REV. 845 (1992).

n58 The state wiretap statutes are codified in the following locations: Alabama (*ALA. CODE* §§ 13A-11-31 to-33 (2005)); Alaska (*ALASKA STAT.* § 42.20.310 (Michie 2005)); Arizona (*ARIZ. REV. STAT.* § 13-3005 (2005)); Arkansas (*ARK. CODE ANN.* § 5-60-120 (Michie 2005)); California (*CAL. PENAL CODE* § 632 (West 2005)); Colorado (*COLO. REV. STAT.* § 18-9-303 (2005)); Connecticut (*CONN. GEN. STAT.* § 53a-189 (2005)); Delaware (*DEL. CODE ANN. tit. 11, § 2402* (2005)); District of Columbia (*D.C. CODE ANN.* § 23-542 (2005)); Florida (*FLA. STAT. ANN.* 934.03 (West 2005)); Georgia (*GA. CODE ANN.* § 16-11-62 (2005)); Hawaii (*HAW.*

REV. STAT. § 803-42 (2005)); Idaho (IDAHO CODE § 18-6702 (Michie 2005)); Illinois (720 ILL. COMP. STAT. 5/14-2 (2005)); Indiana (IND. CODE § 35-33.5-5-5 (2005)); Iowa (IOWA CODE §§ 727.8, 808B.2 (2005)); Kansas (KAN. STAT. ANN. § 21-4002 (2005)); Kentucky (KY. REV. STAT. ANN. § 526.020 (Banks-Baldwin 2005)); Louisiana (LA. REV. STAT. ANN. § 15:1303 (West 2005)); Maine (ME. REV. STAT. ANN. tit. 15, § 710 (West 2005)); Maryland (MD. CODE ANN., CTS. & JUD. PROC. § 10-402 (2005)); Massachusetts (MASS. GEN. LAWS ch. 272, § 99(c)(1) (2005)); Michigan (MICH. COMP. LAWS § 750.539c (2005)); Minnesota (MINN. STAT. § 626A.02 (2005)); Mississippi (MISS. CODE ANN. § 41-29-533 (2005)); Missouri (MO. REV. STAT. § 542-402 (West 2005)); Montana (MONT. CODE ANN. § 45-8-213 (2005)); Nebraska (NEB. REV. STAT. § 86-290 (2005)); Nevada (NEV. REV. STAT. § 200.620 (2005)); New Hampshire (N.H. REV. STAT. ANN. § 570-A:2 (2005)); New Jersey (N.J. STAT. ANN. § 2A-156A-3 (2005)); New Mexico (N.M. STAT. ANN. § 30-12-1 (Michie 2005)); New York (N.Y. PENAL LAW § 250.05 (2005)); North Carolina (N.C. GEN. STAT. § 15A-287 (2005)); North Dakota (N.D. CENT. CODE § 12.1-15-02 (2005)); Ohio (OHIO REV. CODE ANN. § 2933.52 (West 2005)); Oklahoma (OKLA. STAT. tit. 13, § 176.3 (2005)); Oregon (OR. REV. STAT. § 165.543 (2005)); Pennsylvania (18 PA. CONS. STAT. ANN. § 5703 (2005)); Rhode Island (R.I. GEN. LAWS § 11-35-21 (2005)); South Carolina (S.C. CODE ANN. § 16-17-470 (Law Co-op 2005)); South Dakota (S.D. CODIFIED LAWS § 23A-35A-20 (Michie 2005)); Tennessee (TENN. CODE ANN. § 39-13-601 (2005)); Texas (TEX. CODE CRIM. P. ANN. art. 18.20 (Vernon 2005)); Utah (UTAH CODE ANN. § 76-9-403 (2005)); Virginia (VA. CODE ANN. § 19.2-62 (2005)); Washington (WASH. REV. CODE § 9.73.030 (2005)); West Virginia (W. VA. CODE § 62-1D-3 (2005)); Wisconsin (WIS. STAT. § 968.31 (2005)); and Wyoming (WYO. STAT. ANN. § 7-3-702 (Michie 2005)). Vermont is the only state that has not adopted its own state wiretapping statute. There are some protections in place in that state, however, as the Vermont Supreme Court has held that the surreptitious electronic monitoring of communications within a person's home is an unlawful invasion of privacy. See generally *Vermont v. Geraw*, 795 A.2d 1219 (Vt. 2002); *Vermont v. Blow*, 602 A.2d 552 (Vt. 1991).

For more information on the various state wiretapping statutes, see generally Stacy L. Mills, Note, *He Wouldn't Listen To Me Before, But Now . . . : Interspousal Wiretapping and an Analysis of State Wiretapping Statutes*, 37 BRANDEIS L.J. 415 (1998).

n59 Specifically, those states that have adopted a one-party consent exception similar to that contained in Title III are Alabama, Alaska, Arizona, Arkansas, Colorado, Delaware, District of Columbia, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Wisconsin, and Wyoming. Gary L. Bostwick & Jean-Paul Jassy, *Flanagan's Wake: Newsgatherers Navigate Uncertain Waters Following Flanagan v. Flanagan*, 23 LOY. L.A. ENT. L. REV. 1, 10 n.51 (2002).

n60 OHIO REV. CODE ANN. § 2933.52(A)(1) (2005)

n61 § 2933.52(B)(4)

n62 With respect to civil damages, Ohio law provides that "[a] person whose wire, oral, or electronic communications are intercepted, disclosed, or intentionally used in violation [of Ohio law] may bring a civil action to recover from the person or entity that engaged in the violation any relief that may be appropriate." § 2933.65(A)

n63 TEX. PENAL CODE ANN. §§ 16.02(b), (c), 3(a) (2005)

n64 See § 1602(b).

n65 *Commonwealth v. Vitello*, 327 N.E.2d 819, 834 (Mass. 1975); see also *People v. Conklin*, 522 P.2d 1049, 1057 (Cal. 1974) ("The legislative history of Title III reveals that Congress intended that the states be allowed to enact more restrictive laws designed to protect the right of privacy . . . The State statute must meet the *Minimum standards* reflected as a whole in [Title III. If it does so, then the State] would be free to adopt *More restrictive* legislation, or no legislation at all, but not less restrictive legislation. In other words, Congress left room for the states to supplement the law in certain areas, provided the regulations are not more permissive.") (italics added); *United States v. Mora*, 821 F.2d 860, 863 n.3 (1st Cir. 1987) ("Generally speaking . . . states are free to superimpose more

rigorous requirements upon those mandated by the Congress, but not to water down federally-devised safeguards.") (citations omitted). Under this standard, it is possible that evidence admissible in federal court could be excluded in state court under a more restrictive wiretap law. For a discussion of the differences among the various state wiretap statutes, see Mills, *supra* note 58, at 4129.

n66 States adopting a more stringent law include: California, Connecticut, Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, New Hampshire, Pennsylvania, and Washington. See James A. Pautler, *You Know More Than You Think, State v. Townsend, Imputed Knowledge and Implied Consent Under the Washington Privacy Act*, 28 SEA. U. L. REV. 209, 211 n. 18 (2004). Additionally, while Nevada's state statute does not require the consent of all parties to a conversation, the Nevada Supreme Court has held that such consent is necessary. See generally *Lane v. Allstate Ins. Co.*, 969 P.2d 938 (Nev. 1998).

n67 CAL. PENAL CODE § 632(a) (2005) (emphasis added).

n68 See *id.*

n69 § 637.2 ("Any person who has been injured by a violation of this chapter may bring an action against the person who committed the violation for the greater of the following amounts: (1) Five thousand dollars (\$ 5,000) (2) Three times the amount of actual damages, if any, sustained by the plaintiff.")

n70 See *infra* Part II B.2.a.

n71 See *supra* Part II. A.

n72 See *infra* Part II B.2.a.

n73 See *id.*

n74 See *id.*

n75 See *id.*

n76 See *id.*

n77 See *infra* Part II B.2.b.

n78 See *id.*

n79 See *id.*

n80 838 F. Supp. 1535 (D. Utah 1993).

n81 *Id.* at 1537.

n82 *Id.* at 1537-38.

n83 *Id.* ("[Thompson] sought several million dollars in compensatory and punitive damages" from a handful of individuals, including his ex-wife, her parents, and her attorneys for the alleged wiretap.)

n84 *Id.* at 1544.

n85 *Id.* at 1542.

n86 The opinion in which the district court developed the concept of vicarious consent was actually its second

ruling on the motion. See *Thompson v. Dulaney*, No. 2:90CV00676 (Docket) (D. Utah Aug. 15, 1990), *aff'd in part, rev'd in part, and remanded*, 970 F.2d 744 (10th Cir. 1992). In 1991, upon remand, the district court ruled that the case was outside the purview of Title III because it was purely a domestic conflict. See *Thompson*, 970 F.2d at 746. That holding was later reversed in part and Denise Dulaney was given another chance to go forward with her motion. *Id.* at 750.

n87 *Thompson*, 838 F. Supp. at 1544. In addressing the narrowness of its holding, the court emphasized more than once that its holding was very fact-specific:

It is by no means intended to establish a sweeping precedent regarding vicarious consent under any and all circumstances. The holding of this case is clearly driven by the fact that this case involves two minor children whose relationship with their mother/guardian was allegedly being undermined by their father. Under these limited circumstances, the Court concludes that vicarious consent is permissible.

*Id.* at 1544 n.8. One important fact that the court alludes to above in reaching its holding is the age of the children whose conversations were being recorded. It wrote:

The children in this case were ages three and five. They clearly lacked legal capacity to consent, and they could not, in any meaningful sense, have given actual consent, either express or implied, since they were incapable of understanding the nature of consent and of making a truly voluntary decision to consent.

*Id.* at 1543. Based on these and other statements contained in the opinion, it is arguable that the *Thompson* court would not be as liberal in the application of the vicarious consent doctrine to other fact scenarios.

n88 *Id.* at 1544.

n89 *Id.* at 1543.

n90 *Id.*

n91 *Id.* at 1544.

n92 *Id.*

n93 *Thompson*, 838 F. Supp. at 1544.

n94 *Id.* at 1545.

n95 *Id.* On this point the court further stated that any determination of whether or not a parent or guardian "has a good faith basis . . . for believing that it is necessary to consent on behalf of [a] minor [child]" is a question of fact that can only be decided after the presentation of evidence on the issue. *Id.*

n96 *Id.* at 1545, 1548.

n97 680 So.2d 368 (Ala. Civ. App. 1996).

n98 *Id.* at 369.

n99 *Id.* at 370-71.

n100 *Id.* at 371-72.

n101 *Id.* at 371.

n102 See *Thompson v. Dulaney*, 838 F. Supp. 1535, 1544 (D. Utah 1993).



n103 154F.3d601 (6th Cir. 1998).

n104 *Id.* at 603.

n105 *Id.*

n106 *Id.* at 604.

n107 *Id.*

n108 *Id.* at 605.

n109 *Id.*

n110 *Pollock, 154 F.3d at 605.*

n111 *Id.*

n112 *Id.* at 610.

n113 *Id.* (citations omitted).

n114 *Id.*

n115 *Id.*

n116 *Id.* at 608.

n117 *Id.* at 604.

n118 *Id.* at 608 (quoting *Thompson v. Dulancy*, 838 F. Supp. 1535, 1543 (D. Utah 1993)) (alteration in original)

n119 *Id.* (citing *Pollock v. Pollock*, 975 F. Supp. 974, 978 n.2 (W.D. Ky. 1997)).

n120 *Id.* at 610.

n121 *See id.*

n122 *Id.*

n123 *Id.* In addition to *Thompson*, *Silas*, and *Pollock*, a handful of other courts have accepted the doctrine of vicarious consent. Other civil cases include *Campbell v. Price*, 2 F. Supp. 2d 1186, 1191 (E.D. Ark. 1998) ("To be entitled to summary judgment, Mr. Price's intercepting the telephone conversations must have been founded upon a good faith belief that, to advance the child's best interests, it was necessary to consent on behalf of his minor child.") and *Kroh v. Kroh*, 567 S.E.2d 760, 764 (N.C. Ct. App. 2002) ("While our courts have not addressed this issue, federal courts construing the Omnibus Act have considered and adopted the vicarious consent doctrine. . . . As we find the reasoning of these cases persuasive, we adopt the vicarious consent doctrine with respect to our Electronic Surveillance Act . . . as long as the parent has a good faith, objectively reasonable belief that the interception of [the] conversations is necessary for the best interests of the child[.]" ) (citations omitted). *See also Stinson v. Larson*, 893 So. 2d 462 (Ala. Civ. App. 2004) (holding a mother's recording of a minor child's telephone conversations with father as proper under the Electronic Communications Privacy Act).

n124 *See, e.g., Commonwealth v. Barboza*, 763 N.E.2d 547 (Mass. App. Ct. 2002) and cases cited *infra* note 155.

n125 *See, e.g., Barboza, 763 N.E.2d at 547; State v. Morrison, 56 P.3d 63, 65 (Ariz. Ct. App. 2002).*

n126 *763 N.E.2d at 547.*

n127 *Id. at 550.*

n128 *Id.*

n129 *Id.*

n130 *Id.*

n131 *Id.*

n132 *Id.*

n133 *Id.*

n134 *Barboza, 763 N.E.2d at 550.*

n135 *Id.*

n136 *Id.*

n137 *Id.*

n138 *Id.*

n139 *Id.*

n140 *Id. at 550-51.*

n141 *Id. at 549-50* In addition to the taped evidence, Tom, the victim, also testified and told the jury about "numerous acts of indecent touching, and oral and anal sex committed by [Barboza]." *Id.*

n142 *Id. at 551.*

n143 *Barboza, 763 N.E.2d at 551.*

n144 *Id.*

n145 *Id. at 550.*

n146 *Id. at 551-53.*

n147 *Id. at 553-55.*

n148 *Id. at 551.*

n149 *See id.*

n150 *Id. at 552-53.*

n151 *Id. at 552* (quoting *Commonwealth v. Santoro, 548 N.E.2d 862, 864 (Mass. 1990)*).

n152 *Id.* at 552-53.

n153 *Barboza*, 763 N.E.2d at 553-54 Prior to analyzing the issue, the court briefly mentioned the interplay between the federal and state wiretap laws:

"Although a State [wiretap] statute may adopt standards more stringent than the requirements of Federal law, thus excluding from State courts evidence that would be admissible in Federal courts, a State may not adopt standards that are less restrictive" and would thereby allow evidence in State court that would be inadmissible in Federal court.

*Id.* at 553 (quoting *Commonwealth v. Vitello*, 327 N.E.2d 819, 833 (Mass. 1975)).

n154 *Id.* at 554.

n155 *Id.* at 553-54. The court also relied, in part, on another line of cases that approves of this type of eavesdropping under the extension telephone exemption found in 18 U.S.C. § 2510(5)(a)(i). *Id.* As noted above, § 2510(5)(a)(i) provides that "any person who . . . intentionally uses, endeavors to use, or procures any other person to use . . . any electronic, mechanical, or other device to intercept any oral communication . . . shall be punished . . . or shall be subject to suit as provided in [the Act]" With respect to this prohibition, § 2510(5)(a)(1) defines "electronic, mechanical, or other device" as the following:

any device or apparatus which can be used to intercept a wire, oral, or electronic communication *other than* any telephone or telegraph instrument, equipment or facility, or any component thereof, furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of its business . . . for connection to the facilities of such service and used in the ordinary course of its business.

§ 2510(5)(a)(i) (2000) (emphasis added). In short, then, the prohibition against wiretapping is not violated when one records a conversation using an instrument that is connected to the phone and used "in the ordinary course of . . . business" — hence the extension telephone exemption. In addressing and explaining this exemption to the Act, the *Barboza* court wrote the following:

Other courts, focusing on their sense of "Congress's intention to abjure from deciding a very intimate question of familial relations, that of the extent of privacy family members may expect within the home vis-a-vis each other" have relied on the extension telephone exception . . . to uphold the introduction of evidence obtained through taping or eaves-dropping within the family home. The extension telephone exception exempts from the statute equipment . . . e.g., a second residential telephone, used by a telephone service subscriber in the ordinary course of business. This exception has been read to permit members within their own homes to eavesdrop on, and even record, each other.

*Barboza*, 763 N.E.2d at 553-54 (citations omitted). The court then references a series of federal court decisions that have adopted this extension telephone exemption. *Id.* See *Janecka v. Franklin*, 843 F.2d 110 (2nd Cir. 1988), *Scheib v. Grant*, 22 F.3d 149 (7th Cir. 1994), *Newcomb v. Ingle*, 944 F.2d 1534 (10th Cir. 1991).

Not everyone who has encountered the extension telephone exemption and the way the courts have interpreted it agrees that it is a viable exception to the prohibitions contained in Title III. One author wrote the following:

While [the extension phone exception] is arguably consistent with Title III to permit listening in on an extension phone in the family home, most courts considered cases involving conduct that exceeds the mere use of an extension phone or other standard equipment. Courts have tried to avoid the plain language of the telephone extension exemption by asserting that listening in on a telephone extension, recording a call, or installing a wiretapping device is a "distinction without a difference." Yet, courts have recognized precisely such differences in other contexts. Listening in on a telephone extension requires a party's physical presence in the house and is limited to the length of the conversation. In contrast, [installing a] recording or tapping devices is virtually unlimited and considerably more intrusive.

Thus, while the extension phone exemption theoretically exempts a parent from Title III liability, the exception, as expressly provided for in the statute, has not proven highly relevant or logically sound in this context.

Rahavy, *supra* note 21, at 91 (citations omitted) Another commentator wrote the following:

Although there may be areas where the *Pollock* decision could be improved, in adopting the vicarious consent doctrine rather than the extension phone exemption, the Sixth Circuit effectively rejected a clearly flawed doctrine. The first problem is that the extension phone exemption rejects Congress's intent to include domestic situations within the purview of the Federal Wiretapping Statute, and fails to truthfully acknowledge the meaning of the language in the statute. An additional problem with the extension phone exemption is the level of intrusion into privacy that it creates within the home.

Karkosak, *supra* note 54, at 1012. See also *United States v. Murdock*, 63 F.3d 1391, 1396-1400 (6th Cir. 1995) ("We conclude that the recording mechanism (a tape recorder connected to extension phones in Mrs. Murdock's home) does not qualify for the telephone extension (or business extension) exemption . . . Spying on one's spouse does not constitute use of an extension phone in the ordinary course of business"). For a more in-depth discussion of the extension telephone exemption, see generally Karkosak, *supra* note 54.

One issue that the court did not address is the major difference between the extension telephone exemption and the vicarious consent doctrine. Specifically, under the vicarious consent doctrine, a parent must have a reasonable and objective belief that recording the child's telephone conversation is in the child's best interest. See cases cited *supra* Part II.B.2.a. There is no such requirement under the extension telephone exemption, which simply requires that the interception be made from an extension telephone. See Rahavy, *supra* note 21, at 97.

n156 Other criminal courts have recognized the doctrine as well. See, e.g., *State v. Morrison*, 56 P.3d 63, 65 (Ariz. Ct. App. 2002) ("If the parent has a good faith, objectively reasonable basis for believing that the recording of a child's telephone conversations is necessary and in the best interest of the minor, the guardian may vicariously consent on behalf of the child to the recording without violating Title III."); *State v. Diaz*, 706 A.2d 264 (N.J. Super. Ct. App. Div. 1998). In *Diaz*, the court wrote:

In this case, parents of a nine-month old daughter hired defendant to work in their home as a daytime nanny. . . . The parents became concerned about how defendant was treating their daughter and physical evidence of bruises supported their concern. We hold that [N.J. STAT. ANN. §] 2A:156A-4d incorporates the theory of vicarious consent and that, under these circumstances, the audio portions of the [video] recording involving statements to the child and the child's verbal reaction (as well as the video portion of the tape) are admissible.

*Id.* at 270.

n157 581 N.W.2d 777 (Mich. Ct. App. 1998).

n158 *Id.* at 778.

n159 *Id.*

n160 *Id.*

n161 *Id.* The Michigan Court of Appeals summarized the parties' arguments as follows. Defendant Brent Williams, who had sole legal and physical custody of [the couple's child] Jason at the time of the tape recording, argued that he had the authority to give consent on Jason's behalf to the interception of the telephone conversations. Plaintiff [Brenda Williams] posited that defendants' argument improperly expanded the scope of the consent exceptions in the federal and state statutes and that a proper interpretation would require summary disposition in her favor because defendant Brent Williams was not a participant in the conversation.

*Id.*

n162 *Id.*

n163 *Id.* at 778-79.

n164 *Id.* at 779-80. Michigan's wiretap statute is found in *Michigan Compiled Laws*, section 750.539 (2005).

n165 *Williams*, 581 N.W.2d at 778.

n166 *Id.* at 779.

n167 *Id.*

n168 *Id.* at 780.

n169 *Id.* (citations omitted).

n170 The court wrote:

In the provisions of the Michigan eavesdropping statute, we find no indication that the Michigan legislature intended to create an exception for a custodial parent of a minor child to consent on the child's behalf to interceptions of conversations between the child and a third party. If the Legislature had intended the result argued by defendants, then it could have included such an exception in . . . the provision in the Michigan eavesdropping statute in which the Legislature delineated exceptions to the prohibition against eavesdropping. Because the Legislature did not include such an exception, we must presume it intended only the meaning that it plainly expressed

*Id.* at 779.

n171 On this point, the court wrote:

Therefore, notwithstanding other courts' willingness to ascribe different meanings to the consent exception, we decline to follow their lead. We instead commend to the legislative branch the delicate question of the extent of privacy that family members may expect within their home vis-a-vis each other. Unlike the judiciary, the legislative branch of government is able to hold hearings and sort through the competing interests and policies at stake.

*Id.* at 781.

n172 *Williams v. Williams*, 593 N.W.2d 559 (Mich. 1999) (table decision).

n173 *Williams v. Williams*, 603 N.W.2d 114, 115 (Mich. Ct. App. 1999).

n174 *Id.* at 116 (stating that "we are bound to follow the *Pollock* holding with respect to the federal question in this case").

n175 *Id.*

n176 *Id.*

n177 *Id.*

n178 153 Wash. 2d 186, 102 P.3d 789 (2004).

n179 *Id.* at 191, 102 P.3d at 791.

n180 *Id.* at 190, 102 P.3d at 790.

n181 *Id.*

n182 *Id.*

n183 *Id.* at 190, 102 P.3d at 791.

n184 *Id.*



n185 *Id.*

n186 *Id.* at 191, 102 P.3d at 791.

n187 *Id.*

n188 *Id.* at 193-94, 102 P.3d at 792.

n189 *Id.* (citations omitted).

n190 *Id.* at 199, 102 P.3d at 795.

n191 *Id.* at 201, 102 P.3d at 796.

n192 *See* WASH. REV. CODE § 9 73 030 (2005).

n193 *See Christensen*, 153 Wash. 2d at 190, 102 P.3d at 790.

n194 *Id.* at 193-94, 102 P.3d at 792.

n195 404 S.E.2d 887 (N.C. Ct. App. 1991).

n196 *Id.* at 888.

n197 *Id.* at 887-88.

n198 *Id.* at 887.

n199 *Id.* at 888.

n200 *Agam*, the *Thompson* decision, which was the first decision to propose and accept the vicarious consent doctrine, was not issued until 1993. *See supra* Part II B 2 a.

n201 *See Shaw*, 404 S.E.2d at 888.

n202 *Id.*

n203 *Id.*

n204 *Id.* at 889.

n205 *Id.* (citations omitted)

n206 *Id.*

n207 453 S.E.2d 646 (W. Va. 1994).

n208 *Id.* at 652.

n209 *Id.* at 648.

n210 *Id.*

n211 *Id.* at 654.

n212 *Id.*

n213 Commentator Alison S. Aaronson tells the story of the adoption of the vicarious consent doctrine by the Georgia Legislature:

The Georgia Court of Appeals reversed the trial court's decision and concluded that Bishop's motion to suppress the tape recordings should have been granted . . . [In so deciding] the court reasoned that [Georgia law, as it then existed] precluded the application of the vicarious consent exception. In addition, the court declared that "it is solely the task of the legislature to amend [Georgia's wiretapping statute] to allow the admission into evidence of tape recordings such as those at issue here, i.e., tapes made by parents with a good faith, objectively reasonable basis for concern regarding the safety of their children as victims of criminal conduct of another."

Several members of the Georgia House of Representatives took these words to heart, and introduced a bill that was signed into law in April, 2000, allowing a parent to monitor and intercept a minor child's phone conversations. Jim Stokes, a member of the Georgia House Judiciary Committee, sponsored the bill based on a letter he received from David Scott, the victim's father, asking him to address the lack of statutory support for parents to legally wiretap their children's telephone conversations. [In drafting the law,] the Committee sought a limited means of permitting parents to monitor their children's activities for the purpose of protecting them, particularly in sexual molestation cases.

Mr. Stokes acknowledged that the trial court's decision not to admit the tape recordings between Bishop and the victim into evidence under the previous law was the correct legal decision. However, to assist parents in similar situations, the law needed to be changed. Mr. Stokes agreed that parents have the authority to control their children, especially in situations where they suspect their children are in trouble. . . .

Judith Manning, also a member of the Georgia House of Representatives . . . met with the [*Bishop*] victim and her family, and she became involved in the [criminal case against Bishop] "because it was clear to her that Bishop was overwhelmingly guilty" and the girl's parents were helpless, going into trial with hearsay evidence." Although Ms. Manning acknowledged that the United States Constitution prevents unreasonable invasions of privacy, [she believed that the *Bishop* case] was a situation where there were obvious signals that the child was suffering: the victim's grades dropped, her demeanor changed dramatically, and she neglected her personal appearance. [Manning expressed a belief that the] new law gives parents the power to monitor their children when they begin manifesting different behavioral patterns. Ms. Manning stressed that the *Bishop* case was a serious matter, it was not merely a case of a parent snooping through a child's room or reading a diary to learn about the child's healthy personal life. Thus, [she stated,] parents should be legally protected to intercept a child's phone calls where the child's welfare is at stake, and parents should not abuse the law to determine the truth in situations other than where they suspect their child is in physical or emotional danger. . . .

As a result of Georgia's new law, on October 13, 2000, Superior Court Judge George H. Kreeger convicted Bishop of child molestation, two counts of aggravated child molestation, and aggravated sexual battery. Sentencing took place on November 29, 2000, and Bishop was sentenced to ten years for each count, a sum total of thirty years.

Alison S. Aaronson, Note, *Changing with the Times: Why Rampant School Violence Warrants Legalization of Parental Wiretapping to Monitor Children's Activities*, 9 J.L. & POL'Y 785, 827-830 (2001) (citations omitted).

n214 GA. CODE ANN. § 16-11-66(d) (2005).

n215 The full text of Georgia's vicarious consent statute:

The provisions of this article shall not be construed to prohibit a parent or guardian of a child under 18 years of age, with or without the consent of such minor child, from monitoring or intercepting telephonic conversations of such minor child with another person by use of an extension phone located within the family home, or electronic or other communications of such minor child from within the family home, for the purpose of ensuring the welfare of such minor child. If the parent or guardian has a reasonable or good faith belief that such conversation or communication is evidence of criminal conduct involving such child as a victim or an attempt, conspiracy, or solicitation to involve such child in criminal activity affecting the welfare or best interest of such child, the parent or guardian may disclose the content of such telephonic conversation or electronic communication to the district attorney or a law

enforcement officer. A recording or other record of any such conversation or communication made by a parent or guardian in accordance with this subsection that contains evidence of criminal conduct involving such child as a victim or an attempt, conspiracy, or solicitation to involve such child in criminal activity shall be admissible in a judicial proceeding except as otherwise provided in subsection (b) of this Code section.

*Id.*

n216 An attempt to codify the doctrine was made in Virginia in 2000. That attempt, however, failed. See Aaronson, *supra* note 213, at 788 n.14.

n217 See *infra* Part II.C.

n218 See *supra* Part II.B.2.c.

n219 *Williams v. Williams*, 581 N.W.2d 777, 780 (Mich. Ct. App. 1998).

n220 Ann B. Frick & Marjorie J. Long, *Interspousal Wiretapping and Eavesdropping: An Update — Part II*, 24 COLO. LAW 2569, 2570 (1995).

n221 Karkosak, *supra* note 54, at 1017.

n222 Debra Bogosavljevic, Note, *Can Parents Vicariously Consent to Recording a Telephone Conversation on Behalf of a Minor Child?: An Examination of the Vicarious Consent Exception Under Title III of the Omnibus Crime Control and Safe Streets Act of 1968*, 2000 U. ILL. L. REV. 321, 342 (2000) (citations omitted). See also Karkosak, *supra* note 54, at 1020 ("Additionally, [the doctrine of vicarious consent] could lead to circumstances where a parent could conceivably use wiretapping for their own devious means, subjecting their former spouse and child to emotional blackmail.").

n223 *Williams*, 581 N.W.2d at 781.

n224 Bogosavljevic, *supra* note 222, at 343. One commentator expressed concern regarding what a court would do when it cannot easily decide whether the parent was truly acting in what was believed to be the child's best interest, writing that "in a situation where it is unclear if the parent had the best interests of the child at heart, or had ulterior motives such as blackmail or harassment, it is possible that a court would err on the side of caution, trusting that the parent was truly concerned about their child." Karkosak, *supra* note 54, at 1021-22. See also Frick, *supra* note 220, at 2570 ("The danger is that after-the-fact subjective contentions that the parent is acting in the best interests of the child is an unworkable, unverifiable standard.").

n225 Frick, *supra* note 220, at 2570.

n226 *Pollock v. Pollock*, 154 F.3d 601, 603-04 (6th Cir. 1998).

n227 *Id.* at 603.

n228 *Id.* at 604.

n229 *Id.* at 605.

n230 *Id.* at 613.

n231 *Id.* at 612.

n232 Frick, *supra* note 220, at 2570.

n233 *Id.*

n234 Karkosak, *supra* note 54, at 1019 (citations omitted).

n235 *Id.* at 1018 (citations omitted). On this point, the author also references the fact that "court decisions have recognized that older children may have a right to consent for themselves in circumstances such as abortion (allowing for judicial bypass) and certain medical procedures." *Id.*

n236 *Id.* at 1019.

n237 *Id.*

n238 *Fr.*, *supra* note 220, at 2569.

n239 Karkosak, *supra* note 54, at 1020.

n240 *See Pollock v. Pollock*, 154 F.3d 601, 605 (6th Cir. 1998).

n241 *See, e.g., Williams v. Williams*, 581 N.W.2d 777, 780 (Mich. Ct. App. 1998).

n242 *See ia*

n243 *See, e.g., Pritchard v. Pritchard*, 732 F.2d 372, 374 (4th Cir. 1984) ("There is no express exception [in Title III] for instances of willful, unconsented to electronic surveillance between spouses").

n244 *See, e.g., Williams*, 581 N.W.2d at 780.

n245 *Id.*

n246 S. REP. No. 1097 (1968), reprinted in 1968 U.S.C.A.N. 2112, 2274.

n247 *See, e.g., State v. Shaw*, 404 S.E.2d 887, 889 (N.C. Ct. App. 1991).

n248 *See, e.g., State v. Capell*, 966 P.2d 232, 241 (Or. Ct. App. 1998) (Armstrong, J. dissenting).

n249 *See supra* Part II.B.2.

n250 *See supra* Part II.C.

n251 22 F.3d 149 (7th Cir. 1994).

n252 *Id.* at 154.

n253 *Campbell v. Price*, 2 F. Supp. 2d 1186, 1191 (E.D. Ark. 1998).

n254 *Anonymous v. Anonymous*, 558 F.2d 677, 679 (1977) (citing *Hearings on the Anti-Crime Program Before Subcomm. No. 5 of the House Judiciary Comm.*, 90th Cong. 901 (1967) (statement of Professor Herman Schwartz)).

n255 *Campbell*, 2 F. Supp. 2d at 1190 (quoting *Newcomb v. Ingle*, 944 F.2d 1534, 1536 n.5 (10th Cir. 1995)); *see also State v. Capell*, 966 P.2d 232, 234 (Or. Ct. App. 1998) ("To the extent that there could be any doubt about what Congress would have intended in light of the facts in the case, the legislative history underlying the act expressly states that Congress did not want "to make it a crime for a father to listen in on his teenage daughter or some such related problem.").

n256 *Newcomb v. Ingle*, 944 F.2d 1534, 1535-36 (10th Cir. 1991).

n257 *See supra* Part II A.3.

n258 *See id*

n259 *Anonymous*, 558 F.2d at 679.

n260 *Aaronson*, *supra* note 213, at 794.

n261 944 F.2d 1537, 1539 (10th Cir. 1991).

n262 542 F.2d 661, 672-73 (6th Cir. 1976).

n263 *See Heggy*, 944 F.2d at 1539 ("The district court below held that Title III does apply to interspousal wiretaps. We agree with the district court, and join the majority of federal circuit courts in holding that Title III does provide a remedy for such wiretapping."); *Jones*, 542 F.2d at 673 ("The plain language of the Act's legislative history compels interpretation of the statute to include interspousal wiretaps.")

n264 *See supra* Part II B.2 a

n265 966 P.2d 232 (Or. Ct. App. 1998)

n266 *Id.* at 234.

n267 *Id.*

n268 *See supra* note 259 and accompanying text

n269 *Rahavy*, *supra* note 21, at 97.

n270 *Thompson v. Dulaney*, 838 F. Supp. 1535, 1543 (D. Utah 1993)

n271 831 F.2d 373 (2nd Cir. 1987).

n272 *Id.* at 378.

n273 *Id.*, *see also Grigg-Ryan v. Smith*, 904 F.2d 112, 116 (1st Cir. 1990) ("We agree with the Second Circuit that Congress intended the consent requirement to be construed broadly.")

n274 *Amen*, 831 F.2d at 378.

n275 *See supra* Part III A.1 a

n276 For example, many jurisdictions require parental consent for children of certain ages to marry, to obtain an abortion, or have certain medical procedures performed. *See generally* Karkosak, *supra* note 54, at 1021.

n277 Martha Minow, *Pluralisms*, 21 CONN. L. REV. 965, 969 (1989).

n278 Karkosak, *supra* note 54, at 1017, *see also* Laura S. Killian, *Concerned or Just Plain Nosy? The Consequences of Parental Wiretapping Under the Federal Wiretap Act in Light of Pollock v. Pollock*, 104 DICK. L. REV. 561, 571 (2000) ("Parents, as the natural guardians of their children, hold the legal right to act on their behalf to make decisions for their protection.")



n279 *See supra* Part II B.2 a.

n280 Labriola, *supra* note 53, at 456.

n281 *State v. Liebau*, 67 P.3d 156, 160 (Kan. Ct. App. 2003)

n282 *M.S. v. Wermers*, 557 F.2d 170, 177 (8th Cir. 1977).

n283 Karkosak, *supra* note 54, at 1016.

n284 *See Thompson v. Dulaney*, 838 F. Supp. 1535, 1544 (D. Utah 1993).

n285 Karkosak, *supra* note 54, at 1016.

n286 *Bishop v. Georgiu*, 526 S.E.2d 917, 922 (Ga. Ct. App. 1999)

n287 Aaronson, *supra* note 213, at 823

n288 *Bellotti v. Baird*, 443 U.S. 622, 635 (1979)

n289 Aaronson, *supra* note 213, at 822

n290 *Id.* at 823

n291 *Silas v. Silas*, 680 So. 2d 368, 372 (Ala. Civ. App. 1996)

n292 *See, e.g., Parham v. J.R.*, 442 U.S. 584, 602 (1979) ("Our jurisprudence historically has reflected concepts of the family as a unit with broad parental authority over minor children . . . More important, [it] has recognized that natural bonds of affection lead parents to act in the best interests of their children."), *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition"), *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("The custody, care and nurture of the child reside first in the parents").

n293 Aaronson, *supra* note 213, at 821-22 (citation omitted). The author continues: "The continuing rise in school violence as evidenced by the . . . Columbine High School shootings, undoubtedly justifies the need for parents to monitor their children's activities without the fear of liability." *Id.* at 822

n294 *See id.*

n295 *Bishop v. State*, 526 S.E.2d 917, 918-19, 922 (Ga. Ct. App. 1999).

n296 *Commonwealth v. Barboza*, 763 N.E.2d 547, 554 (Mass. App. Ct. 2002)

n297 In both cases the parents had legitimate suspicions of victimization and therefore had a reasonable belief that they were acting in their child's best interest. *See Bishop*, 526 S.E.2d at 922, *Barboza*, 763 N.E.2d at 554

n298 *See Williams v. Williams*, 581 N.W.2d 777, 781 (Mich. Ct. App. 1998).

n299 *Id.*

n300 *See supra* Part III A.2 a.

n301 *See supra* Part II B.2 b

n302 See *Commonwealth v. Barboza*, 763 N.E.2d 547, 555 (Mass. App. Ct. 2002) ("We conclude that a recording by parents of their own minor son on the telephone in their own home, motivated by concerns that he was being sexually exploited by an adult, does not violate Title III").

n303 See *supra* note 41 and accompanying text.

n304 As stated above, violations of Title III can result in civil, criminal, and evidentiary penalties. See *supra* Part II A 2 b.

n305 *Schieb v. Grant*, 22 F.3d 149, 154 (7th Cir. 1994).

n306 See *infra* Part III B.

n307 See *supra* Part III A 2 a.

n308 See *id.*

n309 See *id.*

n310 Labriola, *supra* note 53, at 461.

n311 See TED R. MILLER ET AL., U.S. DEPT OF JUST., VICTIM COSTS AND CONSEQUENCES: A NEW LOOK (1996).

n312 See *infra* Part III B 2 a.

n313 See *infra* Part III B 2 b.

n314 See *infra* Part III B 2 c.

n315 *Schull v. Marin*, 467 U.S. 253, 266 (1984).

n316 In addressing this issue, the United States Supreme Court has recognized that the consequences of a juvenile's criminal activity include "potential physical injury which may be suffered when a victim fights back or a policeman attempts to make an arrest and from the downward spiral of criminal activity into which peer pressure may lead the child." *Id.*

n317 See, e.g., *People v. Taylor*, 8 Cal. Rptr. 2d 439, 449 (Cal. Ct. App. 1992) ("By saying this, we do not condone the sale or use of illegal drugs in any amount. Some risk of death is always present. As usage continues, the probability of adverse consequences rises. And these consequences are not always death. Drug and alcohol abuse ruins untold lives of users and their loved ones. Relationships and job performance suffer from an activity that has no social utility. These are but a few of the reasons for drug laws, education concerning the danger of drug use, and other social measures aimed at ameliorating this serious problem.")

n318 See, e.g., *United States v. Brown*, 64 F.3d 1083, 1088 (7th Cir. 1995) (stating that "cocaine trafficking is known to be an inherently dangerous criminal activity"); *Commonwealth v. Patterson*, 591 A.2d 1075, 1078 (Pa. Super. 1991) (taking judicial notice of the fact that "drug dealers are likely to be armed and dangerous").

n319 As put by the United States Supreme Court, "it is well known, that drug smugglers do not hesitate to use violence to protect their lucrative trade and avoid apprehension." *Treasury Employees v. Von Raab*, 489 U.S. 656, 669 (1989).

n320 The facts of the Nebraska case of *State v. Clark*, 588 N.W.2d 184 (Neb. 1999), provide a good example of the kinds of trouble that people, juveniles included, can find themselves in when interactions with drug dealers goes

had — a type of trouble that a concerned parent who wants what is in a child's best interest would prefer that his or her child avoid. In *Clark*, Patrick A. Clark was convicted of second-degree murder and sentenced to life plus ten years. The individual whom he shot and killed, Leroy Fowler, was Clark's source for methamphetamine, an illegal drug to which he was addicted. The court described the facts — and in particular the situation that Clark found himself in when he accrued drug debts with Fowler — as follows:

Clark is a 42-year-old, divorced, unemployed carpenter addicted to methamphetamine. Clark had met Fowler 7 months prior to the shooting, in August 1996, in connection with a drug transaction. Clark began to buy methamphetamine regularly from Fowler, and his debt to Fowler rapidly increased. According to Clark, in late 1996, Fowler insisted that Clark work for him, apparently as security for the unpaid drug debt. In return for Fowler's "fronting" drugs to Clark without immediate payment, Clark worked for Fowler nearly every day without pay. Clark's debt to Fowler was not diminished by the services he provided to Fowler. The uncontroverted evidence showed that Fowler imposed usurious "interest" and that Clark's debt continued to increase.

Clark's jobs for Fowler included . . . [driving] Fowler around Omaha two or three times per week to collect money from drug sales. Clark testified that Fowler often gave Clark Fowler's gun to carry as the two made these nighttime rounds to collect Fowler's drug money. Fowler could not lawfully carry a gun, since he was a convicted felon. Clark testified that Fowler used intimidation, threats, and violence to collect money due to him for illegal drug sales.

Clark testified that he was dependent on the methamphetamine he got from Fowler, but that he could not pay for it. Clark said he felt increasingly frightened by Fowler's intimidation of him, including threats to injure or kill Clark, his young children, and Clark's parents . . . Clark stated that he felt he could not challenge Fowler because Fowler supplied him with methamphetamine to feed his addiction and Clark believed that Fowler would follow through on his threats to harm Clark or Clark's family because of the unpaid drug debt.

In the week preceding the March 12, 1997, shooting, Clark testified that he had worked for Fowler continuously for nearly 3 days without a break, including moving a large cache of Fowler's weapons, ammunition, and drugs. The weapons included hand grenades and automatic weapons. Clark testified that at approximately 7 p.m. on Friday, March 7, after moving Fowler's cache to a storage unit, Clark told Fowler that he had to get some sleep. According to Clark, Fowler grudgingly agreed to a few hours, telling Clark, "You come down to my house at 10 o'clock or I'm going to chase you down." Clark went to his parents' home, where he lived, to sleep. Contrary to Fowler's instructions, Clark did not return to Fowler's home.

Clark avoided Fowler's attempts to reach him until the following Wednesday, March 12. Fowler arrived at the Clark home in a rage at approximately 8:40 a.m., soon after Clark had awakened. Joseph Clark, Clark's brother, encountered Fowler as Fowler arrived at the Clark home and Joseph Clark was leaving for work. Joseph Clark had never before met Fowler. Fowler gave Joseph Clark "a dirty, dirty glare — like he could beat somebody up."

Once inside the Clark home, Fowler demanded that Clark leave with him. He took many of Clark's possessions, including clothes, tools, and three houseplants, which were later found in the back of Fowler's car. Fowler did not expressly mention Clark's unpaid drug debt, but Clark testified, "I knew that's what this was about" and "I knew he was going to kill me and I knew he had the potential."

Clark testified that he believed that Fowler was carrying a gun underneath his jacket. Fowler threatened to blow up the home of Clark's parents, who were in the upper level of the house. Clark testified that he was very scared that Fowler, who looked "more wicked this time than ever," would carry through with his threat. Clark believed that he could not communicate with his parents to call police, so he agreed to leave with Fowler, to get him out of the house.

*Id.* at 186-87. It was shortly after they left Clark's parents' house that Clark shot and killed Fowler, for which he was convicted and sent to prison. What happened to Patrick Clark as a result of his drug debts is not an uncommon occurrence in the world of narcotics distribution, and what happened to Clark can and does happen to juveniles who are involved in drug transactions.

n321 For example, in Ada County, Idaho, the county code reads as follows: "It shall be unlawful for any person under the age of eighteen (18) years . . . to attempt to run away or to run away from his parents, guardian or other legal custodian, or to be or remain a person who has run away from his parents, guardian or other legal custodian."

## ADA COUNTY, IDAHO, CODE § 5-5-1A (2005).

n322 See, e.g., *People v. R.G.*, 546 N.E.2d 533, 542 (Ill. 1989) ("When a minor detaches himself or herself from parental authority by running away from home, the minor jeopardizes his or her welfare. The minor must find money, food and shelter, not to mention adult guidance, schooling, and medical care, among other things. Even if the minor finds refuge with a relative or friend, the minor's welfare could still be in jeopardy because the minor may not be receiving proper care there.").

n323 For example, the California courts, in a handful of unpublished opinions, have addressed the dangers inherent in both parents exposing children to criminal activity and children involving themselves in criminal activity. See, e.g., *In re A.V.*, No. B176601, 2005 WL 668494, at \*3 n.3 (Cal. Ct. App. 2005) ("The [juvenile] court explained that the parents' shoplifting is my concern in the case. What I should actually say is I think there is a history of the parents using the children to engage in criminal activity and it is a danger to the children . . . because you don't know what is going to happen when you engage in criminal activity."); *Cynthia R. v. Superior Court*, No. B175834, 2004 WL 2152399, at \*3 n.3 (Cal. Ct. App. 2004) ("She was directly using a baby as the cover. I think it still indicates that she is willing to involve children in criminal behavior, which is inherently dangerous to the children both in terms of their own morals . . . but also because when people steal sometimes people that are being stolen from pull guns and shoot you."); *Cynthia M. v. Superior Court*, No. D035860, 2004 WL 1759264 (Cal. Ct. App. 2004).

Mother fails to acknowledge that, as with her drug problem, her criminal behavior detrimentally affects her children's well-being. Her criminal behavior exposes her children to the potential dangers involved with a criminal lifestyle (for example, allowing them to sit in a car driven by a person who is ingesting drugs), prevents her from being available to parent her children during periods of incarceration, and provides a poor role model of acceptable behavior. The children are forced to suffer the consequences of mother's drug addiction and criminal lifestyle.

*Id.* at \*3.

n324 *M.S. v. Wermers*, 557 F.2d 170, 178 (8th Cir. 1977) ("The right to custody and control over a minor child accrues to parents in reciprocation for their duty to support, educate and protect that child.").

n325 *Thompson v. Dulaney*, 838 F. Supp. 1535, 1544 (D. Utah 1993).

n326 *Schall v. Martin*, 467 U.S. 253, 290 (1984) (citing J. STONE ET AL., CITIZENS' COMMITTEE FOR CHILDREN OF NEW YORK, INC., JUVENILE DETENTION PROBLEMS IN NEW YORK CITY 3-4 (1970)) (Marshall, J., Brennan, J., and Stevens, J., dissenting).

n327 467 U.S. at 281-309.

n328 *Id.* at 291.

n329 See IDAHO CODE § 20-509(1) (Michie 2005). Idaho is not unique in allowing juveniles who have committed certain crimes to be directly charged in adult court. In Mississippi, for example, any "act attempted or committed by a child, which if committed by an adult would be punishable under state or federal law by life imprisonment or death, will be in the original jurisdiction of the [adult] court." MISS. CODE ANN. § 43-21-151(1)(a) (2005). Furthermore, in Mississippi any "act attempted or committed by a child with the use of a deadly weapon, the carrying of which concealed is prohibited by [law], or a shotgun or a rifle, which would be a felony if committed by an adult, will be in the original jurisdiction of the [adult] court." § 43-21-151(1)(b). And finally, Mississippi's juvenile courts, by statute, do "not have jurisdiction over offenses committed by a child . . . on or after his seventeenth birthday where such offenses would be a felony if committed by an adult." § 43-21-151(2).

n330 Under Idaho law, a juvenile court must consider a number of factors when making a determination of whether a waiver to adult court is appropriate. The factors to be considered are the following:

(a) The seriousness of the offense and whether the protection of the community requires isolation of the juvenile beyond that afforded by juvenile facilities; (b) Whether the alleged offense was committed in an aggressive, violent,

premeditated, or willful manner; (c) Whether the alleged offense was against persons or property, greater weight being given to offenses against persons; (d) The maturity of the juvenile as determined by considerations of his home, environment, emotional attitude, and pattern of living; (e) The juvenile's record and previous history of contacts with the juvenile corrections system; (f) The likelihood that the juvenile will develop competency and life skills to become a contributing member of the community by use of the facilities and resources available to the court.

*IDAHO CODE § 20-508(8)*. The amount of weight to be given to each of these factors is discretionary with the court. § 20-508(8)(g).

Mississippi law also provides for a discretionary waiver in certain cases: If a child who has reached his thirteenth birthday is charged by petition to be a delinquent child, the youth court, either on motion of the prosecutor or on the youth court's own motion, after a hearing . . . may, in its discretion, transfer jurisdiction of the alleged offense . . . or a lesser included offense to the criminal court which would have trial jurisdiction of such offense if committed by an adult.

*MISS. CODE ANN. § 43-21-157(1)*. After a hearing, "the youth court may transfer jurisdiction . . . if the youth court finds by clear and convincing evidence that there are no reasonable prospects of rehabilitation within the juvenile justice system." § 43-21-157(4). In making this determination, the court is required to weigh certain factors similar to those considered by Idaho judges in making a waiver determination. See § 43-21-157(5).

n331 Bypassing the juvenile justice system can result in a significant increase in penalties. For example, under Idaho law, the crime of robbery "is punishable by imprisonment in the state prison not less than five (5) years, and the imprisonment may be extended to life." *IDAHO CODE § 18-6503*. In other words, robbery carries a mandatory minimum of five years imprisonment with the possibility of life in prison. Because robbery is an auto-waiver crime those penalties apply to any person convicted of the crime, including juvenile offenders. Under Idaho's Juvenile Corrections Act, felonies committed by juveniles are punishable by up to 180 days in detention, three years of probation (or probation until age twenty-one if the crime is one of a sexual nature), and, if certain criteria are met, commitment to the Idaho Department of Juvenile Corrections (IDJC) not to exceed age twenty-one. See § 20-520(d). Therefore, if robbery could be adjudicated in the Idaho juvenile justice system, the maximum penalty for a juvenile sixteen years of age who committed a robbery would be commitment to the IDJC for a period of five years. But because robbery is, per the statute, automatically filed in the adult system, the same five-year period of confinement is the minimum penalty that can be imposed on a sixteen-year-old juvenile who commits the crime of robbery, not the maximum. In short, then, the range of penalties that can be imposed in juvenile court and adult court varies significantly.

n332 Federal law requires a fact-finding with respect to several factors before a juvenile can be transferred to district court.

A juvenile who is alleged to have committed an act of juvenile delinquency and who is not surrendered to State authorities shall be proceeded against under this chapter . . . except that, with respect to a juvenile fifteen years and older alleged to have committed an act . . . which if committed by an adult would be a felony that is a crime of violence or an offense described in . . . the Controlled Substances Act . . . [or] the Controlled Substances Import and Export Act . . . or section 922(x) of this title, or in section 924(b), (g), or (h) of this title, criminal prosecution on the basis of the alleged act may be begun by motion to transfer . . . in the appropriate district court of the United States, if such court finds, after hearing, such transfer would be in the interest of justice. . . .

Evidence of the following factors shall be considered and findings with regard to each factor shall be made in the record, in assessing whether a transfer would be in the interest of justice: the age and social background of the juvenile; the nature of the alleged offense; the extent and nature of the juvenile's prior delinquency record; the juvenile's present intellectual development and psychological maturity; the nature of past treatment efforts and the juvenile's response to such efforts; the availability of programs designed to treat the juvenile's behavioral problems.

*18 U.S.C. § 5032 (2000)*. The statute gives further guidance into how one of these factors should be examined

In considering the nature of the offense . . . the court shall consider the extent to which the juvenile played a leadership role in an organization, or otherwise influenced other persons to take part in criminal activities, involving



the use or distribution of controlled substances or firearms. Such a factor, if found to exist, shall weigh in favor of a transfer to adult status, but the absence of this factor shall not preclude such a transfer.

*Id.*

n333 In Idaho, for example, each of these potential penalties or sanctions is available to a juvenile judge. Specifically, *Idaho Code, section 20-520* permits a juvenile judge, at sentencing, to impose a period of probation; detention; community service; a revocation or restriction on driving privileges; commitment to the state's juvenile corrections system; any examination or treatment deemed necessary by the court, including substance abuse, medical, and psychiatric examinations and treatment; restrictions on associations with parents and other individuals; restrictions on activities that the juvenile may wish to engage in; fines and fees associated with probation and the juvenile court process; and "any other reasonable order which is in the best interest of the juvenile or is required for the protection of the public." *IDAHO CODE § 20-520(1)(j)* (Michie 2005).

n334 *See supra* Part III B 1.

n335 For example, under Idaho Court Administrative Rules, "if a juvenile is adjudicated guilty of an act which would be a criminal offense if committed by an adult, the name, offense, and disposition of the court shall be open to the public." *IDAHO CT. A. R. 32(d)(7)(E)* (2005).

n336 *See generally* MILLER ET AL., *supra* note 311.

n337 *Id.*

n338 *Id.*

n339 Aaronson, *supra* note 213, at 814 (citations omitted).

n340 *CAL. PENAL CODE § 640.5(d)(2)* (West 2005); *see also id.* § 490.5(b) (holding parents jointly responsible with a minor child for the payment of restitution arising out of a theft offense).

n341 *IDAHO CODE § 20-520(3)* (Michie 2005).

n342 *TEX. FAM. CODE ANN. § 41.001* (Vernon 2005).

n343 For more on these types of laws, see generally Christine T. Greenwood, *Holding Parents Criminally Responsible for the Delinquent Acts of Their Children: Reasoned Response or "Knee-Jerk Reaction"?*, 23 *J. CONTEMP. L.* 401 (1997).

n344 *KY. REV. STAT. ANN. § 530.060(1)* (Banks Baldwin 2002).

n345 *MO. REV. STAT. § 568.050 1(3)* (West 2005). *See also OR. REV. STAT. § 163.577(1)(a)* (2005): "A person commits the offense of failing to supervise a child if the person is the parent, lawful guardian or other person lawfully charged with the care or custody of a child under 15 years of age and the child (a) Commits an act that brings the child within the jurisdiction of the juvenile court . . . [or] (b) Violates a curfew law . . . [or] (c) Fails to attend school as required under [Oregon law]."

n346 *OKLA. STAT. tit. 21, § 858.1* (2005).

n347 *OKLA. STAT. tit. 21, § 858.2* (2005).

n348 *See generally* Howard Davidson, *Violence in America: How Can We Save Our Children?*, 7 *STAN. L. & POLY. REV.* 23 (1996).

n349 *See supra* Part III.A.1.d.

n350 *See, e.g., Bishop v. State*, 526 S.E.2d 917, 918-19 (Ga. Ct. App. 1999) (describing how difficult it was for law enforcement to investigate Bishop when the victim refused to cooperate)

n351 Aaronson, *supra* note 213, at 833.

n352 *See generally id.*

n353 Labriola, *supra* note 53, at 461.

n354 *Williams v. Williams*, 581 N.W.2d 777, 781 (Mich. Ct. App. 1998).

n355 *See supra* Part III.A.

n356 *See supra* Part III.A.2.a.

n357 *See supra* Part II.C.1.

n358 *Pollock v. Pollock*, 154 F.3d 601, 605 (6th Cir. 1998) (citations omitted)

n359 This is not to say that an application of the doctrine of vicarious consent does not help to diminish the possibility of misuse in the purely civil context.

If courts require a finding of a good faith objectively reasonable basis for believing consent is necessary to protect a child, the concern that parties would intercept communications solely to gain an advantage in a divorce or custody proceeding diminishes. Additionally, if the court satisfied the objectively reasonable standard and admitted the recorded conversation in a proceeding, concern for the child's welfare overrides any other detrimental effect resulting from admitting the evidence.

Rahavy, *supra* note 21, at 97.

n360 *Commonwealth v. Barboza*, 763 N.E.2d 547, 551 (Mass. App. Ct. 2002).

n361 *Compare id.* at 546, with *Pollock v. Pollock*, 154 F.3d 601, 602-03 (6th Cir. 1998).

n362 *Barboza*, 763 N.E.2d at 549.

n363 *Id.*

n364 *Bishop v. State*, 526 S.E.2d 917, 918 (Ga. Ct. App. 1999).

n365 *See supra* Part II.C.1.

n366 *See supra* Part II.C.3.

n367 *See United States v. Leahy*, 434 F.2d 7, 11 (1st Cir. 1970) ("No one has the right to commit a crime."), *see also People v. Tillman*, 282 N.E.2d 231, 233 (Ill. App. Ct. 1972) ("There is no right to commit crime."); *State v. Strasburg*, 60 Wash. 106, 132, 110 P. 1020, 1028 (1910) (Morris, J. dissenting) ("No man, whether sane or insane, has any constitutional right to commit crime."); *ex parte Roper*, 134 S.W. 334, 337 (Tex. Crim. App. 1910) ("No one has a right to commit crime."); *State v. Cutshall*, 15 S.E. 261, 266 (Sup. Ct. N.C. 1892) ("Criminals have no right to commit crime.")

n368 *See supra* Part I and Part II.B.2.b.

n369 In Idaho, for example, it is a felony for any person to "commit any lewd or lascivious act or acts upon or with the body . . . of a minor child under the age of sixteen (16) years . . . when such acts are done with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person, such minor child, or third party." *IDAHO CODE § 18-1508* (Michie 2005). In other words, it is illegal for any person, whether a child or an adult, to have sexual contact with a child under the age of sixteen.

n370 *See infra* note 373 and accompanying text.

n371 *See supra* Part II.C.4.

n372 *Bishop v. State*, 526 S.E.2d 917, 918 (Ga. Ct. App. 1999).

n373 *Id.* at 919.

n374 *See supra* Part II.B.2.a. and the cases cited therein.

n375 *Id.*

n376 If a court chooses not to recognize the vicarious consent doctrine, a parent's surreptitious recording of her child's conversations are not automatically excluded from evidence in a criminal prosecution. This issue was addressed by the *Barboza* court, which held that the vicarious consent doctrine was not applicable to Massachusetts' state wiretap statute, which requires two-party consent, writing that "exclusionary rules generally are intended to deter future police conduct in violation of constitutional or statutory rights." *Commonwealth v. Barboza*, 763 N.E.2d 547, 552 (Mass. App. Ct. 2002) (quoting *Commonwealth v. Santoro*, 548 N.E.2d 862, 862 (Mass. 1990)). As such, the court continued, "we see no reason why the [exclusionary] rule should protect [Barboza] from the consequences of the unlawful interception by a private citizen, a father, acting in the privacy of his own home, without any government involvement, to protect his child from sexual exploitation by [Barboza]." *Id.* at 553, *see also United States v. Jacobsen*, 466 U.S. 109, 113 (1984) ("This Court has . . . consistently construed [the Fourth Amendment prohibition on unreasonable searches and seizures and the subsequent suppression of illegally obtained evidence] as proscribing only governmental action; it is wholly inapplicable to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official.") (quoting *Walter v. United States*, 447 U.S. 649, 662 (1980) (Blackmun, J., dissenting)).

n377 *See supra* Part II.B.2.a.

n378 *See supra* Part II.B.2.

n379 *See supra* Part II.C. and Part III.A.

n380 *See supra* Part II.B.3.

n381 *See supra* Part III.A.

n382 *See supra* Part III.A.1.b.

n383 *See supra* Part III.A.1.c.

n384 *See supra* Part III.A.2.

n385 *See supra* Part III.A.1.d.

n386 *See supra* Part II.A.2.

n387 *See supra* Part III.C.

# EDUCATION LAW

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## The Chair's Comments ...

The chair of an NCBA section gets invited to five of the best cocktail parties in North Carolina. Starting in June and then again in October, January, April and June, you may sip and savor with the nicest and most diverse group of good folks of achievement that ever gathered in one place at the same time. We jury lawyers like to remind the 12 after a strenuous contest that the participants of the trial will never meet again — a riveting and sad thought.

At the Board of Governors meetings the participants get an opportunity to meet, open up and share lifetime experiences along the pathways of practice. I find it to be a high point in my long love affair with the law.

Rubbing shoulders with seasoned jurists, budding litigators, high-tech innovators, zealous reformers, serious academics and sensible dealmakers adds a breadth of insight and fuels the natural curiosity of the legal mind. I recommend such crossbreeding to all of us in our continuing journey to ever greater specialization.

Wake Forest University has embarked this year on a series of events on the themes of ethics and honor. In February, I attended the Founders Day Convocation where my classmate at the University of

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## Secret Recordings and Other Electronic Eavesdropping

BY BRIAN C. SHAW

School officials on occasion ask for legal advice about communications that were secretly intercepted or recorded. The factual settings vary. It might be a face-to-face conversation recorded by one party, a recorded telephone conversation, a telephone conversation overheard through an extension phone, a cell phone call monitored by a scanner, or a stored e-mail message that is accessed.

Secretly recorded communications often come to light in dramatic circumstances. One leading case involved intercepted telephone calls revealing that a school board chairman accepted a \$90,000 bribe.<sup>1</sup> In another case cordless telephone calls revealed a school board member's involvement in insurance kickbacks, as well as excessive use of profanity and racial epithets.<sup>2</sup> An example from my own practice involves a student's secret tape-recording of a teacher acknowledging sexual contact with the student.

Without trying to comprehensively cover the topic, I thought it might be useful to review some of the major legal issues regarding electronic eavesdropping. This article will not address the use of electronic surveillance for law

enforcement purposes, nor potential tort liability for invasion of privacy or other, tort claims.

I offer two basic rules for attorneys notified of secretly recorded communications:

Rule 1: Interception of a communication is generally legal if one party to the communication consents. Further use and disclosure are permissible.

Rule 2: In all other circumstances, interception is presumptively illegal. The attorney should carefully evaluate the situation prior to authorizing any further use or disclosure.

### Relevant Statutes

Most reported cases in this area arise under the federal Wiretap Act, 18 U.S.C. Section 2510 *et seq.* It was enacted as Title III of The Omnibus Crime Control and We Streets Act of 1968, and amended by the Electronic Communications Privacy Act of 1986. The Wiretap Act protects:

- Oral Communications. This category excludes communications where the speaker does not have a justifiable expectation of privacy.

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## Comments

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Chicago Law School addressed ethics and honor.

Dr. Mary Ann Glendon, currently the Learned Hand Professor of Law at Harvard University, expressed her misgivings about the American Bar Association's decision to remove the words, "honor," "character" and "conscience" from the code of ethics. Perhaps the unintended consequence of intense due process has been the loss of the warning lighthouse beacons that once guided professionals in uncharted waters.

Dr. Glendon noted that recent "communitarian" scholarship offered hopeful balance to unlimited individualism. Finally, she addressed her discovery, upon

completing her soon to be published book on Eleanor Roosevelt, that modern biographers had censored the fact that the deep religious commitment and practice of the former first lady was critical to her successes in social welfare and the formulation of the Human Rights Declaration of the United Nations in 1948.

I will end on a hopeful note for spring and the future: The chorale groups, which give me an opportunity to share the music of Handel's "Messiah" and Leonard Bernstein's "Chichester Psalms" in Hebrew, were joined this year by three law students and several pre-law undergraduates for concerts.

Hope to see all of you at the May 11 CLE at the Bar Center for special education, construction contracts, campus relationships and privacy — and Van Alstyne, his motorcycle and the First Amendment. □

## Eavesdropping

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- Wire Communications. This category includes regular telephone and cellular telephone calls.

- Electronic Communications. This category includes e-mail messages and other computer to computer communications.

The Wiretap Act prohibits the intentional interception of any wire, oral or electronic communication, through the use of any electronic, mechanical or other device. It further prohibits the intentional disclosure or list of the contents of an intercepted communication, "knowing or having reason to know" that the information was obtained through an interception in violation of the statute. Finally, the act sanctions persons who endeavor to intercept, use or disclose a protected communication; or who procure an interception (but not a use or disclosure).<sup>3</sup>

An *interception* means the aural or other acquisition of the contents of a communication through the use of a *device*. A device is any apparatus that can be used to intercept a communication, except for hearing aids and certain telephone-related equipment discussed below under the "extension phone exception." An interception need not result in a recording; a communication can be intercepted by a transmitter that allows a third party to listen to the communication even if no recording is made.

The Wiretap Act's prohibition on disclo-

sure or use is predicated on a prior unlawful interception. Disclosure or use is not unlawful unless it is done "knowing or having a reason to know" that the information was obtained in an unlawful interception. This concept is crucial. A lawyer who learns that his client has information from an intercepted communication (or who is given a recording of a communication) should first attempt to ascertain whether the interception was lawful. If so, client and lawyer can proceed to disclose and use the information without violating the Wiretap Act.

If the communication was intercepted illegally, whether by the client or some third party, father disclosure or use by the client or the lawyer can expose them to potential criminal and civil liability, unless they had no reason to know the interception was unlawful.

North Carolina has its own Wiretap Act enacted in 1995.<sup>4</sup> The state act is modeled closely after the federal Wiretap Act, with very similar provisions.

Another federal statute, the Stored Communications Act, prohibits access to stored wire and electronic communications, such as e-mail messages.<sup>5</sup>

### A Caution for Lawyers

The wiretap statutes do not exempt attorneys from civil or criminal liability for unlawful disclosure or use. Attorneys are defendants in numerous criminal and civil actions under the federal Wiretap Act.<sup>6</sup> A typical scenario is that a client brings the



attorney a tape-recording, the attorney transcribes the recording, and uses the contents to formulate questions at a trial or deposition or induce a favorable settlement. In another scenario, an attorney who disclosed a tape containing evidence of a crime to law enforcement officials had to pay \$20,000 to the people whose illegal activity he attempted to bring to light.<sup>7</sup>

North Carolina attorneys also must give attention to several ethics opinions under the Rules of Professional Conduct. RPC 192 (Jan. 13, 1995) rules that if a lawyer's client makes an illegal tape-recording, the lawyer may not even listen to the tape-recording, or use the information on the illegal tape-recording to advance his client's case. The rationale is that the attorney would be enabling his client to benefit from her illegal conduct, in a manner prejudicial to the administration of justice. I have difficulty justifying this ethics opinion with the fact that illegal recordings may be admissible in evidence for impeachment purposes. See *paragraph 18 below*.

RPC 220 (Oct. 20, 1995) addresses the issue of an illegal tape recording made by someone other than the lawyer's client. The ethics opinion does not try to rule whether it is illegal for the client or the lawyer to listen to the tape recording or use the contents. In the event listening to or using information from the tape recording does not violate the substantive statute, the ethics opinion holds that the attorney may listen to the tape recording and use the information. However, if there is doubt as to whether listening to or using the tape recording would violate the substantive statute, the attorney should seek a court's permission to listen to the tape recording.

A somewhat related issue was addressed in RPC 171 (April 15, 1994). This ethics opinion rules that a lawyer does not violate the Rules of Professional Conduct by secretly tape-recording a conversation with an opposing lawyer. Lawyers are encouraged as a matter of professionalism to disclose to the other lawyer that the conversation is being tape-recorded, but are not required to do so.

### Miscellaneous Issues

The following list of issues arising under the Wiretap Acts is not intended to be comprehensive nor is each issue discussed in detail. The federal Wiretap Act has been described as "famous (if not infamous) for its lack of clarity."<sup>8</sup> Many issues are still unresolved.

1. **Consequences for violation can be severe.** The federal Wiretap Act provides for a fine up to \$500 and imprisonment of not more than five years, or both.<sup>9</sup> Violation of North Carolina's Wiretap Act is a class H felony.<sup>10</sup> In addition, a public officer who violates the North Carolina Act is subject to removal from public office and subsequent ineligibility to hold any public office.<sup>11</sup> Aggrieved persons can receive civil damages. This includes the greater of actual damages or statutory liquidated damages, punitive damages, and reasonable attorneys fees.<sup>12</sup> An award of damages is discretionary under the federal statute,<sup>13</sup> but appears mandatory under the North Carolina statute. Statutory liquidated damages are the greater of \$100 a day for each day of violation, or \$10,000 under federal law and \$1,000

under North Carolina law.

2. **Was the original interception illegal?** The legality or illegality of the original interception affects all subsequent users. If an interception is unlawful, subsequent disclosure or use of the contents of the communication is generally unlawful, even by a person who had no role in the unlawful interception and who learned the contents innocently. The flip side of the coin is an if interception was lawful, further use and disclosure is permissible, even by third parties who would not have been authorized to intercept the communication in the first instance.

3. **Consent by one party.** If one party to a communication gives consent to an interception, the interception does not violate the North Carolina Wiretap Act.<sup>14</sup> Under the federal Wiretap Act, an interception authorized by one party to the communication is lawful unless (1) the interception is for the purpose of committing a criminal or tortious act, and (2) the interception is by a person not acting under color of law.<sup>15</sup> Some states require consent by both parties to an intercepted communication. If the interception involves another state, the attorney should not presume that consent by one party is sufficient.

Even if an interception was unlawful, the North Carolina Wiretap Act permits subsequent disclosure or use if at least one party to the communication consents to the disclosure or use.<sup>16</sup> This is not the case under the federal Wiretap Act.<sup>17</sup>

4. **Consent may be implied.** If an employer clearly notifies employees that telephone calls or e-mail messages will be subject to monitoring or recording, employees probably will be deemed to have given their consent.<sup>18</sup>

5. **Vicarious consent for minors' communication.** Several courts have ruled that parents can give vicarious consent for the interception of their minor children's communications.<sup>19</sup> The parent must act out of concern for the welfare of the child, not for other motivations. Courts do not want to prevent parents from monitoring messages that might be dangerous to their children. Vicarious consent usually arises in the context of a parent recording a child's telephone conversations made from the parent's own house.

The vicarious consent doctrine was not applied when an ex-husband planted a bug in his former wife's house to monitor his child's telephone conversations.

6. **Inadvertence.** The federal Wiretap Act prohibits only intentional interception, disclosure or use of the contents of communications. The North Carolina statute similarly prohibits willful interception, disclosure or use. The somewhat anomalous result is that an interception which is inadvertent (and thus lawful) permits subsequent disclosure and use that is intentional. Of course, a person who claims that his interception of a communication was inadvertent must be prepared to prove that fact if necessary.

7. **No reason to know original interception was illegal.** A person is not prohibited from disclosing or using the contents of an illegal interception if he did not know or have reason to know that the interception was illegal. Courts will not lightly accept a defendant's assertion that he had no

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# Eavesdropping

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reason to know an interception was illegal. A lawyer facing criminal charges for violating the Wiretap Act requested a jury instruction that a lawyer is entitled to believe his client's statement that the client's wife had consented to the interception. The court rejected the proposed jury instruction and left that as an issue for the jury. "There is nothing in the act which affords attorneys special treatment."<sup>21</sup>

**8. Listening, copying and transcribing probably does not constitute use.** Most courts hold that merely listening to an intercepted communication does not create liability for "use" of the communication.<sup>22</sup> Nor does merely reproducing the communication by copying or transcribing.<sup>23</sup> However, at least one court has held that listening constituted "use."<sup>24</sup>

**9. No interspousal communication exception.** Some courts have held that a spouse does not violate the Wiretap Act by tape-recording the other spouse's calls from the family home. This so-called "spousal communication exception" is not available in North Carolina, by authority of both the Fourth Circuit and the North Carolina Supreme Court.<sup>25</sup>

**10. Extension phone exception.** Many cases involve the scope of what is often referred to as the "extension phone exception." The Wiretap Act's definition of *device* contains a complicated exception. A device does not include "any telephone or telegraph instrument equipment or facility, or any component thereof," that is (a) furnished to the user by a provider of wire or electronic communication service in the ordinary course of its business and being used by the user in the ordinary course of its business, or (b) furnished by the user for connection to such wire or electronic communication service and used in the ordinary course of the user's business.<sup>26</sup>

When the exception applies, there is no "device" involved and thus no prohibited interception. The exception includes extension telephones, as long as they are being used in the ordinary course of business. Answering machines also should be included. Courts disagree on whether recording devices attached to the phone system or extension phones are included in the exception. The dispute has important ramifications for employers and employees, in particular.

The Fourth Circuit takes a narrow view of the extension phone exception. A company that had received bomb threats installed a recording device ("voice logger") to record all telephone conversations on the main public access telephone lines to the company.<sup>27</sup> The court ruled that the voice logger was a "device," rather than a component of the telephone system, thus the exception did not apply. The company violated the Wiretap Act. The practical effect of this ruling is that even when an employer has strong reasons to suspect misconduct by an employee, the employer cannot attach a recording device to secretly monitor the employee's calls. In contrast, courts in some other jurisdictions allow employers to install recording devices to

monitor and record employees' business calls when they have a legitimate business reason to do so.<sup>28</sup>

If an employer monitors employees' calls with extension telephones or other telephone-related components not considered "devices," the extension telephone exception applies if the employer acts within the ordinary course of business. Case law indicates that monitoring employees' business calls generally will be considered in the ordinary course of business, while monitoring personal calls is not in the ordinary course of business (except to the limited extent of determining whether the call was personal or business-related).<sup>29</sup>

**11. Employees have privacy rights.** A number of cases hold that employees have legitimate expectations of privacy for conversations or for telephone calls in their offices, and thus can seek redress for illegal interceptions.<sup>30</sup> It all depends on the particular facts and circumstances, when employees' conversations can be easily overheard they do not have a reasonable expectation of privacy.<sup>31</sup>

**12. Boards of education are not liable.** Boards of education and other governmental entities are excluded from the definition of a "person" in the federal and state surveillance statutes, and therefore cannot be a defendants. However, employees of governmental entities may be liable.

**13. Cordless and cellular telephone conversations are protected.** Until 1994, the radio portion of cordless telephone conversations were not protected. Now, both the federal and state wiretap statutes protect these conversations.

**14. Fourth Amendment considerations.** The Fourth Amendment does not apply to interceptions of communications by private persons. If a governmental body or employee intercepts a communication, the initial consideration is whether the speaker had a justifiable expectation of privacy.<sup>34</sup> This depends upon all the circumstances, including the employer's policies and practices. If the employee has a reasonable expectation of privacy, the public employer's work search is judged by the standard of "reasonableness under all the circumstances."<sup>35</sup> This rule likely applies to searches of employee's computer files and electronic mail. The best way for public employers to protect against possible liability is to disseminate a policy notifying employees that their computer files and electronic mail are not private and may be monitored.

**15. Stored e-mail and voice mail messages.** Stored electronic messages are protected by the Stored Communications Act.<sup>36</sup> Accessing stored electronic communications gives rise to civil damages, but not exclusion of evidence under federal law.<sup>37</sup> Unauthorized access to stored e-mail communications will violate the Stored Communications Act, but not the federal Wiretap Act.<sup>38</sup> Unauthorized recording of stored voice-mail messages has been held a violation of both the Stored Communications Act and the federal Wiretap Act.<sup>39</sup>

The Stored Communications Act contains an exception for access by the provider of the electronic communications service.<sup>40</sup> This exception is generally regarded as permitting access to employees' stored e-mail messages (and other electronic communications) by an employer who provides a computer system for employees. Just to be sure, an

employer who wants to ensure access to all e-mail messages on the employer's computer system should adopt and notify all employees of a policy to that effect. This should avoid the creation of a reasonable expectation of privacy and also should constitute implied consent for monitoring by the employer.

**16. "Good faith" defense.** The wiretap statutes have a limited good faith defense. The federal Wiretap Act provides a complete defense for good faith reliance on a court warrant or order, grand jury subpoena, legislative authorization, statutory authorization, request of a law enforcement officer and certain disclosures by electronic communication providers.<sup>41</sup>

The state Wiretap Act is more limited. It provides a complete defense for good faith reliance on a court order or on a representation made by the Attorney General or a district attorney.<sup>42</sup>

Violation does not require specific intent to violate the federal Wiretap Act. Ignorance of the law is no excuse.<sup>43</sup> Good faith reliance on an attorney's advice has been ruled insufficient.<sup>44</sup> Similarly, good faith reliance on the advice of the district attorney that it was legal to record telephone conversations was no defense.<sup>45</sup>

**17. Attorney-client privilege.** It is not established whether a client's disclosure to an attorney of an illegally intercepted communication is protected by the attorney-client privilege. The First Circuit Court of Appeals has said reasonable arguments exist on both sides, but did not decide the issue.<sup>46</sup> The Fifth Circuit Court of Appeals did not allow the attorney-client privilege to be used as a defense, where it was not necessary that the client tell the attorney the contents of the intercepted communication.<sup>47</sup>

**18. Admissibility evidence.** Unlawfully intercepted oral and wire communications are generally inadmissible under the federal Wiretap Act.<sup>48</sup> The North Carolina statute generally excludes illegally intercepted electronic communications as well.<sup>49</sup> Case law supports admissibility for impeachment purposes, at least in criminal cases. The Fourth Circuit recently ruled that an illegally taped conversation showing adultery is admissible in a civil divorce action,

when used to impeach an affidavit denying adultery.<sup>50</sup>

Education lawyers may find it necessary to give advice concerning the interception of oral wire or electronic communications. Such occasions can present high drama and an apparent need for immediate action. The lawyer should carefully consider the federal and state Wiretap Acts before recommending a course of action. □

#### Endnotes

- 1 U.S. v. Murdock, 63 F.3d 1391 (6th Cir. 1995).
- 2 Peavey v. Harman, 37 F.Supp.2d 495 (N.D.Tex. 1999), *aff'd in part, rev'd in part*, 221 F.3d 158 (5th Cir. 2000).
- 3 18 U.S.C. § 2511.
- 4 G.S. § 15A-286 *et seq*.
- 5 18 U.S.C. § 2701 *et seq*.
- 6 E.g., U.S. v. Wuliger, 981 F.2d 1497 (6th Cir. 1992); Williams v. Poulos, 11 F.3d 271 (1st Cir. 1993); Pollock v. Pollock, 154 F.3d 601 (6th Cir. 1998).
- 7 Rodgers v. Wood, 910 F.2d 444 (7th Cir. 1990).
- 8 Steve Jackson Games, Inc. v. United States Secret Service, 36 F.3d 457, 462 (5th Cir. 1994).
- 9 18 U.S.C. § 2511(4)(a).
- 10 G.S. § 15A-287(a).
- 11 G.S. § 15A-287(g).
- 12 18 U.S.C. § 2520, G.S. § 15A-296.
- 13 Culbertson v. Culbertson, 143 F.3d 825 (4th Cir. 14 1998).
- 14 G.S. § 15A-287(a).
- 15 U.S.C. § 2511(2)(c) and (d).
- 16 G.S. § 15A-287(a).
- 17 U.S. v. Wuliger, 981 F.2d at 1508.
- 18 Williams v. Poulos, 11 F.3d at 281-82.
- 19 Thompson v. Dulaney, 838 F.Supp. 1535 (D.Utah 1993); Pollock v. Pollock, *supra* n 6.
- 20 W. Virginia Dept. of Health and Human Resources *ex rel.*, Wright v. David L., 453 S.E.2d 846 (W.Va. 1994).
- 21 U.S. v. Wuliger, 981 F.2d at 1525.
- 22 Dorris v. Absher, 179 F.3d 420, 424 (6th Cir. 1999).
- 23 Peavey v. Harman, 37 F.Supp.2d at 513-14.
- 24 Thompson v. Dulane, *supra* n 19.
- 25 Rickenbocker v. Rickenbocker, 290 N.C. 373, 226 S.E.2d 347 (1976); Pritchard v. Pritchard, 732 F.2d 372 (4th Cir. 1984).
- 26 18 U.S.C. § 2510(5).
- 27 Sanders v. Robert Bosch Corp., 38 F.3d 736 (4th Cir. 1994).
- 28 E.g., Epps v. St. Mary's Hospital, 802 F.2d 412 (11th Cir. 1986).
- 29 Watkins v. L. M. Berry and Co., 704 F.2d 577, 582-83 (11th Cir. 1983).
- 30 Dorris v. Absher, 179 F.3d at 425; U.S. v. McIntyre, 582 F.2d 1221, 1224 (9th Cir. 1978).
- 31 Kemp v. Block, 607 F.Supp. 1262 (D.Nev. 1985).
- 32 18 U.S.C. § 2510(6); G.S. § 15A-286(1)(b); Armati v. City of Woodstock, 176 F.3d 952 (7th Cir. 1999).
- 33 *In re Askin*, 47 F.3d 100, 103 (4th Cir. 1995).
- 34 U.S. v. Katz, 389 U.S. 347 (1967).
- 35 O'Connor v. Orteg, 480 U.S. 709, 725 (1987).
- 36 18 U.S.C. § 2701 *et seq*.
- 37 18 U.S.C. §§ 2701(b), 2707, 2708.
- 38 Steve Jackson Games, Inc. v. United States Secret Service, 36 F.3d 457 (5th Cir. 1994).
- 39 U.S. v. Smith, 155 F.3d 1051 (9th Cir. 1998).
- 40 18 U.S.C. § 2701(c)(1).
- 41 18 U.S.C. § 2520(d).
- 42 G.S. § 15A-296(b).
- 43 U.S. v. McIntyre, 582 F.2d at 1524.
- 44 Thompson v. Dulaney, 838 F.Supp.2d at 1542.
- 45 Peavey v. Harman, 37 F.Supp.2d at 511.
- 46 Williams v. Poulos, 11 F.3d at 291-92.
- 47 Peavey v. Harman, 221 F.3d at 177.
- 48 18 U.S.C. § 2515.
- 49 G.S. § 15A-294(f) and (g).
- 50 Culbertson v. Culbertson, 143 F.3d 825 (4th Cir. 1998).

## MDP TASK FORCE WEB SITE



The NCBA's Multidisciplinary Task Force has a Web site at [www.ncbar.org/committees/mdp](http://www.ncbar.org/committees/mdp). The site includes references on MDP, available speakers, information on upcoming events, and minutes of task force meetings. Also included is a bulletin board to post comments. The MDP Task Force urges NCBA members to provide comments on this important issue.



# Fourth Circuit Approves 60-Day Statute of Limitations in Special Education Due Process Appeals

BY CHRISTOPHER Z. CAMPBELL

On Feb. 21, the United States Court of Appeals for the Fourth Circuit consolidated its decision in two North Carolina appeals and upheld the state's law requiring parents of a disabled student to file a due process petition with the Office of Administration Hearings within 60 days of the "final agency decision" of a school system. Writing for the court, Judge Diana Gibbon Motz reasoned that:

"because the statute at issue here ... contains an express requirement of clear and unambiguous notice of the agency action and of the commencement and time of the limitations period, and also because ... the state expressly designated that this abbreviated limitations period govern [Individuals with Disabilities Education Act (IDEA)] administrative proceedings, we conclude that adoption of this 60-day limitations period is not inconsistent with federal policies animating the IDEA."

In both cases the parents argued that the short limitations period adopted by the state conflicted with the principles embodied in the IDEA and thus was inconsistent with federal law. In one of the appeals, the United States Department of Education filed an *amicus* brief on behalf of the parents and the North Carolina School Boards Association filed an *amicus* brief on behalf of the school system. The State of North Carolina intervened on the side of the school system in both cases.

## North Carolina's Procedure for Due Process

The Individuals with Disabilities Act does not contain a statute of limitations. Courts must "borrow" the most analogous state statute when ruling on the timeliness of a due process complaint brought pursuant to IDEA. The act delegates to states the obligation to devise an appeal process for parental "due process." Under North Carolina law, Section 116(d) of Chapter 115C of the General Statutes expressly incorporates the procedure, for appeals con-

tained in Chapter 150B, the Administrative Procedures Act, including the limitations period set forth in subsection 23(f). The limitations period is 60 days, but it must be "triggered" through explicit notice by the school system in conformity with G.S. 150B-23(f).

## Impact

After upholding the statute of limitations, the court ruled that the notice given by the school systems to the parents in each case was insufficient to trigger the running of the statute of limitations and remanded those cases for further proceedings on the claims barred by the courts below. The court also held that school systems cannot make parents "notice proof" on the statute of limitations issue by providing them a copy of the *Handbook of Parents' Rights*, which outlines the appeals process and limitations period. Instead, a school system must clearly communicate to parents in writing that it is making a final decision and provide parents with the information required in G.S. 150B-23(f).

Notably, neither case dealt with the "Prior Written Notice" form currently in use by North Carolina school systems. That form does provide explicit notice of the limitations period and process to trigger trip running of the statute. In cases where the form is not used, school officials must provide a separate written notice pursuant to G.S. 150B-23(f) in order to trigger the statute. [CM, by JM and EM v. The Bd. of Ed. of Henderson County, No. 99-2533; and ME and PE on behalf of CE v. The Buncombe Bd. of Ed., No. 00-1101; 34 IDELR 57 (4th Cir. 2001)] □

CAMPBELL REPRESENTS SEVERAL BOARDS OF EDUCATION IN SPECIAL EDUCATION MATTERS. HE PRACTICES IN ASHEVILLE WITH THE FIRM OF ROBERTS & STEVENS, P.A.

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# Updates and New Developments



## Charter School Cases

Buncombe County case requiring the local school system to share the county supplement and fine and forfeiture fees with the charter schools in that county has been appealed by section member Richard Schwartz. In the meantime, a similar lawsuit was filed in Alamance County in March.

## Charlotte Case Argued to Full Panel

Section member Luke Largess argued on Feb. 27 to all 11 members of the Fourth Circuit Court of Appeals in support of the divided panel decision overruling Judge Potter's ruling that released the Charlotte system from court oversight and race-based considerations.

## Duke Kicker Verdict Upheld

Federal District Judge James Beaty denied all motions attempting to set aside the more than \$2 million sexual discrimination verdict against Duke University and awarded attorneys fees of \$388,800 to the attorneys for the female placekicker.

The placekicker was awarded compensatory and punitive damages for being cut from the Duke football team in the fall after kicking a winning field goal in spring practice. The plaintiff stated that her recovery would fund female athletic scholarships.

## Leandro Third Act

Judge Howard Manning decreed that state resources must be taken from achieving schools and put into low-performing schools to meet constitutional requirements.

## Education Law Council

### Legislative Proposals Move Forward

Student Discipline rules tightening approved in September meeting and reported in last newsletter, and bus discipline rule additions proposed by council member Jim Lawrence and approved in February meeting are being introduced in the General Assembly.

### Forsyth Teacher Guilty in Student/Sex Case

High School Teacher pleaded guilty to having sex with student in violation of the new N.C. felony statute. He spent several weeks in jail before trial and received a probationary sentence. His employment was terminated. The student transferred to another school.

### Chapel Hill High School Valentine Breath Test

Students attending the high school Valentine dance at East Chapel Hill School had to pass a blood-alcohol digital sensor test before being allowed into the big dance. Those failing were subject to possible five-day suspensions.

### Massachusetts Approves Reasonable Force

Massachusetts Board of Education voted to allow public school teachers to physically restrain students who threaten themselves or others when other options are ineffectual.

### English Teachers to get Self-Defense Training

Parliament approved £22 million for school security in Great Britain, including self-defense training. American teachers are consulting their British counterparts on how they deal with violent, disruptive and disaffected pupils. □

## Outstanding Speakers Highlight May 11 CLE

Plan now to attend the Education Section's CLE Program and Annual Meeting at the Bar Center in Cary on Friday, May 11. CLE Chair Liz Riley continues the section's tradition of offering a strong and timely program, one that should appeal to every member. Topics include Academic Freedom, Campus Relationships, Construction Law, Special Education, and Technology and Copyright.

Attorney James A. Keith from Jackson, Miss., will be joining an outstanding roster of prominent and nationally respected N.C. attorneys to cover these topics. You are sure to be informed and entertained.

As always, you can count on solid materials to take with you and refer to whenever you need them, together with your notes from the presentations.

Small as our section is, we often rank among the highest for percentage of members attending our CLE program annual meeting, and this is a distinction we endeavor to continue.

The program brochure with full details is currently in the mail, but you can check it out for yourself and register online at the NCBA Web site ([www.ncbar.org](http://www.ncbar.org)) or call the CLE Department at (919) 677-8745 or toll-free at 1-800-228-3402. □



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