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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Statutory Adoption of the Doctrine

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

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

C. Critics and Their Attacks on the Doctrine

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5. There is no express exemption in the statute.

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

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

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

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

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

III. APPLYING THE DOCTRINE OF VICARIOUS CONSENT IN CRIMINAL PROSECUTIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

activities.

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

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

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

Many other jurisdictions have enacted similar laws. n343

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

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

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

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

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

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

allowing prosecutors to use these legally created recordings can only help in their efforts to take dangerous criminals off our streets — a benefit to everyone. In short, recognizing the doctrine of vicarious consent will "make . . . it easier to identify and locate the person(s) responsible for attempting to involve a child in criminal activity affecting the welfare or best interest of such child, as well as prosecute [*102.] any person(s) responsible for engaging in criminal conduct involving such child as a victim." n351 The same is true when other types of crimes — such as drug-related crimes, property crimes, and violent crimes — are involved as well. n352

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

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

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

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

1. The doctrine is subject to misuse by conniving parents

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

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

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

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

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

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

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

3. The doctrine may result in interfamily discord or resentment

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

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

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

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

V. CONCLUSION

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

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

is applicable. n387

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

FOOTNOTES:

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

n2 *Id.*

n3 *Id.*

n4 *Id.*

n5 *Id.*

n6 *Id.*

n7 *Id.* at 919.

n8 *Id.*

n9 *Id.*

n10 *Id.*

n11 *Id.*

n12 *Id.* at 920.

n13 *Id.* at 919.

n14 *See infra* Part II.B.2.

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

n16 *See infra* Part II.B.

n17 *See infra* Part II.B.2.

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

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

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

2112, 2154.

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

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

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

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

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

n23 388 U.S. 41 (1967).

n24 *Id.* at 63.

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

n26 389 U.S. 347 (1967).

n27 *Id.* at 353.

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

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

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

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

n32 *Id.* at 515.

n33 *Id.*

n34 *Id.* at 515-16.

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

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

n37 *Id.*

n38 *Id.*

n39 18 U.S.C. § 2511(4)(a) (2000)

n40 *Id.* § 2520(a).

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

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

Id. § 2520(c)(2).

n42 *Id.* § 2515.

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

n44 *Id.*

n45 *Id.*

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

n47 18 U.S.C. § 2511(2)(d) (2000)

n48 *Id.*

n49 *See id.*

n50 *See id.*

n51 *See id.*

n52 *See infra* Part II B.1.

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

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

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

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

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

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

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

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

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

REV. STAT. § 803-42 (2005)); Idaho (ID. HO CODE § 18-6702 (Michie 2005)); Illinois (720 ILL. COMP. STAT. 5/14-2 (2005)); Indiana (IND. CODE § 35-33.5-5-5 (2005)); Iowa (IOWA CODE §§ 727.8, 808B.2 (2005)); Kansas (KAN. STAT. ANN. § 21-4002 (2005)); Kentucky (KY. REV. STAT. ANN. § 526.020 (Banks-Baldwin 2005)); Louisiana (LA. REV. STAT. ANN. § 13:1303 (West 2005)); Maine (ME. REV. STAT. ANN. tit. 15 § 710 (West 2005)); Maryland (MD. CODE ANN., CTS. & JUD. PROC. § 10-402 (2005)); Massachusetts (MASS. GEN. LAWS ch. 272, § 99(c)(1) (2005)); Michigan (MICH. COMP. LAWS § 750.539c (2005)); Minnesota (MINN. STAT. § 626A.02 (2005)); Mississippi (MISS. CODE ANN. § 41-29-533 (2005)); Missouri (MO. REV. STAT. § 542-402 (West 2005)); Montana (MONT. CODE ANN. § 45-8-213 (2005)); Nebraska (NEB. REV. STAT. § 86-290 (2005)); Nevada (NEV. REV. STAT. § 200.620 (2005)); New Hampshire (N.H. REV. STAT. ANN. § 570-A:2 (2005)); New Jersey (N.J. STAT. ANN. § 2A:156A-3 (2005)); New Mexico (N.M. STAT. ANN. § 30-12-1 (Michie 2005)); New York (N.Y. PENAL LAW § 250.05 (2005)); North Carolina (N.C. GEN. STAT. § 15A-287 (2005)); North Dakota (N.D. CENT. CODE § 12.1-15-02 (2005)); Ohio (OHIO REV. CODE ANN. § 2933.52 (West 2005)); Oklahoma (OKLA. STAT. tit. 13, § 176.3 (2005)); Oregon (OR. REV. STAT. § 165.543 (2005)); Pennsylvania (18 PA. CONS. STAT. ANN. § 5703 (2005)); Rhode Island (R.I. GEN. LAWS § 11-35-21 (2005)); South Carolina (S.C. CODE ANN. § 16-17-470 (Law. Co-op 2005)); South Dakota (S.D. CODIFIED LAWS § 23A-35A-20 (Michie 2005)); Tennessee (TENN. CODE ANN. § 39-13-601 (2005)); Texas (TEX. CODE CRIM. P. ANN. art. 18.21 (Vernon 2005)); Utah (UTAH CODE ANN. § 76-9-403 (2005)); Virginia (VA. CODE ANN. § 19.2-62 (2005)); Washington (WASH. REV. CODE § 9.73.030 (2005)); West Virginia (W. VA. CODE § 62-1D-3 (2005)); Wisconsin (WIS. STAT. § 968.31 (2005)); and Wyoming (WYO. STAT. ANN. § 7-3-702 (Michie 2005)). Vermont is the only state that has not adopted its own state wiretapping statute. There are some protections in place in that state, however, as the Vermont Supreme Court has held that the surreptitious electronic monitoring of communications within a person's home is an unlawful invasion of privacy. See generally *Vermont v. Geraw*, 795 A.2d 1219 (Vt. 2002); *Vermont v. Blow*, 602 A.2d 552 (Vt. 1991).

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

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

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

n61 § 2933.52(B)(4)

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

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

n64 See § 1602(b).

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

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

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

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

n68 *See id.*

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

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

n71 *See supra* Part II. A.

n72 *See infra* Part II B 2.a

n73 *See id.*

n74 *See id.*

n75 *See id.*

n76 *See id.*

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

n78 *See id.*

n79 *See id.*

n80 838 F Supp 1535 (D. Utah 1993)

n81 *Id.* at 1537.

n82 *Id.* at 1537-38.

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

n84 *Id.* at 1544.

n85 *Id.* at 1542.

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

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

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

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

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

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

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

n88 *Id.* at 1544

n89 *Id.* at 1543

n90 *Id.*

n91 *Id.* at 1544

n92 *Id.*

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

n94 *Id.* at 1545

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

n96 *Id.* at 1545, 1548

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

n98 *Id.* at 369

n99 *Id.* at 370-71

n100 *Id.* at 371-72

n101 *Id.* at 371

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

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

n104 *Id.* at 603.

n105 *Id.*

n106 *Id.* at 604.

n107 *Id.*

n108 *Id.* at 605.

n109 *Id.*

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

n111 *Id.*

n112 *Id.* at 610.

n113 *Id.* (citations omitted).

n114 *Id.*

n115 *Id.*

n116 *Id.* at 608.

n117 *Id.* at 604

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

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

n120 *Id.* at 610.

n121 *See id.*

n122 *Id.*

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

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

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

n126 763 N.E.2d at 547.

n127 *Id.* at 550.

n128 *Id.*

n129 *Id.*

n130 *Id.*

n131 *Id.*

n132 *Id.*

n133 *Id.*

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

n135 *Id.*

n136 *Id.*

n137 *Id.*

n138 *Id.*

n139 *Id.*

n140 *Id.* at 550-51.

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

n142 *Id.* at 551.

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

n144 *Id.*

n145 *Id.* at 550.

n146 *Id.* at 551-53.

n147 *Id.* at 553-55.

n148 *Id.* at 551.

n149 See *id.*

n150 *Id.* at 552-53.

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

n152 *Id.* at 552-53.

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

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

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

n154 *Id.* at 554.

n155 *Id.* at 553-54. The court also relied, in part, on another line of cases that approves of this type of eavesdropping under the extension telephone exemption found in 18 U.S.C. § 2510(5)(a)(i). *Id.* As noted above, § 2511(1)(b) provides that "any person who . . . intentionally uses, endeavors to use, or procures any other person to use . . . any electronic, mechanical, or other device to intercept any oral communication . . . shall be punished . . . or shall be subject to suit as provided in [the Act]." With respect to this prohibition, § 2510(5)(a)(1) defines "electronic, mechanical, or other device" as the following:

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. at 270.

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

n158 *Id.* at 778.

n159 *Id.*

n160 *Id.*

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

Id.

n162 *Id.*

n163 *Id.* at 778-79.

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

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

n166 *Id.* at 779.

n167 *Id.*

n168 *Id.* at 780.

n169 *Id.* (citations omitted).

n170 The court wrote:

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

Id. at 779.

n171 On this point, the court wrote:

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

Id. at 781.

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

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

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

n175 *Id.*

n176 *Id.*

n177 *Id.*

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

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

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

n181 *Id.*

n182 *Id.*

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

n184 *Id.*

n185 *Id.*

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

n187 *Id.*

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

n189 *Id.* (citations omitted).

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

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

n192 See WASH. REV. CODE § 9 73.030 (2005).

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

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

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

n196 *Id.* at 888.

n197 *Id.* at 887-88.

n198 *Id.* at 887.

n199 *Id.* at 888.

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

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

n202 *Id.*

n203 *Id.*

n204 *Id.* at 889.

n205 *Id.* (citations omitted).

n206 *Id.*

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

n208 *Id.* at 652.

n209 *Id.* at 648.

n210 *Id.*

n211 *Id.* at 654.

n212 *Id.*

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

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

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

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

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

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

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

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

n215 The full text of Georgia's vicarious consent statute

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

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

Id.

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

n217 See *infra* Part II.C.

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

n219 *Williams v. Williams*, 581 N.W2d 777, 780 (Mich. Ct. App. 1998).

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

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

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

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

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

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

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

n227 *Id.* at 603.

n228 *Id.* at 604.

n229 *Id.* at 605.

n230 *Id.* at 613.

n231 *Id.* at 612.

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

n233 *Id.*

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

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

n236 *Id.* at 1019.

n237 *Id.*

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

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

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

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

n242 *See id.*

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

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

n245 *Id.*

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

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

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

n249 *See supra* Part II B.2.

n250 *See supra* Part II C.

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

n252 *Id.* at 154.

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

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

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

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

n257 *See supra* Part II.A.3.

n258 *See id.*

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

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

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

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

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

n264 *See supra* Part II.B.2.a.

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

n266 *Id.* at 234.

n267 *Id.*

n268 *See supra* note 259 and accompanying text.

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

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

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

n272 *Id.* at 378.

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

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

n275 *See supra* Part III.A.1.a.

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

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

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

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

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

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

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

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

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

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

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

n287 Aaronson, *supra* note 213, at 823.

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

n289 Aaronson, *supra* note 213, at 822.

n290 *Id.* at 823.

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

n292 See, e.g., *Parham v. J.R.*, 442 U.S. 584, 602 (1979) ("Our jurisprudence historically has reflected . . . concepts of the family as a unit with broad parental authority over minor children . . . More important, [it] has recognized that natural bonds of affection lead parents to act in the best interests of their children"); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."); *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944) ("The custody, care and nurture of the child reside first in the parents").

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

n294 See *id.*

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

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

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

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

n299 *Id.*

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

n301 See *supra* Part II.B.2.b.

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

n303 See *supra* note 41 and accompanying text.

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

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

n306 See *infra* Part III.B.

n307 See *supra* Part III.A.2.a.

n308 See *id.*

n309 See *id.*

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

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

n312 See *infra* Part III.B.2.a.

n313 See *infra* Part III.B.2.b.

n314 See *infra* Part III.B.2.c.

n315 *Schall v. Martin*, 467 U.S. 253, 266 (1984).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. at *3

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

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

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

n327 467 U.S. at 281-309.

n328 *Id.* at 291.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id.

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

n334 *See supra* Part III B.1.

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

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

n337 *Id.*

n338 *Id.*

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

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

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

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

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

n344 *KY. REV. STAT. ANN. § 530.060(1)* (Banks Baldwin 2005).

n345 *MO. REV. STAT. § 568.050.1(3)* (West 2005). *See also OR. REV. STAT. § 163.577(1)(a)* (2005): "A person commits the offense of failing to supervise a child if the person is the parent, lawful guardian or other person lawfully charged with the care or custody of a child under 15 years of age and the child (a) Commits an act that brings the child within the jurisdiction of the juvenile court . . . [or] (b) Violates a curfew law . . . [or] (c) Fails to attend school as required under [Oregon law]."

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

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

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

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

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

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

n352 *See generally id.*

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

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

n355 *See supra* Part III A.

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

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

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

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

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

Rahavy, *supra* note 21, at 97.

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

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

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

n363 *Id.*

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

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

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

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

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

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

n370 *See infra* note 373 and accompanying text.

n371 *See supra* Part II C.4.

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

n373 *Id.* at 919.

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

n375 *Id.*

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

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

n378 *See supra* Part II B.2.

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

n380 *See supra* Part II B.3.

n381 *See supra* Part III A.

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

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

n384 *See supra* Part III A.2.

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

n386 *See supra* Part II A.2.

n387 *See supra* Part III C.

CORRECTION

THE FOLLOWING DOCUMENT(S)
HAVE BEEN REFILMED TO
ASSURE LEGIBILITY OR PAGINATION



Central Microfilm Services
Department of Education & Early Development
State of Alaska

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

n370 *See infra* note 373 and accompanying text.

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

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

n373 *Id.* at 919.

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

n375 *Id.*

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

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

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

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

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

n381 *See supra* Part III.A.

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

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

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

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

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

n387 *See supra* Part III.C.

HB

439

SENATE COMMITTEE REPORT

DATE: 4/21/06

FURTHER:

DATE TURNED
IN TO OFFICE: _____

Judiciary Committee considered CS FOR HOUSE BILL NO. 439(L&C) am

HB 439 INSURANCE PRODUCT REGULATION COMPACT

"An Act relating to authorizing the state to join with other states in entering into the Interstate Insurance Product Regulation Compact."

and recommends:

- be replaced with _____ CS _____ (_____)
- adopt previous _____ CS _____ (_____)
- attached amendment(s)
- adopt Letter of Intent by _____ Committee
- further referral to _____ Committee

CS Senate Bill:
 Same Title
 New Title

SCS House Bill:
 Same Title
 Technical Title Change
 New Title w/ SCR # _____

NEW FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#.

PREVIOUS FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#.

APPROPRIATION - no fiscal note

SIGNATURES AND RECOMMENDATIONS:	DO PASS	DO NOT PASS	NO REC	AMEND
<i>100512</i>			X	
<i>Gutcher, D. Jones</i>			X	
<i>Conner, J. ...</i>	✓			
<i>[Signature]</i>	✓			
CHAIR: <i>Ralph ...</i>	✓			

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REPRESENTATIVE JOHN COGHILL

HB 439 SPONSOR STATEMENT

Interstate Insurance Product Regulation Act

This bill adds Alaska to the other twenty states that have already joined together in the interstate Insurance Product Regulation Act. Life insurance, annuities, disability income, and long-term care products for the most part must be approved by each state before they are marketed. In addition the states have differing requirements for the structure of these products, so products must be revised to meet each individual state's requirements before they are approved for sale. Consequently, it is expensive and time consuming to market new insurance policies or products as compared to competitors in the financial services marketplace who are federally regulated.

House Bill 439 would enhance state regulation of insurance by creating a Commission governed collectively by the states that would serve as a single point of filing for specified insurance products, and that would establish uniform, national standards for those products. Such a system would benefit consumers and state government as well as the insurers. Consumers will benefit from strong, uniform national product standards. The quality of product review will be enhanced as experienced staff will review the filings, thereby enabling regulators to devote more time and resources to monitoring for problems in the marketplace. The public will have more timely access to innovative insurance products. Importantly the state retains the right to opt out of certain adopted standards if a need is determined.

Alaska is among seventeen states with legislation pending.

The House amended the legislation on the floor on page 23, lines 15 through 25. The language makes policy for the state to opt out of a compact that adopts lower levels of consumer protection than are in state law.

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REPRESENTATIVE JOHN COGHILL

HB 439 Sectional Analysis

Section 1. Adopts the Interstate Insurance Product Regulation Compact.

By adopting the compact the state enters into an agreement with other states to develop uniform standards for insurance policies, provide a central clearinghouse for review and approval of insurance policy forms and to coordinate regulatory resources between state insurance departments. Section 1 includes the compact wording.

The compact:

Article I, sets out the purpose of the compact.

- (1) Promoting and protecting the interests of consumers of life insurance, disability income and long term care products.
- (2) Developing uniform standards.
- (3) Establishing a central clearinghouse for insurance product review.
- (4) Giving regulatory approval to insurance products and advertisements.
- (5) Improving coordination and expertise among members.
- (6) To create the Interstate Product Regulation Commission.
- (7) To perform related functions consistent with State regulation of the business of insurance.

Article II, is the definitions section.

Article III, establishes the Interstate Product Regulation Commission and venue.

Article IV, sets out the powers of the Interstate Product Regulation Commission.

Article V, sets out the organization of the Interstate Product Regulation Commission.

Article VI, sets out participation in and scheduling of meetings of the Interstate Product Regulation Commission.

Article VII, sets out the rules and operating procedures: rulemaking functions of the Interstate Product Regulation Commission opting out of uniform standards.

Article VIII, provides for management of Interstate Product Regulation Commission records and enforcement of commission rules.

Article IX, sets out how disputes will be resolved.

Article X, provides for insurers to make filings with the Interstate Product Regulation Commission.

Article XI, provides an appeal procedure for disapproved filings.

Article XII, Sets out how the Interstate Product Regulation Commission will be financed and conduct their financial business.

Article XIII, Defines when the compact and how the compact becomes effective.

Article XIV, covers withdrawal, default and termination by members.

Article XV, is the severability section.

Article XVI, covers the binding effect of the compact and enforcement of other laws.

Section 2. Amends AS 21.53.010 to approve sale and advertising of products in Alaska that have been approved by and comply with the Interstate Compact under AS 21.42.700.

ALASKA STATE HOUSE OF REPRESENTATIVES



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REPRESENTATIVE JOHN COGHILL

HB 439 Comparison of Bill Versions

Changes made to original bill by the Labor & Commerce Committee Substitute:

Page 23, Line 17:

Deleted Sec. 2. Added language to AS 21.45.010 applicability in Chapter 45 "Life Insurance and Annuities" that allowed provisions of Chapter 45 to be "entirely superseded" by provisions adopted under the Interstate Insurance Product Regulation Compact.

Page 23, line 21:

Deleted Sec. 3. Added language to AS 21.51.010 applicability in Chapter 51 "Health Insurance Policies" that allowed provisions of Chapter 51 to be "entirely superseded" by provisions adopted under the Interstate Insurance Product Regulation Compact.

Page 23, line 25:

Section 4 is renumbered as Section 2.

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number: 1
 Bill Version: CSHB 439(L&C)
 (H) Publish Date: 3/3/2006

Revision Date/Time (Note if correction): _____ Dept. Affected: DCCED - Div of Ins
 Title: insurance Product Regulation Compact RDU _____
 Component _____
 Sponsor: Rep. Coghill
 Requester: House Labor & Commerce 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						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
-----------------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
-------------------------------	--	--	--	--	--	--

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)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

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)

Prepared by: Rep. Tom Anderson, Chair Phone 465-4939
 Division: House Labor & Commerce Committee Date/Time: 3/1/06 12:00 AM
 Approved by: Rep. Tom Anderson Date: 3/1/2006
 Agency: House Labor & Commerce Committee

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number: 2
 Bill Version: CSHB 439(L&C)
 (H) Publish Date: 3/28/06

Revision Date/Time (Note if correction): _____ Dept. Affected: Commerce
 Title Insurance Product Regulation Compact RCJ Insurance (116)
 Component Insurance Operations
 Sponsor Coghill
 Requester Labor & Commerce Component No. 354

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						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
-----------------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
-------------------------------	--	--	--	--	--	--

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)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2006) cost: 0.0

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

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

This legislation authorizes the state to join with other states entering into the Interstate Insurance Product Regulation Compact and authorizes the compact to supersede existing statutes by approving standards, rules, or other action under the terms on the compact. It will not have a financial impact on the operations of the division.

Prepared by: Linda S. Hall, Director
 Division Insurance
 Approved by: William C. Noll, Commissioner
 Agency Commerce, Community and Economic Development

Phone 907-269-7900
 Date/Time 03/02/06 8:47AM
 Date 3/3/2006

HB

441

SENATE COMMITTEE REPORT

DATE: 3/31/06

FURTHER: Finance

DATE TURNED
IN TO OFFICE: _____

Judiciary Committee considered CS FOR HOUSE BILL NO. 441(FIN)

HB 441 THERAPEUTIC COURT FOR DUI

"An Act relating to operating or driving a motor vehicle, aircraft, or watercraft while under the influence; relating to court-ordered treatment programs for certain offenders and offenses; amending Rule 35, Alaska Rules of Criminal Procedure; and providing for an effective date."

and recommends:

- be replaced with _____ CS _____ (_____)
- adopt previous _____ CS _____ (_____)
- attached amendment(s)
- adopt Letter of Intent by _____ Committee
- further referral to _____ Committee

CS Senate Bill:
 Same Title
 New Title

SCS House Bill:
 Same Title
 Technical Title Change
 New Title w/ SCR # _____

NEW FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#

PREVIOUS FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#

APPROPRIATION - no fiscal note

SIGNATURES AND RECOMMENDATIONS:	Do PASS	Do NOT PASS	No REC	AMEND
<i>[Signature]</i>			X	
<i>Gutcher D. Green</i>			X	
<i>[Signature]</i>	X			
CHAIR: <i>Ralph Veerbus</i>	/			

SENATE CONCURRENT RESOLUTION NO.
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-FOURTH LEGISLATURE - SECOND SESSION

BY THE SENATE JUDICIARY COMMITTEE

Introduced:

Referred:

A RESOLUTION

1 **Suspending Rules 24(c), 35, 41(b), and 42(e), Uniform Rules of the Alaska State**
2 **Legislature, concerning House Bill No. 441, relating to operating motor vehicles,**
3 **aircraft, and watercraft while under the influence and treatment programs.**

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

5 That under Rule 54, Uniform Rules of the Alaska State Legislature, the provisions of
6 Rules 24(c), 35, 41(b), and 42(e), Uniform Rules of the Alaska State Legislature, regarding
7 changes to the title of a bill, are suspended in consideration of House Bill No. 441, relating to
8 operating motor vehicles, aircraft, and watercraft while under the influence and treatment
9 programs.

24-LS1295U
Luckhaupt
4/6/06

SENATE CS FOR CS FOR HOUSE BILL NO. 441()
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-FOURTH LEGISLATURE - SECOND SESSION

BY

Offered:

Referred:

Sponsor(s): REPRESENTATIVES ROKEBERG, McGuire, Kelly, Gardner, LeDoux, Crawford

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to criminal sentencing; relating to operating or driving a motor
2 vehicle, aircraft, or watercraft while under the influence; relating to court-ordered
3 treatment programs for certain offenders and offenses; amending Rule 35, Alaska Rules
4 of Criminal Procedure; and providing for an effective date."

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

6 * Section 1. AS 12.55.155(d)(17) is amended to read:

7 (17) except in the case of an offense defined by AS 11.41 or
8 AS 11.46.400, the [OR A] defendant [WHO] has [PREVIOUSLY] been convicted of
9 a class B or C felony, and [THE DEFENDANT], at the time of sentencing, [IS
10 ACTIVELY PARTICIPATING IN OR] has successfully completed a court-ordered
11 [STATE-APPROVED] treatment program that [IS RELEVANT TO THE OFFENSE
12 AND THAT] was begun after the offense was committed;

13 * Sec. 2. AS 28.15.201(d) is amended to read:

14 (d) A court revoking a driver's license, privilege to drive, or privilege to obtain

1 a license under AS 28.15.181(c), or the department when revoking a driver's license,
2 privilege to drive, or privilege to obtain a license under AS 28.15.165(c), may grant
3 limited license privileges if

4 (1) the revocation was for a misdemeanor conviction under
5 AS 28.35.030(a) and not for a violation of AS 28.35.032;

6 (2) the person has

7 (A) not been previously convicted and the limited license is not
8 granted during the first 30 days of the period of revocation;

9 (B) been previously convicted, the limited license is not
10 granted during the first 90 days of the period of revocation, and

11 (i) the person has successfully completed a court-
12 ordered treatment program under AS 28.35.028 or former
13 AS 28.35.030(p); or

14 (ii) the court or department requires the person to use an
15 ignition interlock device during the period of the limited license;

16 (3) the court or the department determines that

17 (A) the person's ability to earn a livelihood would be severely
18 impaired without a limited license; or

19 (B) the person has successfully completed a court-ordered
20 treatment program described under AS 28.35.028 or former AS 28.35.030(p)
21 and the person's ability to earn a livelihood, attend school, or provide for
22 family health would be severely impaired without a limited license;

23 (4) the court or the department determines that a limitation under (a) of
24 this section can be placed on the license that will enable the person to earn a livelihood
25 without excessive danger to the public;

26 (5) the court or the department determines that the person is enrolled in
27 and is in compliance with or has successfully completed the alcoholism screening,
28 evaluation, referral, and program requirements of the Department of Health and Social
29 Services under AS 28.35.030(h); and

30 (6) the person has not been previously convicted under
31 AS 28.15.291(a)(2), AS 28.35.030, or 28.35.032 while driving or operating a vehicle,

1 aircraft, or watercraft under a limited license issued under this section.

2 * Sec. 3. AS 28.35 is amended by adding a new section to article 2 to read:

3 **Sec. 28.35.028. Court-ordered treatment for persons charged with a**
4 **violation of AS 28.35.030 or 28.35.032.** (a) Notwithstanding another provision of
5 law, with the consent of the state and the defendant, the court may elect to proceed in a
6 criminal case under AS 28.35.030 or 28.35.032, including the case of a defendant
7 charged with violating the terms of probation, under the procedure provided in this
8 section and order the defendant to complete a court-ordered treatment program. The
9 state may not consent to a referral under this subsection unless the state has consulted
10 with the victim and explained the process and consequences of the referral to the
11 victim. A court may not elect to proceed under this section if the defendant has
12 previously participated in a court-ordered treatment program under this section two or
13 more times. *therapeutic court model*

14 (b) Once the court elects to proceed under this section, the defendant shall
15 enter a no contest or guilty plea to the offense or shall admit to a probation violation,
16 as appropriate. The state and the defendant may enter into a plea agreement to
17 determine the offense or offenses to which the defendant is required to plead. If the
18 court accepts the agreement, the court shall enforce the terms of the agreement. The
19 court shall enter a judgment of conviction for the offense or offenses for which the
20 defendant has pleaded or an order finding that the defendant has violated probation, as
21 appropriate. A judgment of conviction or an order finding a probation violation must
22 set a schedule for payment of restitution owed by the defendant. In a judgment of
23 conviction and on probation conditions that the court considers appropriate, the court
24 may withhold pronouncement of a period of imprisonment or a fine to provide an
25 incentive for the defendant to complete recommended treatment successfully.
26 Imprisonment or a fine imposed by a court shall comply with AS 12.55 or any
27 mandatory minimum or other sentencing provision applicable to the offense.
28 However, notwithstanding Rule 35, Alaska Rules of Criminal Procedure, and any
29 other provision of law, the court, at any time after the period when a reduction of
30 sentence is normally available, may consider and reduce the defendant's sentence
31 based on the defendant's compliance with the treatment plan; when reducing a

1 sentence, the court (1) may not reduce the sentence below the mandatory minimum
2 sentence for the offense unless the court finds that the defendant has successfully
3 complied with and completed the treatment plan and that treatment plan approximated
4 the severity of the minimum period of imprisonment, and (2) may consider the
5 defendant's compliance with the treatment plan as a mitigating factor allowing a
6 reduction of a sentence under AS 12.55.155(a). A court entering an order finding the
7 defendant has violated probation may withhold pronouncement of disposition to
8 provide an incentive for the defendant to complete the recommended treatment
9 successfully.

10 (c) If the defendant does not successfully complete the treatment plan imposed
11 by the court under this section, the defendant's no contest or guilty plea or admission
12 to a probation violation to the court shall stand, and the sentence previously imposed
13 shall be executed or, if sentence has not yet been imposed, sentence shall be imposed
14 by the court.

15 (d) Notwithstanding any other provision of law to the contrary, the judge, the
16 state, the defendant, and the agencies involved in the defendant's treatment plan are
17 entitled to information and reports bearing on the defendant's assessment, treatment,
18 and progress. The victim is entitled to periodic reports on the defendant's progress and
19 participation.

20 (e) In addition to other conditions authorized under AS 12.30 or AS 12.55, a
21 court may impose the following conditions of bail or probation:

- 22 (1) require the defendant to submit to electronic monitoring;
23 (2) require the defendant to submit to house arrest.

24 (f) A court shall refer a defendant who is ordered to participate in a treatment
25 program under this section to an alcohol safety action program developed and
26 implemented or designated under AS 47.37.040(21) for screening, referral, and
27 monitoring.

28 (g) In addition to other conditions authorized under AS 12.30, a court may
29 require the defendant to take a drug or combination of drugs intended to prevent
30 substance abuse.

31 (h) In this section,

1 (1) "court-ordered treatment program" or "treatment plan" means a
2 treatment program for a person who consumes alcohol or drugs and that

3 (A) requires participation for at least 18 consecutive months;

4 (B) includes planning and treatment for alcohol or drug
5 addiction;

6 (C) includes emphasis on personal responsibility;

7 (D) provides in-court recognition of progress and sanctions for
8 relapses;

9 (E) requires payment of restitution to victims and completion
10 of community work service;

11 (F) includes physician approved treatment of physical addiction
12 and treatment of the psychological causes of addiction;

13 (G) includes a monitoring program and physical placement or
14 housing; and

15 (H) requires adherence to conditions of probation;

16 (2) "sentence" or "sentencing" includes a suspended imposition of
17 sentence as authorized under AS 12.55.085.

18 * Sec. 4. AS 28.35.030(b) is amended to read:

19 (b) Except as provided under (n) of this section, driving while under the
20 influence of an alcoholic beverage, inhalant, or controlled substance is a class A
21 misdemeanor. Upon [EXCEPT AS PROVIDED UNDER (p) OF THIS SECTION,
22 UPON] conviction,

23 (1) the court shall impose a minimum sentence of imprisonment of

24 (A) not less than 72 consecutive hours and a fine of not less
25 than \$1,500 if the person has not been previously convicted;

26 (B) not less than 20 days and a fine of not less than \$3,000 if
27 the person has been previously convicted once;

28 (C) not less than 60 days and a fine of not less than \$4,000 if
29 the person has been previously convicted twice and is not subject to
30 punishment under (n) of this section;

31 (D) not less than 120 days and a fine of not less than \$5,000 if

1 the person has been previously convicted three times and is not subject to
2 punishment under (n) of this section;

3 (E) not less than 240 days and a fine of not less than \$6,000 if
4 the person has been previously convicted four times and is not subject to
5 punishment under (n) of this section;

6 (F) not less than 360 days and a fine of not less than \$7,000 if
7 the person has been previously convicted more than four times and is not
8 subject to punishment under (n) of this section;

9 (2) the court may not

10 (A) suspend execution of sentence or grant probation except on
11 condition that the person

12 (i) serve the minimum imprisonment under (1) of this
13 subsection; and

14 (ii) pay the minimum fine required under (1) of this
15 subsection;

16 (B) suspend imposition of sentence;

17 (3) the court shall revoke the person's driver's license, privilege to
18 drive, or privilege to obtain a license under AS 28.15.181, and may order that the
19 motor vehicle, aircraft, or watercraft that was used in commission of the offense be
20 forfeited under AS 28.35.036; and

21 (4) the court may order that the person, while incarcerated or as a
22 condition of probation or parole, take a drug or combination of drugs intended to
23 prevent the consumption of an alcoholic beverage; a condition of probation or parole
24 imposed under this paragraph is in addition to any other condition authorized under
25 another provision of law.

26 * Sec. 5. AS 28.35.032(g) is amended to read:

27 (g) Upon [EXCEPT AS PROVIDED UNDER (r) OF THIS SECTION,
28 UPON] conviction under this section,

29 (1) the court shall impose a minimum sentence of imprisonment of

30 (A) not less than 72 consecutive hours and a fine of not less
31 than \$1,500 if the person has not been previously convicted;

1 (B) not less than 20 days and a fine of not less than \$3,000 if
2 the person has been previously convicted once;

3 (C) not less than 60 days and a fine of not less than \$4,000 if
4 the person has been previously convicted twice and is not subject to
5 punishment under (p) of this section;

6 (D) not less than 120 days and a fine of not less than \$5,000 if
7 the person has been previously convicted three times and is not subject to
8 punishment under (p) of this section;

9 (E) not less than 240 days and a fine of not less than \$6,000 if
10 the person has been previously convicted four times and is not subject to
11 punishment under (p) of this section;

12 (F) not less than 360 days and a fine of not less than \$7,000 if
13 the person has been previously convicted more than four times and is not
14 subject to punishment under (p) of this section;

15 (2) the court may not

16 (A) suspend execution of the sentence required by (1) of this
17 subsection or grant probation, except on condition that the person

18 (i) serve the minimum imprisonment under (1) of this
19 subsection; and

20 (ii) pay the minimum fine required under (1) of this
21 subsection; or

22 (B) suspend imposition of sentence;

23 (3) the court shall revoke the person's driver's license, privilege to
24 drive, or privilege to obtain a license under AS 28.15.181, and may order that the
25 motor vehicle, aircraft, or watercraft that was used in commission of the offense be
26 forfeited under AS 28.35.036;

27 (4) the court may order that the person, while incarcerated or as a
28 condition of probation or parole, take a drug or combination of drugs intended to
29 prevent the consumption of an alcoholic beverage; a condition of probation or parole
30 imposed under this paragraph is in addition to any other condition authorized under
31 another provision of law; and

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(5) the sentence imposed by the court under this subsection shall run consecutively with any other sentence of imprisonment imposed on the person.

* Sec. 6. AS 47.37.040 is amended to read:

Sec. 47.37.040. Duties of department. The department shall

(1) develop, encourage, and foster statewide, regional, and local plans and programs for the prevention of alcoholism and drug abuse and treatment of alcoholics, intoxicated persons, drug abusers, and inhalant abusers in cooperation with public and private agencies, organizations, and individuals, and provide technical assistance and consultation services for these purposes;

(2) coordinate the efforts and enlist the assistance of all public and private agencies, organizations, and individuals interested in prevention of alcoholism, drug abuse, and inhalant abuse, and treatment of alcoholics, intoxicated persons, drug abusers, and inhalant abusers;

(3) cooperate with the Department of Corrections in establishing and conducting programs to provide treatment for alcoholics, intoxicated persons, drug abusers, and inhalant abusers in or on parole from penal institutions;

(4) cooperate with the Department of Education and Early Development, school boards, schools, police departments, courts, and other public and private agencies, organizations, and individuals in establishing programs for the prevention of alcoholism, drug abuse, and inhalant abuse, and treatment of alcoholics, intoxicated persons, drug abusers, and inhalant abusers, and preparing curriculum materials for use at all levels of school education;

(5) prepare, publish, evaluate, and disseminate educational material dealing with the nature and effects of alcohol and drugs, and the misuse of hazardous volatile substances;

(6) develop and implement, as an integral part of treatment programs, an educational program for use in the treatment of alcoholics, intoxicated persons, drug abusers, and inhalant abusers that includes the dissemination of information concerning the nature and effects of alcohol, drugs, and hazardous volatile substances;

(7) organize and foster training programs for all persons engaged in treatment of alcoholics, intoxicated persons, drug abusers, and inhalant abusers, and

1 establish standards for training paraprofessional alcoholism, drug abuse, and inhalant
2 abuse workers;

3 (8) sponsor and encourage research into the causes and nature of
4 alcoholism, drug abuse, and inhalant abuse, and the treatment of alcoholics,
5 intoxicated persons, drug abusers, and inhalant abusers, and serve as a clearinghouse
6 for information relating to alcoholism, drug abuse, and inhalant abuse;

7 (9) specify uniform methods for keeping statistical information by
8 public and private agencies, organizations, and individuals, and collect and make
9 available relevant statistical information, including number of persons treated,
10 frequency of admission and readmission, and frequency and duration of treatment;

11 (10) conduct program planning activities approved by the Advisory
12 Board on Alcoholism and Drug Abuse;

13 (11) review all state health, welfare, and treatment plans to be
14 submitted for federal funding, and advise the commissioner on provisions to be
15 included relating to alcoholics, intoxicated persons, drug abusers, and inhalant
16 abusers;

17 (12) assist in the development of, and cooperate with, alcohol, drug
18 abuse, and inhalant abuse education and treatment programs for employees of state
19 and local governments and businesses and industries in the state;

20 (13) use the support and assistance of interested persons in the
21 community, particularly recovered alcoholics, drug abusers, and inhalant abusers, to
22 encourage alcoholics, drug abusers, and inhalant abusers to voluntarily undergo
23 treatment;

24 (14) cooperate with the Department of Public Safety and the
25 Department of Transportation and Public Facilities in establishing and conducting
26 programs designed to deal with the problem of persons operating motor vehicles while
27 under the influence of an alcoholic beverage, inhalant, or controlled substance, and
28 develop and approve alcohol information courses required to be taken by drivers under
29 AS 28.15 or made available to drivers to reduce points assessed for violation of traffic
30 laws;

31 (15) encourage hospitals and other appropriate health facilities to

1 admit without discrimination alcoholics, intoxicated persons, drug abusers, and
2 inhalant abusers and to provide them with adequate and appropriate treatment;

3 (16) encourage all health insurance programs to include alcoholism
4 and drug abuse as a covered illness;

5 (17) prepare an annual report covering the activities of the department
6 and notify the legislature that the report is available;

7 (18) develop and implement a training program on alcoholism and
8 drug abuse for employees of state and municipal governments, and private institutions;

9 (19) develop curriculum materials on drug and alcohol abuse and the
10 misuse of hazardous volatile substances for use in grades kindergarten through 12, as
11 well as a course of instruction for teachers to be charged with presenting the
12 curriculum;

13 (20) develop and implement or designate, in cooperation with other
14 state or local agencies, a juvenile alcohol safety action program that provides alcohol
15 and substance abuse screening, referral, and monitoring of persons under 18 years of
16 age who have been referred to it by

17 (A) a court in connection with a charge or conviction of a
18 violation or misdemeanor related to the use of alcohol or a controlled
19 substance;

20 (B) the agency responsible for the administration of motor
21 vehicle laws in connection with a license action related to the use of alcohol or
22 a controlled substance; or

23 (C) department staff after a delinquency adjudication that is
24 related to the use of alcohol or a controlled substance;

25 (21) develop and implement, or designate, in cooperation with other
26 state or local agencies, an alcohol safety action program that provides alcohol and
27 substance abuse screening, referral, and monitoring services to persons who have been
28 referred by a court in connection with a charge or conviction of a misdemeanor
29 involving the use of a motor vehicle, aircraft, or watercraft and alcohol or a controlled
30 substance, referred by a court under AS 28.35.028, or referred by an agency of the
31 state with the responsibility for administering motor vehicle laws in connection with a

1 driver's license action involving the use of alcohol or a controlled substance.

2 * Sec. 7. AS 28.35.030(p) and 28.35.032(r) are repealed.

3 * Sec. 8. The uncodified law of the State of Alaska is amended by adding a new section to
4 read:

5 INDIRECT COURT RULE AMENDMENT. AS 28.35.028(b), added by sec. 2 of this
6 Act, has the effect of amending Rule 35, Alaska Rules of Criminal Procedure, by allowing a
7 court to consider and reduce a criminal sentence outside of the time periods currently
8 provided by that rule.

9 * Sec. 9. The uncodified law of the State of Alaska is amended by adding a new section to
10 read:

11 TRANSITION. Notwithstanding sec. 6 of this Act, defendants participating in a court-
12 ordered treatment program under AS 28.35.030(p) or 28.35.032(r) or the therapeutic court
13 pilot program created by ch. 64, SLA 2001, as amended by ch. 109, SLA 2004, on the
14 effective date of this Act, shall continue in their respective programs under the terms of that
15 program until the individual program is completed.

16 * Sec. 10. This Act takes effect immediately under AS 01.10.070(c).

ALASKA STATE LEGISLATURE

House of Representatives

COMMITTEE ASSIGNMENTS

RULES COMMITTEE, CHAIRMAN
LABOR & COMMERCE COMMITTEE, MEMBER
LEGISLATIVE COUNCIL, MEMBER
SPECIAL COMMITTEE ON OIL & GAS, MEMBER
SPECIAL COMMITTEE ON WAYS & MEANS, MEMBER

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Representative Norman Rokeberg

e-mail: Representative_Norman_Rokeberg@legis.state.ak.us

SECTIONAL ANALYSIS FOR SCS CSHB 441()

By: Representative Norman Rokeberg
24-LS1295\I

Title: An Act relating to criminal sentencing; relating to operating or driving a motor vehicle, aircraft, or watercraft while under the influence; relating to court-ordered treatment programs for certain offenders and offenses; amending Rule 35, Alaska Rules of Criminal Procedures; and providing for an effective date.

Changes made by the CS are in bold.

- Section 1:** Clarifies the mitigator for defendants who participate in a court-ordered treatment program.
- Section 2:** Conforming amendment referencing the new therapeutic court statute.
- Section 3:** Creates a therapeutic court statutory structure, AS 28.35.028.

AS 28.35.028(a): Provides authority for a defendant to enter a court-ordered treatment program if charged under the DUI or refusal statutes. A defendant cannot participate in the program if they have already done so two or more times.

AS 28.35.028(b): Defendant shall enter a plea of no contest or guilty plea. The state and defendant may enter a plea agreement. The court shall enter a judgment of conviction for the offense(s) for which the defendant pleaded. There must be a schedule provided for payment of restitution. The court may withhold pronouncement of sentence or fine as an incentive to complete the recommended treatment. Court may reduce the sentence based on defendant's compliance with the treatment plan. Court cannot reduce below the mandatory minimum unless the defendant has successfully complied with and completed the treatment plan. Court may consider defendant's compliance with the treatment plan as a mitigating factor allowing a reduction of sentence.

AS 28.35.028(c): If defendant does not successfully complete the court-ordered treatment program, defendant's plea shall stand and the court shall impose sentence.

AS 28.35.028(d): Provides for information and reports on defendant's assessment, treatment and progress for those entities involved with the therapeutic court. Victim is entitled to periodic reports on defendant's progress and participation.

AS 28.35.028(e): Electronic monitoring and house arrest can be a condition of bail or probation. We deleted "if the commissioner of corrections agrees to this condition." This section is no longer needed, as Corrections is no longer doing the supervision.

AS 28.35.028(f): Court shall refer the defendant to Alcohol Safety Action Program (ASAP).

AS 28.35.028(g): Court may require defendant to take a drug or combination of drugs to prevent substance abuse.

AS 28.35.028(h): Defines court-ordered treatment program, treatment plan, sentence and sentencing. Previous subsection (h) was deleted.

Section 4: Conforming amendment.

Section 5: Conforming amendment.

Section 6: Conforming amendment to H&SS statutes for ASAP participation in therapeutic court.

Section 7: Repeals the following statutes:

AS 28.35.030(p): Existing court-ordered treatment provisions.

AS 28.35.032(r): Existing court-ordered treatment provisions.

Section 8: Indirect court rule amendment to Rule 35, Alaska Rules of Criminal Procedure, as the court will be allowed to consider and reduce a criminal sentence outside of the time periods provided by the rule.

Section 9: Transition section that allows those in existing therapeutic court programs to complete their existing programs.

Section 10: Immediate effective date.

ALASKA STATE LEGISLATURE

House of Representatives

COMMITTEE ASSIGNMENTS

RULES COMMITTEE, CHAIRMAN
LABOR & COMMERCE COMMITTEE, MEMBER
LEGISLATIVE COUNCIL, MEMBER
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Representative Norman Rokeberg

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SPONSOR STATEMENT FOR CSHB 441(FIN)

By: Representative Norman Rokeberg

Title: An Act relating to operating or driving a motor vehicle, aircraft, or watercraft while under the influence; relating to court-ordered treatment programs for certain offenders and offenses; amending Rule 35, Alaska Rules of Criminal Procedures; and providing for an effective date.

The Alaska Legislature has repeatedly stated its belief in the effectiveness of therapeutic courts. Therapeutic courts save money and reduce recidivism by changing the long-term addictive behavior of offenders. The Anchorage Wellness Court tracked graduates of its therapeutic court over a three-year period after graduation. Only 25 percent of the graduates had any repeat crime. This is in stark contrast to the 75 percent of DUI defendants who re-offend after serving their time in jail.

Over the last several years, the legislature has made tremendous efforts to provide these courts with the statutory tools, financial assistance and institutional support to make these courts successful. To further the accomplishments of therapeutic courts, the 22nd Legislature created a pilot DUI program in Anchorage and Bethel. This pilot program is set to expire on June 30th, 2006.

As therapeutic courts are being formed around the state, from Ketchikan to Fairbanks, it is important these courts have uniformity in their operation. HB 441 takes all of the tools created over the last several years and establishes one uniform therapeutic court statutory structure to be applied throughout the state.

This legislation streamlines and makes more workable provisions for a therapeutic court. HB 441 is vital to creating permanent successful therapeutic courts for the people of Alaska.

I urge your support of this legislation.

ALASKA STATE LEGISLATURE

House of Representatives

COMMITTEE ASSIGNMENTS

RULES COMMITTEE, CHAIRMAN
LABOR & COMMERCE COMMITTEE MEMBER
LEGISLATIVE COUNCIL, MEMBER
SPECIAL COMMITTEE ON OIL & GAS, MEMBER
SPECIAL COMMITTEE ON WAYS & MEANS, MEMBER

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Representative Norman Rokeberg

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SECTIONAL ANALYSIS FOR CSHB 441(FIN)

By: Representative Norman Rokeberg

Title: An Act relating to operating or driving a motor vehicle, aircraft, or watercraft while under the influence; relating to court-ordered treatment programs for certain offenders and offenses; amending Rule 35, Alaska Rules of Criminal Procedures; and providing for an effective date.

Section 1: Conforming amendment referencing the new therapeutic court statute.

Section 2: Creates a therapeutic court statutory structure, AS 28.35.028.

AS 28.35.028(a): Provides authority for a defendant to enter a court-ordered treatment program if charged under the DUI or refusal statutes. A defendant cannot participate in the program if they have already done so two or more times.

AS 28.35.028(b): Defendant shall enter a plea of no contest or guilty plea. The state and defendant may enter a plea agreement. The court shall enter a judgment of conviction for the offense(s) for which the defendant pleaded. There must be a schedule provided for payment of restitution. The court may withhold pronouncement of sentence or fine as an incentive to complete the recommended treatment. Court may reduce the sentence based on defendant's compliance with the treatment plan. Court cannot reduce below the mandatory minimum unless the defendant has successfully complied with and completed the treatment plan. Court may consider defendant's compliance with the treatment plan as a mitigating factor allowing a reduction of sentence.

AS 28.35.028(c): If defendant does not successfully complete the court-ordered treatment program, defendant's plea shall stand and the court shall impose sentence.

AS 28.35.028(d): Provides for information and reports on defendant's assessment, treatment and progress for those entities involved with the

therapeutic court. Victim is entitled to periodic reports on defendant's progress and participation.

AS 28.35.028(e): Electronic monitoring and house arrest can be a condition of bail or probation.

AS 28.35.028(f): Court shall refer the defendant to Alcohol Safety Action Program (ASAP).

AS 28.35.028(g): Court may require defendant to take a drug or combination of drugs to prevent consumption of alcohol.

AS 28.35.028(h): Department of Health & Social Services may require treatment providers to make advances to the defendant for the initial cost related to the use of Naltrexone. Defendant must repay the treatment provider.

AS 28.35.028(i): Defines court-ordered treatment program, treatment plan, sentence and sentencing.

Section 3: Conforming amendment.

Section 4: Conforming amendment.

Section 5: Conforming amendment to H&SS statutes for ASAP participation in therapeutic court.

Section 6: Repeals the following statutes:

AS 28.35.030(p): Existing court-ordered treatment provisions.

AS 28.35.032(r): Existing court-ordered treatment provisions.

Section 7: Indirect court rule amendment to Rule 35, Alaska Rules of Criminal Procedure, as the court will be allowed to consider and reduce a criminal sentence outside of the time periods provided by the rule.

Section 8: Transition section that allows those in existing therapeutic court programs to complete their existing programs.

Section 9: Immediate effective date.

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number: 1
 Bill Version: HB 441
 (H) Publish Date: 2/27/06

Revision Date/Time (Note if correction): 2/23/06 5:20 p.m. Dept. Affected: Administration
 Title: An act relating to operating or driving a motor vehicle, aircraft, or watercraft while under the influence of alcohol or a controlled substance. RDU: Legal and Advocacy Services
 Component: Office of Public Advocacy
 Sponsor: Rep. Rokeberg
 Requester: (H) JUD Component No.: 43

Expenditures/Revenues (Thousands of Dollars)

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

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

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

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

Estimate of any current year (FY2006) cost: 0.0

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

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

This legislation would authorize "therapeutic courts" for individuals charged with violations of AS 28.35.030 (Operating a vehicle, aircraft or water craft while under the influence...) and AS 28.35.032 (Refusal to submit to chemical test). Therapeutic courts provide an alternative to the normal criminal justice process emphasizing treatment and rehabilitation.

This legislation would have no fiscal impact on the Office of Public Advocacy.

Prepared by: Joshua P. Fink, Director Phone (907) 269-3500
 Division: Office of Public Advocacy Date/Time 2/23/06 5 20 PM
 Approved by: Mike Tibbles, Deputy Commissioner Date 2/24/2006
 Agency: Administration

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number: 2
 Bill Version: HB 441
 (H) Publish Date: 2/27/06

Revision Date/Time (Note if correction): _____ Dept. Affected: _____
 Title: Therapeutic Courts for DUI/Sentencing RDU: Alaska Court System
 Sponsor: Representative Rokeberg Component: Trial Courts
 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						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

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

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 441.

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

Phone 463-4750
 Date/Time 2/21/06 @ 2:45 pm
 Date 2/21/2006

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number: 3
 Bill Version: HB 441
 (H) Publish Date: 2/27/06

Revision Date/Time (Note if correction): _____ Dept. Affected: LAW
 Title: "An Act relating to operating or driving a motor vehicle, aircraft, or watercraft while under the influence..." RDU: CIVIL
 Sponsor: Representative Rokeberg Component: Criminal Justice Litigation
 Requester: House Judiciary 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						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

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

Estimate of any current year (FY2006) cost: 0.0

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

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

This bill expands the conditions under which the court may grant limited driver's license privileges to someone whose license would otherwise be revoked under a misdemeanor conviction for operating a vehicle, aircraft or water while under the influence of an alcoholic beverage, inhalant, or controlled substance, or refusal to submit to a chemical test, if that person has successfully completed a court-ordered treatment program. The bill spells out the procedure the court shall follow in allowing the defendant to participate in a court-ordered treatment program, including imposing a sentence for a defendant who fails to complete the treatment program, and the bill sets forth certain conditions the court may impose before allowing such treatment. The bill spells out what kind of programs or treatments the court may consider. The bill removes conflicting mitigating sentencing language in AS 28.35.030 (b)(p) and AS 28.35.032(g)(r).

Prepared by: Kathryn Daughettee, Director Phone 465-3673
 Division: Administrative Services Division Date/Time 2/23/06 11:21 AM
 Approved by: Kathryn Daughettee for David Márquez, Attorney General Date 2/23/2006
 Agency: Department of Law

FISCAL NOTE #3

STATE OF ALASKA
2006 LEGISLATIVE SESSION

BILL NO. HB 441

ANALYSIS CONTINUATION

The purpose of this bill is to codify what has already been set forth in law in 2001 in HB 172 and funded with accompanying fiscal notes. As a result, passage of this bill will not have a fiscal impact on the Department of Law.

CORRECTION

THE FOLLOWING DOCUMENT(S)
HAVE BEEN REFILMED TO
ASSURE LEGIBILITY OR PAGINATION



Central Microfilm Services
Department of Education & Early Development
State of Alaska

FISCAL NOTE #3

STATE OF ALASKA
2006 LEGISLATIVE SESSION

BILL NO. HB 441

ANALYSIS CONTINUATION

The purpose of this bill is to codify what has already been set forth in law in 2001 in HB 172 and funded with accompanying fiscal notes. As a result, passage of this bill will not have a fiscal impact on the Department of Law.

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number: 4
 Bill Version: CSHB 441(FIN)
 (H) Publish Date: 3/17/06

Revision Date/Time (Note if correction): 2/23/06 5:30 p.m. Dept. Affected: Administration
 Title: An act relating to operating or driving a motor vehicle, aircraft, or watercraft while under the RDU: Legal and Advocacy Services
 Component: Public Defender Agency
 Sponsor: Rep. Rokeberg
 Requester: H(Jud) Component No.: 1631

Expenditures/Revenues (Thousands of Dollars)

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

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

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

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

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

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)
 This legislation would authorize "therapeutic courts" for individuals charged with violations of AS 28.35.030 (Operating a vehicle, aircraft or water craft while under the influence...) and AS 28.35.032 (Refusal to submit to chemical test). Therapeutic courts provide an alternative to the normal criminal justice process emphasizing treatment and rehabilitation.

 This legislation is not expected to have a fiscal impact on the Public Defender Agency.

Prepared by: Quinlan Steiner, Director Phone (907) 334-4414
 Division: Public Defender Agency Date/Time 2/23/06 5:30 p.m.
 Approved by: Mike Tibbles, Deputy Commissioner Date 2/24/2006
 Agency: Administration

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number: 5
 Bill Version: CSHB 441(FIN)
 (H) Publish Date: 3/17/06

Revision Date/Time (Note if correction): _____ Dept. Affected: Corrections
 Title: "An act relating to operating or diving a motor vehicle, aircraft, or watercraft while under the influence." RDU: Administration and Support
 Sponsor: Representative Rokeberg Component: Office of the Commissioner
 Requester: House Finance Component No.: 694

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
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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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
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

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 legislation codifies substance abuse treatment programs/therapeutic court projects that were set forth in law in 2001 in HB172. The legislation also specifies the types of programs or treatments the court may consider and removes conflicting mitigating sentencing language in AS 28 35 030(b)(p) and AS 28.25.032(g)(r). The bill spells out the procedures the court shall follow to allow the defendant to participate in a court-ordered treatment program, and sets forth certain conditions the court may impose before allowing such treatment. As the legislation primarily codifies what already is occurring, passage of the legislation will not have a fiscal impact on the Department of Corrections.

Prepared by: Sharleen Griffin, Director Phone: (907) 465-3339
 Division: Administrative Services Date/Time: 3/1/06 3:05 PM
 Approved by: Portia C.K. Parker, Deputy Commissioner Date: 3/1/2006
 Agency: Department of Corrections