



That these recommendations were developed by such a diverse and large aggregation of powerful organizations — representing such a broad swath of our economy and society — should be heartening to those who had given up on the prospects for policy responses commensurate with the scope of the challenges we face. We should not be resigned to settling for small steps forward — not when the problems of the health care system are growing by leaps and bounds.

We need systemic, and rapid, reform.

**COMMONWEALTH NORTH**

**Alaska Primary Health Care:  
*OPPORTUNITIES & CHALLENGES***

Approved by the Board of Directors on June 7, 2005  
Updated July 31, 2005

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## **EXECUTIVE SUMMARY**

### **Why Alaska health care issues must be addressed and solved**

Health care is not a goal or end in itself. The ultimate goal of health care and of this study is health and wellness for Alaskans. Alaskans must identify and improve the aspects of health care that are under our control. Many health care issues are national, that Alaskans cannot affect. Therefore, it is even more important to address and solve issues we can do something about. Furthermore, the demographics of an aging population will put foreseeable pressure on all fronts.

### **ACCESS**

- Approximately 110,000 Alaskans have no health insurance coverage.
- Many others have minimal or inadequate coverage.
- Thousands are turning to hospital emergency rooms as a source of primary health care, often without ability to pay.
- Adequate health care in remote areas is a significant logistical, financial and educational challenge.

### **QUALITY**

- Based on the 2004 National Healthcare Quality Report, Alaska has low rankings in several key measures of cancer, heart disease, maternal and child health, respiratory diseases, and nursing and home health care.
- Many Alaskans are in high-risk health categories, many are not receiving adequate care.

### **COST**

- Alaska health care costs are approximately 40% higher than Seattle (per Premera, corroborated by Providence and Alaska Regional)
- Medicaid costs to the State of Alaska are rising dramatically, to over \$1 billion in 2005. It is placing a strain on the state budget.
- Health care insurance premiums are also rising dramatically, creating a significant burden on employers and employees.
- Alaska hospitals are losing tens of millions of dollars from uncollectable accounts arising from excessive emergency room use and they are unable to reduce the amount of emergency room care provided due to Federal law.

### **What can we do?**

There are four major interrelated factors driving primary healthcare in Alaska today:

1. Health and wellness of the population
2. Availability of care and insurance
3. Affordability of care and insurance
4. Financial health of the stakeholders, such as employers, providers and individuals

These drivers are currently interacting in a "cost spiral" that is creating a very serious situation nationally and in Alaska. The rate of increase in the cost of health care is unsustainable—if unchecked health care increases will price employers out of the market. Already industries such as automobiles are threatened. We need to avoid similar impacts in Alaska.

We believe that with focus and coordination Alaskans can impact this "cost spiral" positively through specific actions in the four areas mentioned above:

1. Lifestyle and prevention: Raise public awareness and increase personal responsibility for wellness
2. Access: Make services and insurance more widely available
3. Quality: Continue improving quality of care that is delivered
4. Costs: Reduce costs of service delivery and insurance to make them more affordable

There are many health care initiatives already underway in these areas by various governmental and non-governmental entities. Some have proven to be effective and cost-efficient. Others show significant promise. Health care reform is complex and controversial, with multiple players and competing interests. Inconsistent tracking and trending create significant factual disputes about healthcare systems. Any major reform has potential to create both winners and losers.

Given this environment, the Study Group came to three overarching conclusions:

1. The Study Group process itself has been enlightening, educational and productive.
2. Every aspect of health care is complex. Understanding the system and improving it is beyond the capacity of any one element within the system.
3. The Study Group recommends that an ongoing body be established to continue and deepen this Group's work.

The time to act is now. Involvement of Alaskans in the health care debate is vital. Reform of some sort is inevitable, and Alaskans should control it as much as possible to our own benefit. Since there is no single forum today where the disparate players can come together to agree on facts, share solutions and craft a win-win for our unique Alaskan conditions, this Study Group recommend formation of—

### **The Alaska Health Care Roundtable ("Roundtable")**

The goals of the Roundtable are to continue communication and foster action among parties that have a long-term vested interest in health care reform. It must set a standard of credibility and create timely actionable ideas that can gather bipartisan support, get quick approval and become part of a long-term fiscal plan for Alaska. It would be a sounding board and facilitator for ideas and recommendations, with a focus on lifestyle and prevention, access, quality and cost.

The core membership in the Roundtable would be self-selecting, comprised of members with a long-term compelling interest in improving the Alaska health care system. Examples of core members would be major employers at risk, health care providers and local foundations. A wide variety of other potential members, resources and ad hoc participants could be included as needed. Funding would be by voluntary contributions by the participants and the community.

# An Urgent Call for Special Health Courts:

American healthcare is in meltdown.  
Costs are skyrocketing.  
Thousands die from needless errors.  
Doctors are quitting.

## America needs a reliable system of medical justice.



**COMMON GOOD™**

RESTORING COMMON SENSE TO AMERICAN LAW

[WWW.CGGOOD.ORG](http://WWW.CGGOOD.ORG)

# Unreliable Justice Is Destroying American Healthcare

## **Medical Justice is Random.**

Unreliable justice is not fair to anyone. Most patients harmed by medical errors get nothing. But doctors who did nothing wrong, especially in circumstances of human tragedy, are often hit with huge verdicts. There is no standard of care that doctors or patients can rely upon. One jury may make an award, and, on the same facts, the next jury may make a completely different judgment. Random justice infects the entire healthcare system with debilitating distrust.

## **Costs are Skyrocketing.**

American healthcare now costs more than \$6,000 per person—almost twice what other countries spend, but with no better results. Distrust of justice causes doctors to practice “defensive medicine,” ordering billions of dollars of unnecessary tests and procedures each year. More than 45 million Americans are uninsured, in part because many small businesses cannot afford coverage. Fear of lawsuits makes it almost impossible even to talk about containing costs.

## **Medical Errors are Widespread.**

Doctors and nurses are afraid of admitting uncertainty or mistakes, leading to needless medical errors. Thousands of Americans die each year unnecessarily from preventable slip-ups—like the wrong dosage of medicine—often in the same hospitals where miracle cures take place. Instead of providing incentives for doctors and hospitals to improve their systems, unreliable justice causes them to adopt a bunker mentality.

## **More and More Doctors are Quitting or Retiring.**

Distrust of the current justice system is undermining the healthcare profession. Stunning increases in medical malpractice premiums are causing doctors to abandon high-risk specialties like obstetrics and neurosurgery. In 2004, only 65% of the ob-gyn residency slots in the nation were filled by the graduating classes at U.S. medical schools.

## **We Must Restore Reliability to Medical Justice.**

A broad coalition of healthcare and other leaders—including leading patient advocates and employers—have come together behind the idea of creating reliable health courts. Common Good, a bipartisan organization dedicated to restoring common sense to American law, is helping spearhead this initiative.

**“In our current system, both patients and physicians are often unjustly penalized. We need to create a means of delivering medical justice that is consistent, efficient and fair.”**

**William R. Brody, M.D., Ph.D.**  
President, Johns Hopkins University

# How Special Health Courts Would Solve the Problem

**Reliable Justice**  
Health courts would have judges dedicated full-time to resolving healthcare disputes. The judges would make written rulings in every case to provide guidance on proper standards of care. Their rulings would set precedents on which both patients and doctors could rely. As with similar administrative courts that exist in other areas of law—for tax disputes, workers' compensation, and vaccine liability, among others—there would be no juries. To assure uniformity and predictability, each ruling could be appealed to a new Medical Appellate Court.

## **Fair Accountability**

Patients injured by mistakes should be compensated for their injuries without waiting years and without paying one-third or more to lawyers. Good doctors, unfairly charged, should be affirmatively protected, without living for years under the threat of personal ruin. Special health courts would be reliable and speedy.

**Reliable Justice**  
Reliable justice will not only clarify standards of proper care but provide incentives for doctors to keep up with the latest developments in medicine. Trust will be restored, encouraging the open professional interaction needed to reduce errors.

**"When patients are injured through medical error, healthcare providers have an obligation to respond—not only with improved medical care but also with equitable compensation. Healthcare courts are needed to provide fair resolution to both patients and healthcare providers."**

**William L. Roper, M.D., M.P.H.**

Dean, School of Medicine & Vice Chancellor for Medical Affairs,  
The University of North Carolina at Chapel Hill;  
CEO, UNC Health Care System

# How Special Health Courts Would Work

## **Full-Time Judges.**

The hallmark of the health courts would be full-time judges, dedicated solely to addressing healthcare cases. The judges would be appointed through a nonpartisan screening commission.

## **Neutral Experts.**

Those judges would be able to choose from a panel of experts in each area of medicine, avoiding the dueling "hired gun" experts that confuse and prolong disputes today.

## **Speedy Proceedings; Lower Costs.**

Most cases would be resolved within months. Except in exceptional cases, legal fees would be held to 20 percent, reducing current costs by almost half.

## **Liberalized Recovery for Injured Patients.**

Once a mistake is verified, recovery would be automatic without the need to prove precisely how it happened.

## **Damages.**

Patients would be reimbursed for all of their medical costs and lost income, plus a fixed sum that would be pre-determined according to a schedule addressing specific types of injuries. The schedule would be established by a panel of experts and updated periodically to reflect changing costs.

**"The current legal system presents real barriers to improving the quality of American healthcare. A special health court could provide powerful incentives for honest reporting and analysis of errors, and to elevate standards of care."**

**Margaret E. O'Kane**

President, National Committee for Quality Assurance

# Coming Together for Our Common Good

**"Our nation was built on a foundation of reliable law. Fixing American healthcare requires a basic shift in approach, aimed at making justice reliable for both patients and doctors."**

**Philip K. Howard**

Chair, Common Good

America was built with a spirit of common sense and cooperation. Our nation's founders erected schools and hospitals because these common institutions were essential to a vigorous and free society. Today, the American legal system has unintentionally undermined this cooperative spirit. Legal fear is infecting daily choices, inhibiting doctors, teachers, little league coaches and others from making the reasonable judgments needed to serve the common good.

Common Good is a bipartisan coalition dedicated to restoring common sense to America. Working with experts in different fields, Common Good is developing practical solutions to restore reliability to American law, so that Americans in all walks of life feel free to do what is right and reasonable.

Common Good's board is composed of leaders in every field, including political figures from both parties such as Tom Kean, George McGovern, Newt Gingrich, Alan Simpson and Griffin Bell. Common Good's Chair, Philip K. Howard, is a prominent lawyer, civic leader and bestselling author (*The Death of Common Sense* and *The Collapse of the Common Good*).

**"The current medical liability system is undermining patient safety. By creating incentives to hide errors, blame and never apologize, it fuels the epidemic of medical errors and consumer distrust. Piecemeal tort reform is not a solution. We must create a system of justice that can make the deliberate choices needed to fix healthcare and restore integrity in both law and medicine."**

**Martin J. Hatlie, J.D.**

President, Partnership for Patient Safety;  
Co-Founder, Consumers Advancing Patient Safety



## BIPARTISAN LEGISLATION TO CREATE SPECIAL HEALTH COURTS IS INTRODUCED IN U.S. SENATE

**The Bill, Advancing an Idea Championed by Common Good, Would Authorize Funding for States to Create Health Courts on a Pilot Project Basis**  
*Common Good Press Release, June 30, 2005*

Senators Michael Enzi (R-WY) and Max Baucus (D-MT) have introduced legislation in the U.S. Senate to create special health courts on a pilot project basis. Known as the *Fair and Reliable Medical Justice Act*, the bill is backed by a broad coalition of patient advocates and providers and responds to the Institute of Medicine's call for the development of alternatives to current medical tort litigation. Sen. Enzi is Chair of the Senate Committee on Health, Education, Labor, & Pensions. Committee hearings on the legislation are expected later this year.

The bill's purpose is:

- To restore fairness and reliability to the medical justice system by fostering alternatives to current medical tort litigation, including the creation of a special health care court, that promote early disclosure of health care errors and provide prompt, fair, and reasonable compensation to patients who are injured by health care errors;
- To promote patient safety through early disclosure of health care errors; and
- To support and assist states in developing such alternatives.

The bill would authorize the U.S. Secretary of Health and Human Services to award up to 10 demonstration grants to states for the development, implementation and evaluation of alternatives to current tort litigation for resolving disputes over medical errors. Within that context, the bill specifically authorizes the creation of a special health care court. The hallmark of such a court would be full-time judges with health care expertise, whose sole focus would be on addressing medical malpractice cases.

"This important bill, introduced by Senators Enzi and Baucus, points the way to making justice in health care serve our common goals," said Philip K. Howard, Chair of Common Good. "Special health courts can offer reliable justice for doctors and patients alike, while providing affirmative rulings to improve patient safety. Both Senators deserve great praise for advancing this bipartisan initiative."

"Reliable and timely decisions by expert courts are needed for real improvements in patient safety, as well as basic fairness," said Troyen Brennan, MD, M.P.H., a Professor at the Department of Health Policy and Management at Harvard School of Public Health. "The important legislation introduced by Senators Enzi and Baucus is a very significant step in the right direction."

**The Enzi-Baucus legislation enjoys prominent, bi-partisan support. Here is what a few national leaders had to say:**

"The current legal system presents real barriers to improving the quality of American health care. The legislation introduced by Senators Enzi and Baucus--oriented around exploring alternatives to the current malpractice system--represents a major positive development."--  
*Margaret E. O'Kane, President, National Committee for Quality Assurance*

"I've been working to improve patient safety since medical errors resulted in the death of my husband and a serious injury to my son--reforming the legal system is crucial. The legislation introduced by Senator Enzi and Senator Baucus is a very positive development."--  
*Susan E. Sheridan, Co-Founder, Consumers Advancing Patient Safety*

"The Progressive Policy Institute congratulates Senators Mike Enzi and Max Baucus for introducing legislation to create specialized health courts as pilot projects that could eventually replace America's broken system of medical justice."--  
*David Kendall, Senior Fellow, Progressive Policy Institute*

"The legislation introduced by my friends Senators Mike Enzi and Max Baucus represents a critically important step in developing a more reliable system of medical justice."--  
*Alan K. Simpson, Former U.S. Senator, Wyoming*

"The Enzi-Baucus bill to create health courts is

"The current medical liability system incentivizes cover-up and blame, fueling the epidemic of medical error," said Martin J. Hatlie, President of the Partnership for Patient Safety. "The legislation introduced by Senator Enzi and Senator Baucus can help create the system of justice that both consumers and providers need to restore trust between them, improve health care and save lives."

"Health courts are needed to provide fair resolution to both patients and health care providers," said William L. Roper, M.D., M.P.H., Dean of the School of Medicine and CEO of the University of North Carolina Health Care System. "The legislation introduced by Senators Enzi and Baucus represents an important step in developing a more reliable system of medical justice."

More than 80 of the nation's most prominent leaders in health care and law--including patient safety experts and 11 deans of medical schools or schools of public health--have called for the creation of special health courts as a way of restoring reliability to medical justice. Their call was precipitated by inadequacies and inequities in the current system:

- At present, less than two percent of patients with medical injuries due to substandard care file a claim, and even fewer receive compensation. Those fortunate enough to receive compensation will have waited an average of four years in the court system before receiving a dime.
- The current system cannot reliably distinguish good doctors from bad ones, which exposes medical professionals who have done nothing wrong to the risk of ruinous liability. Eighty percent of claims involve situations where doctors did no wrong. Nonetheless, plaintiffs receive compensation in a quarter of these cases.
- The current system harms patient quality and safety. Fear of litigation drives costly and inefficient "defensive medicine," while creating incentives for health care providers to cover up their own mistakes and the mistakes of their colleagues. This culture of silence prevents doctors from learning from mistakes, and leads to needless suffering and death.

a major step toward breaking the logjam over litigation reform. For too long doctors have been driven out of practice and Americans have found themselves losing their healthcare because of excess litigation. This bill is a very creative effort to find a new and better solution."--*Newt Gingrich, Founder, Center for Health Transformation, Former Speaker of the U.S. House of Representatives*

"The medical liability crisis is a serious problem that is driving up the cost of care, driving physicians out of the health care delivery system and not even effectively compensating those who have been hurt by medical errors. Aetna supports a liability system that is centered on patients and safety and one that uses the best medical expertise available to answer questions of fact in medical liability cases. The use of special health courts could be a key component of a comprehensive solution to the problem. The comprehensive solution should include efforts to (a) avoid medical errors in the first place and (b) establish an efficient mechanism to ensure that those who are hurt are fairly compensated. Special health courts that bring medical expertise to bear would be helpful, along with uniform medical liability reform, improved patient safety and better use of national medical data."--*John W. Rowe, M.D., Chairman and CEO, Aetna*

Read the *Fair and Reliable Medical Justice Act*

Read the Common Good press release.

Read the American College of Obstetricians and Gynecologists' endorsement of the bill.

Printed from <http://www.cgood.org/>

# STATE OF ALASKA

Department of Health & Social Services  
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## MEMORANDUM

**TO:** The Honorable Peggy Wilson  
Alaska House of Representatives  
State Capitol, Room 108

**THRU:** Karleen Jackson  
Commissioner  
Department of Health and Social Services

**FROM:** Richard Mandsager, M.D.  
Director, Division of Public Health  
Department of Health and Social Services

**DATE:** February 21, 2006

**SUBJECT:** HB396 – Alaska Commission on Health Care

You have asked for a quick review of projects, initiatives and special emphasis underway in Alaska to address the issues of improving public health and health care and reducing health care costs. As you are aware, much of the work on these broad topics occurs outside the purview of the Division of Public Health (DPH).

Here is a very general list of work being undertaken in Alaska that involves staff from the Department of Health and Social Services (DHSS). This is by no means intended to be a comprehensive analysis but instead a broad-brush outline.

This listing of ongoing work involving the Department is organized according to the issues identified in Sec. 44.19.277 of HB396, which describes the fundamental powers and duties of the proposed commission:

### **1) Establishment of an affordable, effective, and quality healthcare system**

- Revision of Certificate of Need regulations, standards and methodology to assure that new facilities and services are built only in response to need.
- Obtaining federal funds for support of the primary care and rural health systems to:

- Provide data support for Community Health Center and other safety net provider applications, and improve data availability through diverse means;
- Complete health professional shortage area designations;
- Coordinate recruitment efforts (National Health Service Corps, J-1 visa program, 3R-Net, SEARCH);
- Conduct workforce studies; and
- Support quality improvement and network development in the health care system (rural hospitals, primary care providers, integrated services for primary care and behavioral health, emergency medical services).
- DHSS Commissioner has co-chaired the Alaska Telehealth Advisory Council and Department staff work to support telemedicine development to reduce costs and improve quality of care.
- Establishment of a Regional Health Information Organization/Health Information Exchange workgroup.
- Work with Denali Commission to ensure funding for improvements in the health care infrastructure.
- Through the Denali Commission, coordinate regional planning efforts in the Mat-Su, on Prince of Wales Island and the Copper River region.
- Assist small rural hospitals to evaluate the possibility of converting to Critical Access Hospital classification.
- Foster the development through grant funding of the Alaska Hospital and Nursing Home Association in the establishment and development of the Alaska Small Hospital Improvement Program in meeting member hospitals' PPS, HIPAA and QI collective needs.
- Support the Alaska Hospital Performance Improvement Project, focusing on three small hospitals to identify potential improvements in reimbursement and patient care.
- Much work is underway in the Division of Behavioral Health in the area of integrating substance abuse and mental health treatment. This applies not just to adults, but also to children (DHSS' Bring the Kids Home initiative).
- Participation as a member of the All-Alaska Pediatric Partnership with the goal of improving and further developing the delivery of medical services to children.

## **2) Access to affordable health care**

- Creation of Denali KidCare.
- Expansion of the federal Section 330 Community Health Center program in Alaska.
- Evaluating progress toward Healthy Alaskans 2010 goal to cover the uninsured through household and employer surveys, identifying who is

uninsured and why, and inter-departmental work on insurance issues and options for improving access to affordable insurance and care. (Health Planning and Systems Development work is now underway with HRSA funds to expand these efforts, to display and explain the nature of the problem, and the direct and indirect costs of people being uninsured.)

- Telemedicine support and coordination that provides for greater degree of on-site care provision with less travel costs and less use of antibiotics.
- Telehealth expansion plans that will result in availability of clinical telehealth services in Community Health Centers.
- TeleBehavioral Health Program.
- Worked with the Anchorage Access to Healthcare Coalition to develop Anchorage Project Access, which is a volunteer provider network to increase access to individuals who cannot afford care and do not qualify for any assistance programs.

### **3) Individual responsibility for personal health and wellness; and**

### **4) Disease prevention and management**

The Section of Chronic Disease Prevention and Health Promotion in DPH includes several programs (*Cancer Prevention and Control Program, Diabetes Prevention and Control Program, Arthritis Program, Heart Disease and Stroke Program, Obesity Prevention and Control Program, Tobacco Prevention and Control Program, School Health Program and the Health Promotion Program*) that are currently addressing the issue of disease prevention and management as well as the promotion of health and wellness. An overarching goal of all of the Section's programs is that they focus their efforts on creating and establishing policy and environmental changes that enable individuals to make healthy lifestyle choices. Additionally many of the programs are working with communities, businesses, healthcare providers and other partners to support and sustain these efforts. Evidence based public health practices support this approach, which will enable long term and sustainable changes in societal norms and health behavior that will ultimately result in improved health outcomes.

Here are some examples of program activities:

- Worksite Wellness Project - This is a collaborative project between all of our chronic disease programs and Aetna to implement a pilot project with four small businesses to determine a set of best practices for developing worksite wellness programs in Alaska.
- Chronic Disease Self Management - This is a collaborative project with all of our chronic disease programs that provides training to health care

providers statewide to teach them how to work more closely with patients to address their patients ability to manage their chronic disease(s).

- Obesity and School Health programs are working with schools and communities to address the surging epidemic of childhood obesity.

#### **5) Workforce shortages among health care providers**

- Work with the Alaska Workforce Investment Board and conduct workforce studies.
- Partnership between the University of Alaska and the health care industry to expand the number of nurses graduating from UAA.
- In cooperation with the university, establishment of the Alaska Physician Supply Task Force.
- Maintaining current Health Professional Shortage Area applications for health, mental health and dental designations throughout Alaska.
- Coordinate recruitment efforts that focus on opportunities for loan repayment, scholarships and student/resident rotations (National Health Service Corps, J-1 visa program, 3R-Net, SEARCH student rotations).
- Coordinate and lead Comprehensive Integrated Mental Health Program Plan to help improve access to care for Alaskans with behavioral health needs and developmental disabilities.

#### **6) Cost shifting by health care providers caused by insufficient reimbursement or lack of insurance**

- Collaboration amongst the Medicaid program and the tribally administered programs so that cost efficiencies are maximized.
- Integrating tribal and community supported health care providers to maximize local dollars minimize redundant/competing systems. The "Tribal Program" in DHSS is an effort to provide state government responsiveness and assistance to solve problems, build and maintain capacity to assure access, and encourage efficiency.
- Establishment of State Planning Grant to document issues related to the uninsured and underinsured residents in Alaska.
- Distribution of Disproportionate Share Hospital funding allocations.

#### **7) Need for courts with specialized jurisdiction to consider health issues**

- Nothing is underway in Alaska that we are aware of; however, this is actually a question for the Department of Law and Alaska Court System.

#### **8) Improvements in public health**

- The passage of a comprehensive new public health law to better protect the public while strengthening due process rights. The new statutes (incorporated by HB95, passed by the 2005 Legislature) are critically important to public health practice because they provide the framework within which governmental public health agencies operate, as well as the legal authorities required to monitor health status in communities, identify health threats, and to control the spread of disease.
- A newly consolidated certification and licensing function in state government that better protects the public safety by coordinating background check functions, on-site reviews and other requirements to make hospitals, nursing facilities and assisted living homes as safe as possible.
- Pending construction of a modern virology laboratory in Fairbanks to replace an outdated, overcrowded facility. The safe and efficient operation of the virology lab is vital to the detection, treatment and control of highly infectious and serious diseases in Alaska.
- Creation of statewide plan to prepare for the possibility of pandemic flu in Alaska. The plan describes a coordinated strategy to prepare for and respond to an influenza pandemic in five key areas: surveillance and investigation; health care systems; community disease control; vaccines and antiviral medications; and communications.

#### **9) Public availability of health care cost information**

- The Department publicly reports the annual cost of Medicaid services in Alaska and regularly cites estimates from the federal government of costs associated with various health problems (i.e., according to CDC, Alaska's annual medical costs for tobacco use are approximately \$132 million).
- As for public information about costs and comparisons for specific types of medical care or procedures, nothing substantive is underway in Alaska that we are aware of.

Cc: Sherry Hill  
 Special Assistant  
 Office of the Commissioner  
 Department of Health and Social Services

Patricia A. Carr, MPH  
 Health Planning and Systems Development  
 Alaska Office of Rural Health  
 Office of the Commissioner  
 Department of Health and Social Services

**HB**

**408**



24-GH2021\G  
Mischel  
2/13/06

**CS FOR HOUSE BILL NO. 408(HES)**

**IN THE LEGISLATURE OF THE STATE OF ALASKA**

**TWENTY-FOURTH LEGISLATURE - SECOND SESSION**

**BY THE HOUSE HEALTH, EDUCATION AND SOCIAL SERVICES COMMITTEE**

**Offered:  
Referred:**

**Sponsor(s): HOUSE RULES COMMITTEE BY REQUEST OF THE GOVERNOR**

**A BILL**

**FOR AN ACT ENTITLED**

1 **"An Act relating to the definition of 'child abuse or neglect'; and providing for an**  
2 **effective date."**

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

4 **\* Section 1.** AS 47.17.290(2) is amended to read:

5 (2) "child abuse or neglect" means the physical injury or neglect,  
6 mental injury, sexual abuse, sexual exploitation, or maltreatment of a child under the  
7 age of 18 by a person under circumstances that indicate that the child's health or  
8 welfare is harmed or threatened thereby; "child abuse or neglect" includes a  
9 determination, at delivery, by a health care provider that a child has been  
10 adversely affected by, or is withdrawing from exposure to, a controlled substance  
11 or alcohol; in this paragraph,

12 (A) "controlled substance" has the meaning given in  
13 AS 11.71.900, but does not include a substance lawfully taken under a  
14 prescription from a health care professional;

1  
2  
3  
4

(B) "mental injury" means an injury to the emotional well-being, or intellectual or psychological capacity of a child, as evidenced by an observable and substantial impairment in the child's ability to function;

\* **Sec. 2.** This Act takes effect immediately under AS 01.10.070(c).

**AMENDMENT #1**

OFFERED IN THE HOUSE HEALTH,  
EDUCATION AND SOCIAL  
SERVICES COMMITTEE  
TO: HB 408

BY Rep. Gatto  
DATE 2/09/06

- 1 Page 1, line 1, following "An Act relating to the definition of 'child abuse':

Delete "and"  
Insert "or"

AMENDMENT #2

OFFERED IN THE HOUSE HEALTH,  
EDUCATION AND SOCIAL SERVICES  
COMMITTEE  
TO: HB 408

BY Rep. Gardner & Rep. Wilson

- 1 Page 1, line 8, following "thereby;":  
2       Insert "child abuse or neglect" includes a determination. at delivery. by a health  
3 care provider that a child has been adversely affected by. or is withdrawing from exposure  
4 to, a controlled substance or alcohol:"  
5  
6 Page 1, lines 9 - 12:  
7       Delete all material.  
8  
9 Page 1, line 13:  
10       Delete "(B)"  
11       Insert "(A)"  
12  
13 Page 2, line 2:  
14       Delete "(C)"  
15       Insert "(B)"

# FISCAL NOTE

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

Fiscal Note Number: 1  
 Bill Version: HB 408  
 ( H ) Publish Date: 1/30/06  
 Dept. Affected: Health & Social Services

Revision Date/Time (Note if correction):

Title SUBSTANCE EXPOSED NEWBORNS AND CHILD ABUSE

RDU Children's Services

Component Front Line Social Workers

Sponsor (RLS) BY REQUEST OF THE GOVERNOR

Requester GOVERNOR

Component No. 2305

**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 (0)</b>						
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**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1037 GF/Mental Health						
Other(Specify Type-do not abbreviate)						
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: \_\_\_\_\_

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 Office of Children's Services (OCS) has determined that many medical professionals in Alaska are already reporting affected infants to our offices. The potential increased reporting that would result from the enactment of this bill should be minimal, and the OCS does not anticipate any fiscal impact.

Prepared by: Tammy Sandoval, Deputy Commissioner

Phone 465-3791

Division Office of Childrer's Services

Date/Time 11/04/2005

Approved by: Karleen Jackson, Commissioner

Date 11/08/2005

Agency Department of Health and Social Services

Representative Peggy Wilson  
State Capitol, Room 108  
Juneau, AK 99801  
Phone: 907-465-3824  
Toll Free: 800-686-3824  
Fax: 907-465-3175  
Rep.Peggy.Wilson@legis.state.ak.us

STATE OF ALASKA

*Representative Peggy Wilson*

House District 2

FAX TRANSMITTAL SHEET

TO: Leg Legal

FAX # 2029 DATE 2/10/06

# of PAGES (total): 5

FROM:

- Representative Peggy Wilson
- Jean Ellis
- Becky Rooney
- Linda Miller -3759
- Aaron Danielson

COMMENTS:

I would like to order a HESS Committee CS incorporating  
Amendment 1 and 2 which are enclosed for HB408 Definition of  
Child Abuse and Neglect.

Thanks,

Linda

AMENDMENT #1

OFFERED IN THE HOUSE HEALTH,  
EDUCATION AND SOCIAL  
SERVICES COMMITTEE  
TO: HB 408

BY Rep. Gatto  
DATE 2/09/06

- 1 Page 1, line 1, following "An Act relating to the definition of 'child abuse':

Delete "and"  
Insert "or"

AMENDMENT #2

OFFERED IN THE HOUSE HEALTH,  
EDUCATION AND SOCIAL SERVICES  
COMMITTEE  
TO: HB 408

BY Rep. Gardner & Rep. Wilson

1 Page 1, line 8, following "thereby;":

2 Insert "child abuse or neglect" includes a determination, at delivery, by a health  
3 care provider that a child has been adversely affected by, or is withdrawing from exposure  
4 to, a controlled substance or alcohol;"

5

6 Page 1, lines 9 - 12:

7 Delete all material.

8

9 Page 1, line 13:

10 Delete "(B)"

11 Insert "(A)"

12

13 Page 2, line 2:

14 Delete "(C)"

15 Insert "(B)"

# STATE OF ALASKA

## DEPT. OF HEALTH AND SOCIAL SERVICES

OFFICE OF THE COMMISSIONER

FRANK H. MURKOWSKI, GOVERNOR

P.O. BOX 110601  
JUNEAU, ALASKA 99811-0601  
PHONE: (907) 465-3030  
FAX: (907) 465-3068

January 31, 2006

Honorable Peggy Wilson, Chair  
House Health, Education, and  
Social Services Committee  
Alaska State Capitol, Room 108  
Juneau, AK 99801-1182

Dear Representative Wilson,

The Department of Health and Social Services respectfully requests that House Bill 408, "An Act relating to the definition of 'child abuse and neglect' for child protection purposes; and providing for an effective date," be scheduled for a hearing in the House Health, Education, and Social Services Committee at your earliest convenience.

This bill would clarify that the definition "child" includes an infant who has been identified by a health care provider involved in the delivery or care of that infant as being affected by abuse of a controlled substance or from withdrawal from prenatal exposure to a controlled substance. The purpose of the bill is to ensure that health care professionals report such infants to the Department of Health and Social Services under the state's mandatory reporting laws for child abuse and neglect. This provision is necessary to be in compliance with federal law as a condition of continued federal funding for child abuse and neglect prevention and treatment.

A copy of a zero fiscal note should be on file with the committee. Your favorable consideration of this request will be most appreciated.

Sincerely,



Sherry Hill, Special Assistant  
Department of Health and Social Services

cc: Kevin Jardell, Director  
Governor's Legislative Office

Tammy Sandoval, Deputy Commissioner  
Department of Health and Social Services

Section of CAPTA Law that proposed legislation addresses

**SECTION I: CHILD ABUSE PREVENTION AND TREATMENT ACT**

**SEC. 106. GRANTS TO STATES FOR CHILD ABUSE AND NEGLECT PREVENTION AND TREATMENT PROGRAMS. [42 U.S.C. 5106a]**

**b. ELIGIBILITY REQUIREMENTS.—**

**1. STATE PLAN.— .....**

**2. COORDINATION.—**A State plan submitted under paragraph (1) shall, to the maximum extent practicable, be coordinated with the State plan under part B of title IV of the Social Security Act [42 U.S.C. 620 et seq.] relating to child welfare services and family preservation and family support services, and shall contain an outline of the activities that the State intends to carry out using amounts received under the grant to achieve the purposes of this title, including—

**A.** an assurance in the form of a certification by the chief executive officer of the State that the State has in effect and is enforcing a State law, or has in effect and is operating a Statewide program, relating to child abuse and neglect that includes—

**i.** provisions or procedures for the reporting of known and suspected instances of child abuse and neglect;

**ii.** policies and procedures (including appropriate referrals to child protection service systems and for other appropriate services) to address the needs of infants born and identified as being affected by illegal substance abuse or withdrawal symptoms resulting from prenatal drug exposure, including a requirement that health care providers involved in the delivery or care of such infants notify the child protective services system of the occurrence of such condition of such infants, except that such notification shall not be construed to—

**I.** establish a definition under Federal law of what constitutes child abuse; or

**II.** require prosecution for any illegal action.

**iii.** the development of a plan of safe care for the infant born and identified as being affected by illegal substance abuse or withdrawal symptoms;

**iv.** procedures for the immediate screening, risk and safety assessment, and prompt investigation of such reports;

**HB**

**412**



**AMENDMENT #1**

OFFERED IN THE HOUSE HEALTH,  
EDUCATION AND SOCIAL  
SERVICES COMMITTEE

TO: CS for HB 412 (HES) Version F

BY Rep. Seaton  
DATE 3/21/06

1 Page 1 Line 8. following board costs,

Insert "for a period up to five years"

**Representative Jay Ramras**  
**Co-Chair, House Resources**  
**Co-Chair, Economic Develop.**  
**Tourism & Trade**  
**House State Affairs**  
**Joint Armed Services**  
119 N. Cushman St. Suite 207  
Fairbanks, Alaska 99701  
Phone: (907) 452-1088  
Fax: (907) 452-1146

## Alaska State Legislature



While in Session  
**State Capitol, Room 104**  
**Juneau, Alaska 99801-1182**  
(907) 465- 3004  
Fax: 465-2070  
Toll Free: (877) 465-3004

**House District 10**

### House of Representatives

## Sponsor Statement HB 412

Everyday, we enjoy the freedoms and security granted to us by our Constitution and laws. These rights, that so many take for granted, are there because men and women work everyday to assure they are protected. Alaskans who put on a uniform and put their life on the line, be it a police officer, a firefighter, or a member of the armed services deserve our respect and support.

When they give the ultimate sacrifice to protect us, we as Alaskans have an obligation to help their families, in more than just the short term. Most families, have not only lost a spouse or a parent, they have lost a major source of income. HB 412 will offer these surviving family members an opportunity to advance their lives by attending the University of Alaska for a very reduced cost.

Existing language in AS 14.43.085 allows a waiver of fees and tuition. HB 412 expands that language to include on-campus room and board. The cost to the State and the University is small when compared to the price of giving ones life in service to our state and country.

By combining these cost reductions with the limited compensation provided by the Federal Government, an Alaskan student could receive a University of Alaska education at little or no expense. HB 412 will show our men and women who selflessly give of themselves that we support them, not only while they serve, but we will also be there should they make the ultimate sacrifice.

AMENDMENT

OFFERED IN THE HOUSE  
TO: HB 412

BY REPRESENTATIVE RAMRAS

1 Page 1, line 2:

2 Following "services":

3 Delete "or"

4 Insert ", a"

5 Following "department":

6 Insert ", ambulance service, or first responder service"

7

8 Page 1, line 13, following "department":

9 Insert ", ambulance service, or first responder service"

10

11 Page 2, line 1:

12 Delete the second occurrence of "or"

13

14 Page 2, line 2, following "fighter":

15 Insert "; or

16 (C) duties as an ambulance service or first responder service

17 provider"

18

19 Page 2, line 6, following "AS 14.43.085":

20 Delete all material.

21 Insert "to take into account the changes made by sec. 1 of this Act."

# FISCAL NOTE

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

Fiscal Note Number: \_\_\_\_\_  
 Bill Version: HB412-DMVA-COMM-1-31-06  
 ( ) Publish Date: \_\_\_\_\_

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: Military & Veterans Affairs  
 Title Tuition Waivers: Military/Police/Fire RDU Military & Veterans Affairs  
 Component Office of the Commissioner  
 Sponsor Representative Ramras  
 Requester \_\_\_\_\_ Component No. 414

**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	0.0	0.0	0.0	0.0	0.0	0.0
Contractual	0.0	0.0	0.0	0.0	0.0	0.0
Supplies	0.0	0.0	0.0	0.0	0.0	0.0
Equipment	0.0	0.0	0.0	0.0	0.0	0.0
Land & Structures	0.0	0.0	0.0	0.0	0.0	0.0
Grants & Claims	0.0	0.0	0.0	0.0	0.0	0.0
Miscellaneous	0.0	0.0	0.0	0.0	0.0	0.0
<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>	0.0	0.0	0.0	0.0	0.0	0.0
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<b>CHANGE IN REVENUES ( )</b>	0.0	0.0	0.0	0.0	0.0	0.0
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**FUND SOURCE** (Thousands of Dollars)

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

**ANALYSIS:**

No fiscal impact.

Prepared by: John Cramer  
 Division: Administrative Services Division  
 Approved by: Craig E. Campbell, Commissioner  
 Agency: Department of Military & Veterans Affairs

Phone (907) 465-4602  
 Date/Time 1/31/06 10:00 AM  
 Date 1/31/2006

# FISCAL NOTE

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

Fiscal Note Number: \_\_\_\_\_  
 Bill Version: HB412  
 ( ) Publish Date: \_\_\_\_\_

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: University of Alaska  
 Title Tuition Waivers:Military/Police/Fire RDU \_\_\_\_\_  
 Component \_\_\_\_\_  
 Sponsor REPRESENTATIVE(s) RAMRAS, Stoltze, Crawford  
 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	108.4	117.3	127.0	137.6	149.0	161.4
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>108.4</b>	<b>117.3</b>	<b>127.0</b>	<b>137.6</b>	<b>149.0</b>	<b>161.4</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	108.4	117.3	127.0	137.6	149.0	161.4
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
<b>TOTAL</b>	<b>108.4</b>	<b>117.3</b>	<b>127.0</b>	<b>137.6</b>	<b>149.0</b>	<b>161.4</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)

For an estimated 10 students per year, the additional cost to the University for FY07 would be 108.4, which would require additional general funds.

Projected tuition and fees are calculated based on FY06 tuition and fee average of \$4,086 per year with an increase of 10% per year

Projected room and board is calculated based on an FY06 average amount of \$5,930 per year with an increase of 7% per year.

Prepared by: Pat Pitney Phone 450-8191  
 Division University of Alaska Date/Time 3/16/06 11:40 AM  
 Approved by: Pat Pitney Date 3/16/2006  
 Agency University of Alaska

# FISCAL NOTE

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

Fiscal Note Number: \_\_\_\_\_  
 Bill Version: HB412  
 ( ) Publish Date: \_\_\_\_\_

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: University of Alaska  
 Title Tuition Waivers: Military/Police/Fire RDU \_\_\_\_\_  
 Component \_\_\_\_\_  
 Sponsor REPRESENTATIVE(s) RAMRAS, Stoltze, Crawford  
 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	108.4	117.3	127.0	137.6	149.0	161.4
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>108.4</b>	<b>117.3</b>	<b>127.0</b>	<b>137.6</b>	<b>149.0</b>	<b>161.4</b>

<b>CAPITAL EXPENDITURES</b>						
-----------------------------	--	--	--	--	--	--

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

1002 Federal Receipts						
1003 GF Match						
1004 GF	108.4	117.3	127.0	137.6	149.0	161.4
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type—Do not abbreviate)						
<b>TOTAL</b>	<b>108.4</b>	<b>117.3</b>	<b>127.0</b>	<b>137.6</b>	<b>149.0</b>	<b>161.4</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)

For an estimated 10 students per year, the additional cost to the University for FY07 would be 108.4, which would require additional general funds.

Prepared by: Pat Pitney  
 Division: University of Alaska  
 Approved by: Pat Pitney  
 Agency: University of Alaska

Phone 450-8191  
 Date/Time 2/10/06 12:00 AM  
 Date 2/10/2006

## **Federal Benefits for Veterans and Dependents 2005 Edition**

### **Department of Veterans Affairs**

#### **Dependents Educational Assistance**

Dependents Educational Assistance benefits are available to spouses who have not remarried and children of: (1) veterans who died or are permanently and totally disabled as the result of a disability arising from active military service; (2) veterans who died from any cause while rated permanently and totally disabled from service-connected disability; (3) servicemembers listed for more than 90 days as currently missing in action or captured in line of duty by a hostile force; (4) servicemembers listed for more than 90 days as currently detained or interned by a foreign government or power.

The termination of a surviving spouse's remarriage — either by death or divorce — will reinstate Dependents' Educational Assistance benefits to the surviving spouse. If a surviving spouse ceases living with another person who has been held out publicly as the person's spouse, there is no bar to granting Dependents Educational Assistance benefits to the surviving spouse.

Benefits may be awarded for pursuit of associate, bachelor or graduate degrees at colleges and universities, including independent study, cooperative training and study abroad programs. Courses leading to a certificate or diploma from business, technical or vocational schools also may be taken.

Benefits may be awarded for apprenticeships, on-the-job training programs and farm cooperative courses. Benefits for correspondence courses under certain conditions are available to spouses only. Secondary-school programs may be pursued if the individual is not a high-school graduate. An individual with a deficiency in a subject may receive tutorial assistance benefits if enrolled halftime or more. Deficiency, refresher and other training also may be available.

#### **Monthly Payments**

Payments are made monthly. The rate effective Oct. 1, 2004, is \$803 a month for full-time school attendance, with lesser amounts for part-time training. A person may receive educational assistance for full-time training for up to 45 months or the equivalent in part-time training. Payments to a spouse end 10 years from the date the individual is found eligible or from the date of the death of the veteran.

VA may grant an extension. Children generally must be between the ages of 18 and 26 to receive education benefits, though extensions may be granted.

#### **Montgomery GI Bill Death Benefit**

VA will pay a special Montgomery GI Bill death benefit to a designated survivor in the event of the service-connected death of an individual while on active duty or within one year after discharge or release. The deceased must either have been entitled to educational assistance under the Montgomery GI Bill program or a participant in the program who would have been so entitled but for the high school diploma or length-of-service requirement. The amount paid will be equal to the participant's actual military pay reduction, less any education benefits paid.

## **Examples of State Educational Benefits for Spouses and Children**

---

### **California (CA)**

College fee waiver program to children and dependents of service-connected disabled or service-related deceased veterans. The program is administered by the California Department of Veterans Affairs (CDVA)

ELIGIBILITY: Three plans for eligibility - Child, Spouse, Dependant

**BENEFITS:**

Fee waivers applies only to California State Universities, University of California campuses, and California Community Colleges. Annual benefits awarded on "academic year" basis. Students required to reapply each year for continued benefits.

---

### **Oregon**

ELIGIBILITY: Oregon State requirements for offering aid to veterans are:

1. Active Duty in the U.S. Armed Forces for not less than 90 days and Korean War service 6/25/50 and 1/31/55, or received campaign or expeditionary medal, or ribbon awarded by the U.S. Armed Forces for service after 6/30/58;
2. Separation from military service under honorable conditions;
3. OR a resident at time of application for benefits;
4. U.S. Citizen; 5. Educational aid is not available for courses you would be receiving Federal GI Bill or Vocational Rehabilitation benefits

**BENEFITS:**

Rate of \$50 per month for full-time undergraduate studies; or other studies at \$35 per month.

## **Washington**

- Honorably discharged veterans who have served in any branch of the armed forces may be eligible for the following state benefits:

### **Educational Benefits**

County Veterans Assistance/Burial

Homeless Veteran Program

Employment Preference

Reemployment and Layoff Rights

Military Retirement Credit

Motor Vehicle Licenses

Reduced Fishing/Hunting License Fees

State and Federal Park Passes

Documents and Public Records

Reduced Public Transportation Fees

## **Hawaii**

Currently the Hawaiian State Office of Veteran Services does not offer education assistance programs.

## **Iowa**

### **Iowa War Orphans Education Aid**

Children of veteran parents who died as a result of service between: 4/6/17 and 6/2/21; 9/16/40 and 12/31/46; 6/25/50 and 1/31/55; 8/5/64 and 5/7/75; or 8/2/90 (all dates inclusive). Iowa resident for two years. Reserve components on active duty status and National Guardsmen on active duty included.

#### **BENEFITS:**

\$600 maximum per year for tuition, matriculation and other fees, books, supplies, board, room, and other expenses at any IA education institution or trade school approved by the Department of Veterans Affairs Division (in addition to federal government benefits). Maximum total \$3,000 per student. No income or age limitations.

## **Minnesota**

### **War Orphan Education Program**

This program serves children of Minnesota veterans who died while on active duty military service or as a result of injuries or disease incurred while on active duty military service. Children are eligible for "tuition free status" at any state college level institution except the University of Minnesota. In addition, \$350.00 per year is available for school related expenses.

**ELIGIBILITY CRITERIA:** The deceased veteran parent must have been a resident at the time of entry into active duty military service and the dependent child must have been a resident for two years immediately prior to application.

## **Montana**

### **Children of deceased Veterans**

**Eligibility:** Children of MT residents deceased from service in WWII, Korea, or Vietnam

**Program Benefits:** Waiver of fees (depends on tuition at the school) These fee waivers are only available at: Montana State University at Billings, Bozeman, and Northern; the University of Montana at Missoula; Montana Tech of the University of Montana, the University of Montana College of Technology at Missoula; Western Montana College of the University of Montana; Montana State University College of Technology at Billings and Great Falls; and Helena College of Technology of the The University of Montana.

### **Fee waiver for Honorably discharged Veterans**

**Eligibility:** Honorably discharged MT residents who served during war time and are ineligible for financial aid under federal laws:

**Program Benefits:** Waiver of fees (depends on tuition at the school) These fee waivers are only available at: Montana State University at Billings, Bozeman, and Northern; the University of Montana at Missoula; Montana Tech of the University of Montana, the University of Montana College of Technology at Missoula; Western Montana College of the University of Montana; Montana State University College of Technology at Billings and Great Falls; and Helena College of Technology of the The University of Montana.

### **Dependents of POW/MIAs**

**Eligibility:** Dependent of MT resident who has been declared by SECDEF to be a POW, missing or captured in connection with the conflict in Southeast Asia after 1/1/91

**Program Benefits:** Waiver of fees (depends on tuition at the school) These fee waivers are only available at: Montana State University at Billings, Bozeman, and Northern; the University of Montana at Missoula; Montana Tech of the University of Montana, the University of Montana College of Technology at Missoula; Western Montana College of the University of Montana; Montana State University College of Technology at Billings and Great Falls; and Helena College of Technology of the The University of Montana.

## **North Dakota**

### **Dependent Children**

**Eligibility:** Dependent Children, spouse, widow or ND resident veteran who was Killed in Action, died from wounds, or any other service connected causes, was totally disabled or died as a result of service connected causes, or was a POW/MIA. The veteran must have been born in and lived in ND until entrance into the U.S. Armed Forces or must have resided within the state for at least six months prior to entrance into the service.

**Benefits:** Free tuition and fees to any state supported school of higher education including vocational and technical schools to obtain bachelor's degree or certificate of completion. Maximum is 36 months or 8 semester period. Veteran must have been born in or lived in ND until entrance into the U.S. Armed Forces or must have resided within the state for at least 6 months prior to entrance into military service.

### **Veteran Emergency Loans**

**Eligibility:** Loans to eligible ND resident veterans for temporary financial emergencies may be granted to honorably discharged veterans in amounts up to \$2,000.

**Program Benefits:** 8% interest is charge. One half of interest is refunded if loan is repaid within period loan was granted. Loan can be granted for periods of 6 to 48 months.

**Application:** North Dakota Department of Veterans Affairs, PO Box 9003, Fargo, ND 58106-9003

## **South Dakota**

### **Free Tuition for Veterans**

Certain veterans are eligible to take undergraduate courses at a state university without the payment of tuition provided they are not eligible for educational payments under the GI Bill or any other federal educational program. To qualify the veteran must be:

- Discharged under Honorable conditions, and
- A current resident of South Dakota and qualify for in-state tuition, and
- Able to meet one of the following criteria:
  - Served on active duty at any time between August 2, 1990 and March 3, 1991.
  - Received an Armed Forces Expeditionary medal, Southwest Asia Service medal, or other United States campaign or service medal for participation in combat operations against hostile forces outside the boundaries of the United States.
  - Have a service connected disability rated 10%, or more, disabling.

Eligible veterans may receive one month of free tuition for each month of "qualifying service" with a minimum of one, up to a maximum of four, academic years. Qualifying service is defined as: the amount of time served on active duty between the beginning and ending dates of the particular period of conflict or hostilities during which the veteran earned eligibility for this program. Since all of the post-Vietnam conflicts have been very

short in duration, the majority of veterans who qualify will be entitled to only the minimum, one academic year, of free tuition.

Under the free tuition program, the veteran has twenty (20) years from the ending date of the specific period of service during which he or she served and met the eligibility criteria, or, twenty (20) years after the date that he or she was rated 10%, or more, disabled by the DVA.

EXAMPLE: A veteran earned the Armed Forces Expeditionary medal for serving in Grenada in October 1983. As the hostilities in Grenada were declared to have ceased as of November 21, 1983, the veteran has until November 21, 2003, to use the free tuition program.

SDDVA form E-11 "Veterans Application for Free Tuition at State Supported Schools" is available at the schools' financial aids, veterans representative or registrars offices or, they can be obtained from the Division of Veterans Affairs. The completed application, along with a copy of the veteran's DD-214 must be submitted to the Sioux Falls VA Regional Office (address shown on the reverse side of the form) and then returned to the school.

#### **Free Tuition for Children of Veterans Who Die During Service**

Children who are under the age of 25, are residents of South Dakota, and whose mother or father was killed in action or died of other causes while on active duty, are eligible for free tuition at a state supported school, if the deceased parent was a bona-fide resident of this state for at least six (6) months immediately preceding entry into active service.

SDDVA form E-12 "Application for Free Tuition at State Supported Institutions" is available at the schools' financial aids, veterans representative or registrars offices or, they can be obtained from the Division of Veterans Affairs.

#### **Free Tuition for Dependents of POW's and MIA's**

Children and spouses of prisoners of war, or of persons listed as missing in action, are entitled to attend a state supported school without the payment of tuition or mandatory fees provided they are not eligible for equal or greater federal benefits.

SDDVA form E-12 "Application for Free Tuition at State Supported Institutions" is available at the schools' financial aids, veterans representative or registrars offices or, they can be obtained from the Division of Veterans Affairs.

#### **Reduced Tuition for South Dakota National Guardmembers**

Guard members, who meet the requirements for admission, are eligible for a fifty percent (50%) reduction in undergraduate tuition charges at any state supported school for up to a maximum of four academic years OR, one program of study, approved by the state Board of Education, at any state vocational school upon payment of fifty percent (50%) of the tuition charges.

The receipt of federal educational benefits does not affect eligibility for this program. To qualify the guardmember must:

1. be a resident of this state and a member of the SD Army or Air Guard throughout each semester or vocational program for which he or she applies for benefits.
2. have completed required active duty for training.
3. attend 90% of drills and training periods and maintain a satisfactory academic grade level.
4. provide proper notice to the institution at time of registration for the term in which benefits are sought.

## **Wisconsin**

### **Tuition and Fee Reimbursement Grant**

Veterans who were discharged from active duty within the last 10 years may be reimbursed for up to 50% of their tuition and fees for courses completed as an undergraduate at schools in the University of Wisconsin System and the Wisconsin Technical College System. Reimbursement may not exceed 50% of the cost of tuition and fees for equivalent credits at UW-Madison.

Wisconsin veterans who receive a waiver of non-resident tuition while attending a school in Minnesota also may qualify for reimbursement.

Veterans with a service-connected disability rated by the VA as 30 percent or higher may be reimbursed for up to 100% of their tuition and fees at qualifying schools. Reimbursement may not exceed 100% of the cost of tuition and fees for equivalent credits at UW-Madison.

Spouses and dependent children of deceased veterans are not eligible for this grant.

The semester for which a reimbursement grant is requested must end within 10 years after the veteran's release date from active duty. Veterans may receive grants for a total of eight full-time semesters or 120 credits of part-time study (no more than half of the total may have been taken at technical system schools).

The grant application must be received by WDVA no later than 60 days after the completion of the semester.

Veterans who receive a Tuition and Fee Reimbursement Grant are not allowed a Part-Time Study Grant or Retraining Grant for the same semester.

Income limit --- the veteran and spouse's combined annual income may not exceed \$47,500 plus \$500 for each dependent in excess of two dependents.

Veterans may apply for the grant at their County Veterans Service Office. Or write: Wisconsin Department of Veterans Affairs PO Box 7843 30 W. Mifflin St. Madison, WI 53703-7843 phone: (608) 266-1311 or toll-free 1-800-947-8387 (WIS-VETS)

### **Part-Time Study Grants**

Veterans may be reimbursed for up to 50% of tuition and fees (not to exceed the cost at UW-Madison for the same number of undergraduate credits) after successfully completing part-time classroom or correspondence courses at most Wisconsin schools. Veterans with a service-connected disability rated by the VA as 30 percent or higher may be reimbursed for up to 100% of their tuition and fees at qualifying schools (not to exceed the cost at UW-Madison for the same number of undergraduate credits)..

In some instances, spouses and dependent children of deceased Wisconsin veterans also may be eligible for this grant.

To qualify as a part-time student, undergraduates must carry 11 credits or less per semester, and students with a bachelor's degree must carry eight credits or less per semester. Students enrolled in a summer session are automatically classified as part-time by WDVA.

Part-time students with a bachelor's degree may qualify for the grant if they do not have remaining federal veterans' benefits (not including Montgomery GI Bill for Selected Reserves).. Those with a master's degree or its equivalent do not qualify for grants.

The part-time coursework must be related to the applicant's occupational, professional or employment objectives. Courses taken solely for personal edification do not qualify for reimbursement.

Part-time students attending out-of-state schools may qualify for the grant if the school is accredited by the U.S. Office of Education and is within 50 miles of the Wisconsin border and the course is not offered at a Wisconsin school within 50 miles of the student's residence. Out-of-state correspondence courses may qualify for reimbursement if the school is accredited by the U.S. Office of Education and the course is not offered by a Wisconsin school.

The grant application must be received by WDVA no later than 60 days after the completion of the course.

Applicants who receive a Part-Time Study Grant are not allowed a Retraining Grant or Tuition and Fee Reimbursement Grant for the same period of enrollment. Applicants may receive no more than four Part-Time Study Grants during a 12-month period.

Income limit --- the veteran and spouse's combined annual income may not exceed \$47,500 plus \$500 for each dependent in excess of two dependents.

Veterans may apply for the grant through their County Veterans Service Office. You may call or write: Wisconsin Department of Veterans Affairs PO Box 7843 30 W. Mifflin St. Madison, WI 53703-7843 phone: (608) 266-1311 or toll-free 1-800-947-8387 (WIS-VETS)

**Dependents of Deceased Veterans**

Eligibility: Widow (er)s, minor or dependent children of eligible deceased WI veterans of any war, if residents and living in WI at the time of application. Children remain eligible if widow(er) remarries. Eligibility is determined by state statute. Income limit --- the veteran and spouse's combined annual income may not exceed \$47,500 plus \$500 for each dependent in excess of two dependents

Benefits: Reimbursement of costs for tuition, fees, and required textbooks upon satisfactory completion of part-time classroom correspondence course(s) at university, college, vocational, technical institute, or other institution of higher education as defined by WI statute, section 39.32(1)(a), provided the course(s) are related to the students occupational, professional, or educational objective. Reimbursement is limited to \$300 per course up to \$1,100 during any fiscal year. As long as the student continues to meet program requirements, reimbursement can be provided until Masters or Masters-equivalent Degree is obtained.

For more information

Your County Veterans Service Office will help with eligibility questions and the application process. For more information and questions about these programs, contact [cschulde@mail.state.wi.us](mailto:cschulde@mail.state.wi.us).

You may call or write: Wisconsin Department of Veterans Affairs PO Box 7843 30 W. Mifflin St. Madison, WI 53703-7843 phone: (608) 266-1311 or toll-free 1-800-947-8387 (WIS-VETS)

**National Guard Tuition Grant for Enlisted Members**

Eligibility: National Guard Tuition Grant for Enlisted Members

Benefits: For in-state or out of state institutions approved by the Higher Education Aids Board. Reimburses up to one-fourth of students tuition costs. Grant limited to no more than eight full semesters of studying and no grant shall be more than 25% of the resident undergraduate tuition charged by the University of Wisconsin-Madison.

Application: Contact your local National Guard Unit Authority.

## Where do you want to go to college? How much does it cost?

Getting an early handle on this will help you figure out how much you'll need to save, earn or borrow.

The table gives you an idea of how much it costs to attend *one year at a four-year college*. In addition, you'll also have to budget for books, miscellaneous expenses and travel. Going to an in-state college costs less, since you are paying resident tuition and usually do not have to travel as far.

	Tuition and Fees	Room and Board	Total
University of Alaska	\$4,286	\$5,587	\$9,873
University of Washington	\$19,907	\$8,424	\$28,331
University of California Los Angeles	\$24,882	\$10,880	\$35,762
Montana State University Bozeman	\$14,190	\$5,500	\$19,690
Gonzaga University Spokane WA	\$23,140	\$3,895	\$27,035

*Tuition and fees are averages. Out-of-state averages are based on non-resident prices.*

Source: <http://info.Alaska.edu/gotocollege/costs.xml> University of Alaska Website

**HB**

**414**

Representative Peggy Wilson  
State Capitol, Room 108  
Juneau, AK 99801  
Phone: 907-465-3824  
Toll Free: 800-686-3824  
Fax: 907-465-3175  
Rep.Peggy.Wilson@legis.state.ak.us

STATE OF ALASKA

*Representative Peggy Wilson*

House District 2

FAX TRANSMITTAL SHEET

TO: Leg. Legal

FAX # 2029 DATE 2/15/06

# of PAGES (total): 5 w/cover

FROM:

Representative Peggy Wilson  
 Jean Ellis  
 Becky Rooney  
 Linda Miller -3759  
 Aaron Danielson

COMMENTS:

I would like to order a final for the CS for HB 414 Version G (HESS Committee)

Thanks,

Linda

24-LS1565G  
Wayne  
2/13/06

**CS FOR HOUSE BILL NO. 414( )**  
**IN THE LEGISLATURE OF THE STATE OF ALASKA**  
**TWENTY-FOURTH LEGISLATURE - SECOND SESSION**

BY

Offered:  
Referred:

Sponsor(s): REPRESENTATIVE KOTT

**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 to read:

6       **Sec. 12.37.030. Requirements for an order authorizing a communications**  
7       **interception.** Upon consideration of an application, the court may enter an ex parte  
8       order authorizing the interception of a private communication if the court determines,  
9       on the basis of the application, that a parent or guardian of a minor has consented  
10       to the interception of a communication of the minor in good faith and based on  
11       an objectively reasonable belief that it is necessary for the welfare of the minor  
12       and in the best interest of the minor or that

13               (1) there is probable cause to believe that the person whose  
14       communication is to be intercepted is committing, has committed, or is planning to

1 commit an offense listed in AS 12.37.010;

2 (2) there is probable cause to believe that a communication concerning  
3 the offense may be obtained through the interception;

4 (3) there is probable cause to believe that the facility from which, or  
5 the place where, the communication is to be intercepted, is, has been, or is about to be  
6 used in connection with the commission of the offense, or is leased to, listed in the  
7 name of, or commonly used by, the person whose communication is to be intercepted;

8 (4) normal investigative procedures with respect to the offense have  
9 been tried and have failed or reasonably appear to be either unlikely to succeed if tried  
10 or too dangerous to employ; and

11 (5) if the application, other than an application for an extension, is for  
12 an order to intercept a communication of a person, or involving a communications  
13 facility, that was the subject of a previous application, the current application is based  
14 upon new evidence or information different from and in addition to the evidence or  
15 information offered to support the previous application.

16 \* Sec. 2. AS 12.37.900 is amended by adding a new paragraph to read:

17 (16) "minor" has the meaning given in AS 42.20.390.

18 \* Sec. 3. AS 42.20.320(a) is amended to read:

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

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

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

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

31 (4) recording or listening with the aid of any device to an emergency

1 communication made in the normal course of operations by a federal, state, or local  
2 law enforcement agency or institutions dealing in emergency services, including  
3 hospitals, clinics, ambulance services, fire fighting agencies, a public utility  
4 emergency repair facility, civilian defense establishment, or military installations;

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

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

9 (7) interception, listening, or recording of communications by a peace  
10 officer, or a person acting under the direction or request of a peace officer, in an  
11 emergency where the communications are received from a device that intercepts the  
12 communications of a person

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

16 (B) holding another person hostage; or

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

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

22 (A) the interception and monitoring occurs

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

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

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

29 (C) the communication intercepted is not recorded;

30 **(9) interception of a private communication to which a minor is a**  
31 **party, by a parent or guardian of the minor, except that interception of a private**

1  
2  
3  
4  
5

communication between a minor and the minor's attorney or guardian ad litem is not exempt from the provisions of AS 42.20.300 and 42.20.310.

\* Sec. 4. AS 42.20.390 is amended by adding a new paragraph to read:

(11) "minor" means a child under 18 years of age who has not had the disabilities of a minor removed as described in AS 09.55.590.



# 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  
Fax: (907) 465-2819  
Toll Free (877) 861-5688

**Interim:**  
10928 Eagle River Road – Suite 238  
Eagle River, AK 99501-2133  
Phone: (907) 694-8944  
Fax: (907) 694-8945

## 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: \_\_\_\_\_  
 Bill Version: HB414-Courts-2-10-06  
 ( ) Publish Date: \_\_\_\_\_

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>						
-----------------------------	--	--	--	--	--	--

<b>CHANGE IN REVENUES ( )</b>						
-------------------------------	--	--	--	--	--	--

**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

# 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.

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<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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All rights reserved.

\*\*\* Current Through the 2005 Regular Session \*\*\*  
\*\*\* Annotations 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

## O.C.G.A. § 16-11-66

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);

## O.C.G.A. § 16-11-66

*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. 68, 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).

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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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**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

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**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. n9 In response, Bishop filed a challenge to the prosecution's use of the tapes, arguing that they were recorded in violation of Georgia law. n10 The trial court denied Bishop's motion. n11 In so doing, it relied on a legal doctrine known as the doctrine of vicarious consent. n12 Though the trial court was ultimately overruled on the issue, based on the language of a specific Georgia statute, n13 it expressed a belief that has been adopted by a small handful of federal and state courts. n14 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. n15

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 [\*957] 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. n16 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. n17 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. n18 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." n19 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. [\*958] 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. n20 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. n21 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, n22 was a response to two key decisions by the [\*959] United States Supreme Court. In the first case, *Berger v. New York*, n23 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. n24 The *Berger* Court further "delineated the constitutional criteria that electronic surveillance legislation should contain." n25 In the second case, *Katz v. United States*, n26 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. n27 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 a 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 dove 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 this 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. Dulaney*, 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