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# CHANGING WITH THE TIMES: WHY RAMPANT SCHOOL VIOLENCE WARRANTS LEGALIZATION OF PARENTAL WIRETAPPING TO MONITOR CHILDREN'S ACTIVITIES

*Alison S. Aaronson\**

## INTRODUCTION

In light of the tragic shootings that occurred at Columbine High School in Littleton, Colorado,<sup>1</sup> parents have been encouraged to supervise their children more closely.<sup>2</sup> Many parents have ques-

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\* Brooklyn Law School Class of 2002; B.A., Brandeis University, 1999. Thanks to Professor Rosato for her guidance, to Francis Chin and Rose Patti for their invaluable assistance, and to my family and friends for their encouragement and support.

<sup>1</sup> On the morning of April 20, 1999, seventeen-year-old Dylan Klebold and eighteen-year-old Eric Harris shot and killed two students in the parking lot of Columbine High School. Matt Bai, *Anatomy of a Massacre*, NEWSWEEK, May 3, 1999, at 24. As they proceeded toward the school, the boys shot two more students. *Id.* Once inside the school, Klebold and Harris opened fire and threw pipe bombs into the cafeteria, where more than five hundred students were present. *Id.* As Klebold and Harris headed up a flight of stairs, they fatally injured a teacher who was trying to warn other students in the library and science rooms. *Id.* Inside the library, the pair tortured their innocent victims with arbitrary and slow deaths. *Id.* At one point, when Klebold and Harris discovered a girl cowering under a desk, they leaned down, said "peek-a-boo" to her, and then shot her. *Id.* Klebold and Harris killed ten students in the library before ending the terror with their own suicides. *Id.* In the end, their killing spree left thirteen people dead and twenty-three injured, several of them critically. *Id.*

<sup>2</sup> See *Silas v. Silas*, 680 So.2d 368, 371 (Ala. Civ. App. 1996) ("It is ordinarily for the parent in the first instance to decide . . . what is actually necessary for the protection and preservation of the life and health of his child, so long as he acts as a reasonable and ordinarily prudent parent would act in the like situation.") (quoting 59 AM. JUR. 2D *Parent and Child* § 48, at 193-94 (1987)).

tioned whether children's privacy should be reconsidered or eliminated altogether.<sup>3</sup> One supporter in favor of limiting children's privacy rights argues:

We think privacy for children is some sort of God-given right. It's no right at all. Kids are kids. Nowhere else in the world is there as much of that sentiment as in the U.S. We're just so individualistic, we make the assumption that our kids are individuals, and if we don't let them be, we're hampering their growth. None of that makes sense.<sup>4</sup>

Similarly, others believe that as a society that values individual rights, we have created a situation where our children have so many rights as citizens regardless of their status as minors, it prevents parents from effectively disciplining and controlling them.<sup>5</sup> Despite parents' efforts to discipline and control their children, some say that parents have no alternative other than to "resort to uncomfortably intrusive methods in an attempt to keep them safe from addiction, gangs, and guns."<sup>6</sup> For many parents, it is an issue of survival rather than trust; they will spy on their children if that is what it takes to keep them safe.<sup>7</sup> One marriage and family therapist states that "[he] do[es] not believe it is the parent's right, [he] believe[s] it is the parent's responsibility [to spy]."<sup>8</sup>

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<sup>3</sup> Jean Nash Johnson, *Some Parents Spy to Keep Their Children Safe*, DALLAS MORNING NEWS, Apr. 28, 1999, at 1C.

<sup>4</sup> Anita Manning, *Parenting Without Privacy: Despite Critics, Spying on Teens Provides Clues*, USA TODAY, Oct. 4, 1999, at 09D (quoting remarks of Michael Gurian, author and family therapist in Spokane, Washington).

<sup>5</sup> See Talk of the Nation (National Public Radio Inc., radio broadcast, Apr. 27, 1999). The focus of the radio broadcast, which aired one week following the Columbine shootings, was on parental responsibility stemming from the commission of violent acts by children. *Id.* One caller pointed out that while parents are held civilly and criminally responsible for the misconduct of their children, the law confers so many rights on children that parents are deprived of the tools they need to control their children. *Id.*

<sup>6</sup> Leslie Brody, *For Some Kids, Parents' Scrutiny Getting Intense*, N.J. RECORD, Apr. 30, 1999, at A01.

<sup>7</sup> Johnson, *supra* note 3, at 1C.

<sup>8</sup> Johnson, *supra* note 3, at 1C.

In a society where parents are held civilly liable for damages resulting from their children's acts,<sup>9</sup> there is a broad consensus that parents have the responsibility to monitor their children's activities. Many states have enacted laws imposing criminal liability on parents for the delinquent acts of a minor child,<sup>10</sup> as well as for endangering a child's welfare by failing to exercise reasonable supervision and control of a child to prevent him from becoming delinquent.<sup>11</sup> Ironically, while the need for parental responsibility is increasing, parents' tools to supervise and control their children are decreasing.<sup>12</sup>

Parents who want to take an aggressive approach to monitoring their children's activities may resort to surveillance tactics, such as purchasing devices that tape-record their children's telephone conversations.<sup>13</sup> In fact, two states, Virginia and Georgia, have

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<sup>9</sup> 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, 401 (1997) (noting that all fifty states have statutes imposing civil liability on parents for damages resulting from their children's acts).

<sup>10</sup> See, e.g., ALA. CODE § 12-15-13 (West 2000); CAL. PENAL CODE § 272 (West 2000); N.C. GEN. STAT. § 14-316.1 (West 2000); TENN. CODE ANN. § 37-1-156 (2000); WIS. STAT. ANN. 948.40 (West 2000).

<sup>11</sup> See, e.g., KY. REV. STAT. ANN. § 530.060(1) (Banks-Baldwin 2000); MO. ANN. STAT. § 568.050 (West 2000); N.Y. PENAL LAW § 260.10(2) (McKinney 2000).

<sup>12</sup> See, e.g., *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976) (holding that a State could not lawfully authorize an absolute parental veto over the decision of a minor to obtain an abortion); *Doe v. Irwin*, 615 F.2d 1162, 1169 (6th Cir. 1980) (holding that a family planning center's practice of distributing contraceptive devices and medication to unemancipated minors without notice to their parents did not infringe a constitutional right of the parents). These cases illustrate that parents are prohibited from taking actions that they believe would be in the best interests of their children.

<sup>13</sup> See, e.g., *Pollock v. Pollock*, 154 F.3d 601, 603 (6th Cir. 1998) (involving a mother's recording of telephone conversations between her daughter and ex-spouse); *Newcomb v. Ingle*, 944 F.2d 1534, 1535 (10th Cir. 1991) (involving a mother intercepting telephone conversations between her minor son and ex-husband by use of a wiretap on her own phone); *Campbell v. Price*, 2 F. Supp. 2d 1186, 1187 (E.D. Ark. 1998) (involving a father's recording of telephone conversations between his daughter and his daughter's mother); *State v. Capell*, 966 P.2d 232, 233 (Or. Ct. App. 1998) (involving a mother's recording of her

proposed to amend their wiretapping statutes to create an exception for parents to monitor and intercept their children's telephone conversations.<sup>14</sup>

This Note examines whether Title III of the Omnibus Crime Control and Safe Streets Act of 1968 should be amended to exempt parents from liability for wiretapping their children's telephone calls as a matter of public policy. Part I presents an introduction to Title III,<sup>15</sup> the federal statute that regulates the use of wiretapping and other electronic surveillance, and compares it to state wiretapping statutes. Part I also discusses how some courts have interpreted the federal wiretapping statute to implicitly provide for an interspousal exception while other courts reject this notion. Part II argues that it is reasonable to carve out a parental exception to Title III liability based on the controversial interspousal exception to the Act. It also discusses the policy reasons behind parental immunity. Finally, Part III analyzes the recent state legislatures' attempts in Georgia and Virginia to amend their wiretapping

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son's telephone conversation with defendant regarding a drug transaction); see also Jacqueline L. Salmon, *When Trust Dries Up, Some Parents Resort to Spying*, THE PLAIN DEALER, Mar. 21, 1999, at 1K. One parent, who felt no guilt about taping her child's phone calls because of her concerns about substance abuse, said that "[y]ou get so desperate that you do anything to stop it. That's the bottom line. You fight fire with fire . . . You do jungle warfare. That's what we're dealing with here." *Id.*

<sup>14</sup> See H.R. 1576, 145th Gen. Assem., Reg. Sess. (Ga. 1999-2000) (enacted); see also H.R. 1370 (Va. 2000). On April 20, 2000, Georgia's wiretapping statute was amended to provide that a parent or guardian of a minor child may monitor or intercept telephone conversations between such child and another person for the purpose of ensuring the welfare of such child. GA. CODE ANN. § 16-11-66(d) (2000). The Virginia proposed amendment, which was never adopted, provided the following:

It shall not be a criminal offense under this chapter for a person to intercept a wire, electronic or oral communication, where such person is (I) a party to the communication or one of the parties to the communication has given prior consent to such interception, or (II) the spouse, parent or guardian of one of the parties to the communication and the communication occurs using any telephone in the residence of such spouse, parent or guardian.

H.R. 1370(B)(2).

<sup>15</sup> 18 U.S.C. §§ 2510-2522 (2000).

statutes to allow parents to monitor and intercept their children's conversations free from liability. This Note ultimately proposes that Title III be amended to include a provision like the one recently added to Georgia's wiretapping statute, allowing parents to legally intercept and record their children's telephone conversations.

## I. TITLE III AND ITS ROLE IN DOMESTIC DISPUTES

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III") is the federal statute that regulates wiretapping and the use of electronic surveillance.<sup>16</sup> It provides that "any person" who intercepts<sup>17</sup> by wiretap<sup>18</sup> the private telephone conversations of another without permission will be subject to

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<sup>16</sup> *Id.*

<sup>17</sup> Section 2510 defines "intercept" and its related terms as follows:

(4) "intercept" means the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device;

(5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire, oral, or electronic communication other than—

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business or furnished by such subscriber or user for connection to the facilities of such service and used in the ordinary course of its business; or (ii) being used by a provider of wire or electronic communication service in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

(b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal.

*Id.* § 2510(4)-(5).

<sup>18</sup> Title III uses the term "wire communication" to include wiretapping. "Wire communication" is defined as any aural transfer [a transfer containing the human voice at any point between and including the point of origin and the point of reception] made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception. *Id.* § 2510(1).

criminal and civil penalties.<sup>19</sup> Title III enumerates several narrow

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<sup>19</sup> Title III describes four ways to violate the Act. Except as otherwise specifically provided for in this chapter [18 U.S.C. §§ 2510-2522] any person who—

(a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept, any wire, oral, or electronic communication; (b) intentionally uses, endeavors to use . . . any electronic, mechanical or other device to intercept any oral communication when—

(i) such device is affixed, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect foreign or interstate commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

(d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; or

(e)(i) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, intercepted by means authorized by sections 2511(2)(a)(ii), 2511(2)(b),(c), 2511(2)(e), 2516, and 2518 of this chapter, (ii) knowing or having reason to know that the information was obtained through the interception of such a communication in connection with a criminal investigation; (iii) having obtained or received the information in connection with a criminal investigation, and with intent to improperly obstruct, impede, or interfere with a duly authorized criminal investigation, shall be punished as provided in subsection

exceptions to the prohibition.<sup>20</sup> However, it does not specifically create an exception for interspousal or parental wiretapping. The question of whether Title III should extend to domestic affairs is one that remains unanswered. For several decades, federal and state judiciaries have debated the scope of Title III's protection. Courts deciding interspousal wiretapping cases refuse to apply Title III's prohibitions to "mere domestic conflicts," relying on a lack of congressional intent to extend Title III to the home.<sup>21</sup> Other courts

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(4) or shall be subject to suit as provided in subsection (5).

*Id.* § 2511(1)(a)-(e).

<sup>20</sup> See 18 U.S.C. § 2511(2) (2000). Exceptions include: (1) switchboard operators, officers, employees, agents of providers of wire and electronic communication services who "in the normal course of [their] employment" intercept communications while engaged in activities incidental to their employment, or intercept communications to protect the rights or property of the provider of the service, or provide assistance to persons authorized by law to intercept communications; (2) officers, employees, or agents of the Federal Communications Commission who "in the normal course of [their] employment" intercept communications; (3) persons acting under the color of law who intercept communications, "where such person is a party to the communication or one of the parties to the communication has given prior consent to such exception; (4) persons who consent to the interception of their communications; (5) officers, employees, or agents of the United States who conduct government foreign intelligence activities; and (6) persons who intercept communications through the use of an extension telephone being used in the ordinary course of business. *Id.*; see also 18 U.S.C. § 2510(5)(a) (2000).

<sup>21</sup> See, e.g., *Newcomb v. Ingle*, 944 F.2d 1534, 1536 (10th Cir. 1991) (holding that a parent's interception of telephone conversations of her minor son within her home, without the son's knowledge or consent, was not prohibited by Title III because Congress did not intend to apply Title III to familial relations); *Simpson v. Simpson*, 490 F.2d 803, 809 (5th Cir. 1974) (holding that a former wife could not recover civil damages against her former husband who wiretapped her conversations with a third party because Congress did not intend its regulations to invade the realm of personal acts within the marital home); *Lizza v. Lizza*, 631 F. Supp. 529, 533 (E.D.N.Y. 1986) (stating that "[a]bsent a signal, either in the statute itself or legislative history, Congress intended that the Act's criminal and civil proscriptions and liabilities to extend to a decision by a spouse to record conversations on his own residence's telephone, this Court must decline to impute such an intent."); *Anonymous v. Anonymous*, 558 F.2d 677, 679 (2d Cir. 1977) (holding that a husband who secretly intercepted and recorded his ex-wife's conversations with their eight-year-old daughter did not rise to the level of criminal conduct Congress intended to be covered by Title III).

refuse to create an exception to Title III for domestic wiretapping where Congress has not explicitly provided one.<sup>22</sup> Like their federal counterparts, most state courts have found that their wiretapping statutes do not contain an interspousal exception, either based on the statutory language, or lack of specific statutory provisions regarding an explicit spousal exception.<sup>23</sup>

### A. *Examining the History and Legislative Purpose of Title III*

Title III was originally enacted to provide law enforcement with a weapon to use in the war against organized crime,<sup>24</sup> and purported to end violations of privacy.<sup>25</sup> Prior to the passage of Title

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<sup>22</sup> See, e.g., *Heggy v. Heggy*, 944 F.2d 1537, 1539-41 (10th Cir. 1991) (holding that Congress did not intend to keep interspousal wiretapping beyond the reach of Title III); *Kempf v. Kempf*, 868 F.2d 970, 973 (8th Cir. 1989) (holding that there is “no legal basis in Title III or its legislative history to insulate [wiretapping spouses] from Title III’s reach or its civil penalties”); *Pritchard v. Pritchard*, 732 F.2d 372, 374 (4th Cir. 1984) (holding that there is no indication that Congress intended to imply an exception to interspousal wiretapping cases).

<sup>23</sup> For cases declining to recognize an interspousal exception in their state wiretapping statute based on the statutory language, see generally *W. Va. Dep’t of Health & Human Res. ex rel. Wright v. David L.*, 453 S.E.2d 646 (W. Va. 1994); *Ransom v. Ransom*, 324 S.E.2d 437 (Ga. 1985); *Markham v. Markham*, 272 So. 2d 813 (Fla. 1973); *M.G. v. J.C.*, 603 A.2d 990 (N.J. Ch. Div. 1991), *overruled on other grounds by Smith v. Whitaker*, 713 A.2d 20 (N.J. Super. Ct. App. Div. 1998); *Standiford v. Standiford*, 598 A.2d 495 (Md. Ct. Spec. App. 1991). For cases citing lack of specific statutory provisions regarding an explicit spousal exception as a rationale for failing to recognize one, see generally *David L.*, 453 S.E.2d at 646; *Ransom*, 324 S.E.2d at 437; *Markham*, 272 So. 2d at 813.

<sup>24</sup> Title III aided law enforcement officials in fighting organized crime by providing procedures satisfying constitutional standards enunciated by the Supreme Court in the 1960s. Megan Moriarty, *Parental Wiretapping: Should Federal Courts Provide a Civil Remedy in a Family Law Matter?*, 48 U. KAN. L. REV. 397, 399 (2000). It prevented the use of illegally intercepted conversations at criminal trials. *Id.*

<sup>25</sup> Debra Bogosavljevic, *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*

III in 1968, the Federal Communications Act of 1934<sup>26</sup> governed wiretapping by law enforcement officers and private citizens, although it failed to adequately protect individual privacy.<sup>27</sup> The inadequacy of the 1934 Act, coupled with the increasing use of wiretaps in the private sphere, prompted Congress to enact Title III, which provided for a broad prohibition of private wiretapping.<sup>28</sup>

Beginning in 1965, Congress conducted a series of hearings on the invasion of privacy issue, where the prevalence of electronic surveillance within the marital home was clearly noted.<sup>29</sup> For example, at one congressional hearing, Subcommittee Chairman, Senator Long stated that “[t]he three large areas of snooping in [the] field [of non-governmental surveillance] are (1) industrial, (2) divorce cases, and (3) politics.”<sup>30</sup> In addition, Richard Gerstein, District Attorney of Dade County, Florida, testified before the subcommittee that “it is routine procedure in marital disagreements and other civil disputes for private detective agencies, generally with full knowledge of the lawyers, to tap telephones.”<sup>31</sup> After a number of bills were introduced, the Senate Judiciary Committee settled on one bill entitled The Right of Privacy Act of 1967.<sup>32</sup> The bill made electronic surveillance illegal if the surveillance involved interstate commerce or occurred on federal soil.<sup>33</sup> Thus, the bill only prohibited wiretappings that occurred in the commercial espionage context.

During the 1967 congressional hearings, Professor Robert Blakey, who is credited as the author of Title III, recommended that Congress reject the Right of Privacy Act of 1967 in favor of

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*Safe Streets Act of 1968*, 2000 U. ILL. L. REV. 321, 323 (2000).

<sup>26</sup> 47 U.S.C. § 605 (2000).

<sup>27</sup> Scott J. Glick, *Is Your Spouse Taping Your Telephone Calls?: Title III and Interspousal Electronic Surveillance*, 41 CATH. U. L. REV. 845, 856 (1992).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Invasions of Privacy: Hearings Before the Subcomm. on Admin. Practice & Procedure of the Senate Comm. on the Judiciary*, 89th Cong. 2261 (1965-66) (statement of Sen. Long).

<sup>31</sup> *Id.* at 1009 (testimony of Richard E. Gerstein, District Attorney, Dade County, Fla.).

<sup>32</sup> Glick, *supra* note 27, at 857.

<sup>33</sup> Glick, *supra* note 27, at 857.

his own draft bill. Professor Blakey's proposal provided for a complete ban on all electronic surveillance, including electronic surveillance in preparation of marital litigation.<sup>34</sup> Subsequently, President Johnson signed Title III, which included Professor Blakey's broad prohibition on all private wiretapping, into law.<sup>35</sup>

Irrespective of the foregoing, however, Title III's legislative history does not manifest a congressional desire to include all domestic wiretapping within the purview of Title III. Its legislative history nowhere reveals that the drafters included parents in its broad prohibition. Senator Long and Professor Blakey's testimony focused solely on wiretapping between spouses.<sup>36</sup> The lack of testimony concerning parental wiretapping indicates that Congress refused to legislate the appropriate amount of privacy between a parent and child.<sup>37</sup> Furthermore, Professor Herman Schwartz, who testified before the House Judiciary Committee in 1967, stated that "nobody wants to make it a crime for a father to listen in on his teenage daughter or some such related problem."<sup>38</sup> Courts have relied on these types of statements and argue that Congress did not intend to subject parents to civil and criminal penalties for recording their children's telephone calls out of concern for their children's welfare.<sup>39</sup> In examining the evolution of Title III's applicability to the domestic relations area, it is helpful to discuss

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<sup>34</sup> Glick, *supra* note 27, at 859.

<sup>35</sup> Glick, *supra* note 27, at 859.

<sup>36</sup> See *Invasions of Privacy: Hearings Before the Subcomm. on Admin. Practice & Procedure of the Senate Comm. on the Judiciary*, 89th Cong. 2261 (1965-66) (statement of Sen. Long) (observing that "[t]he three large areas of snooping in [the] field [of non-governmental surveillance] are (1) industrial, (2) divorce cases, and (3) politics); see also Glick, *supra* note 27, at 858 (pointing out that "private bugging in this country can be divided into two broad categories, commercial espionage and marital litigation") (quoting remarks of Professor Blakey).

<sup>37</sup> 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, 576 (2000).

<sup>38</sup> *Anti-Crime Program: Hearings Before the Subcomm. No. 5 of the House Comm. on the Judiciary*, 90th Cong. 989 (1967) (testimony of Professor Herman Schwartz, of the State University of New York at Buffalo School of Law).

<sup>39</sup> See, e.g., *Scheib v. Grant*, 22 F.3d 149, 154 (7th Cir. 1994); see also *Anonymous*, 558 F.2d at 679.

the history of interspousal wiretapping cases before deciding whether to apply Title III to parental wiretapping cases.

*B. The Interspousal Immunity Doctrine and Spousal Wiretapping Cases*

The interspousal immunity doctrine has its roots in common law, growing out of the idea that upon marriage, the husband and wife were perceived as one entity – the husband.<sup>40</sup> Many argue that the doctrine is “antiquated”<sup>41</sup> and “anachronistic,”<sup>42</sup> challenging the doctrine’s underlying notion that it is impossible for one spouse to sue the other because a man cannot sue himself.<sup>43</sup> Despite the passage of the Married Women’s Property Act,<sup>44</sup> which granted married women the right to sue and be sued in their own capacity, several courts upheld the interspousal immunity doctrine.<sup>45</sup> Such courts argued that the doctrine maintained marital peace and harmony<sup>46</sup> and avoided the risk of collusion between

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<sup>40</sup> Glick, *supra* note 27, at 864; *see also* Shearer v. Shearer, 480 N.E.2d 388, 392 (Ohio 1985); Jonathan D. Niemeyer, *All in the Family: Interspousal and Parental Wiretapping Under Title III of the Omnibus Crime Act*, 81 KY. L.J. 237, 246 (1992/93).

<sup>41</sup> Niemeyer, *supra* note 40, at 246.

<sup>42</sup> Glick, *supra* note 27, at 865.

<sup>43</sup> Glick, *supra* note 27, at 864-65.

<sup>44</sup> *See* PROSSER AND KEETON ON THE LAW OF TORTS 901-02 (5th ed. 1984) (discussing the Married Women’s Property Act).

<sup>45</sup> *See, e.g.*, Campbell v. Campbell, 114 S.E.2d 406 (W. Va. 1960); Wright v. Davis, 53 S.E.2d 335 (W. Va. 1949); Poling v. Poling, 179 S.E. 604 (W. Va. 1935).

<sup>46</sup> *See, e.g.*, Gowin v. Gowin, 264 S.W. 529, 537 (Tex. App. 1924), *aff’d*, 292 S.W. 211 (Tex. Comm’n App. 1927). The court reasoned that:

[T]o hold that a cause of action . . . can be maintained in the courts of the country, would endanger the institution of marriage, and would therefore be against public policy. It is reasonably supposable that, if the rule were otherwise, then actions and cross-actions would constantly be instituted by and between spouses, and that the irritation from such controversies, involving criminations and recriminations, would strongly tend to separations and divorces, which probably would not otherwise occur, and would thereby tend to impair the institution of marriage, which is the chief support of the social edifice the world

spouses.<sup>47</sup> Those courts also expressed their concern that judicial intervention would threaten the institution of marriage.<sup>48</sup>

Today, however, the strength of the interspousal immunity doctrine has diminished.<sup>49</sup> There are several reasons advanced as to why the interspousal immunity doctrine may not be invoked as a viable defense in spousal wiretapping cases. First, courts more readily reject the notion that the institution of marriage is a "sacred cow."<sup>50</sup> If one spouse is secretly intercepting the private telephone conversations of the other spouse to obtain evidence of some type

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over, and without which the structure would fall.

*Id.*; see also Poling, 179 S.E. at 607. The court asserted that:

To allow actions for damages between spouses for alleged personal injury would involve the placing of an additional strain on the marriage relation. The state is vitally concerned in maintaining that relationship and not in facilitating its disruption by authorizing personal injury actions between them - 'another step to destroy the sacred relation of man and wife, and to open the door to lawsuits between them for every real and fancied wrong, -suits which the common law has refused on the grounds of public policy.'

*Id.* (citations omitted).

<sup>47</sup> See, e.g., *McKinney v. McKinney*, 135 P.2d 940, 954 (Wyo. 1943) (acknowledging that suits between husbands and wives pose a danger of fraud and collusion).

<sup>48</sup> See, e.g., *Devers v. Devers*, 79 S.E. 1048, 1049 (Va. 1913) ("The well-being and good order of society demand that husbands and wives shall in good faith endeavor to reconcile their differences and dwell together in unity and peace rather than to make occasion for resort to the courts for redress.").

<sup>49</sup> See, e.g., *United States v. Jones*, 542 F.2d 661, 672 n.21 (6th Cir. 1976) ("The trend appears to be toward abrogation of the doctrine.").

<sup>50</sup> *Glick*, *supra* note 27, at 865 (citing *Kratz v. Kratz*, 477 F. Supp. 463, 476 (E.D. Pa. 1979)). Regarding the notion that the institution of marriage is no longer a "sacred cow" in our society, the *Kratz* court said the following:

The institution of marriage is not such a "sacred cow" that when Congress seeks to prohibit a "dirty business" such as wiretapping it must abstain (or be deemed to have abstained) from proscribing this wrong when committed by one spouse against the other. The evils of electronic surveillance are not peculiar to the marital relationship, and there is no more reason to permit husbands and wives to perpetrate these evils upon each other with impunity than there is to permit them legally to commit any other crimes against each other.

*Kratz*, 466 F. Supp. at 476 (footnotes omitted).

of illicit conduct, then it is beyond the court's control to preserve domestic tranquility.<sup>51</sup> That kind of behavior can hardly suggest that a viable marital relationship exists. Second, there is little potential for collusion between spouses in Title III actions because the statute provides not only for a civil remedy, but criminal sanctions as well.<sup>52</sup> Third, the interspousal immunity doctrine has never been applied in criminal cases.<sup>53</sup> In *United States v. Jones*, the Sixth Circuit Court of Appeals refused to allow interspousal immunity to bar the defendant's criminal prosecution, acknowledging that "[e]ven in states which recognize interspousal immunity, that immunity does not apply to criminal prosecutions."<sup>54</sup> A final reason for denying application of the state-created interspousal immunity doctrine to Title III, is that a state law cannot supersede a cause of action created by a federal statute.<sup>55</sup> Allowing a state-created doctrine to trump federal law would violate the Supremacy Clause.<sup>56</sup> One commentator argues that "[c]arving out an interspousal immunity exception in Title III is simply extralegal policymaking by the judiciary – indeed, bad policy – that has neither been approved by Congress nor presented to the President for his signature."<sup>57</sup>

Even in jurisdictions that have maintained the interspousal immunity doctrine, most courts have failed to apply the doctrine in

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<sup>51</sup> Moriarty, *supra* note 24, at 414.

<sup>52</sup> Section 2511(4)(a) provides that a person who violates subsection (1) of the section can be fined or imprisoned up to five years, or both. 18 U.S.C. § 2511(4)(a) (2000).

<sup>53</sup> Glick, *supra* note 27, at 865.

<sup>54</sup> 542 F.2d 661, 672 (6th Cir. 1976).

<sup>55</sup> Glick, *supra* note 27, at 866.

<sup>56</sup> U.S. CONST. art. VI, cl. 2. The Supremacy Clause provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

*Id.*

<sup>57</sup> Glick, *supra* note 27, at 869.

the context of Title III relating to domestic disputes.<sup>58</sup> For example, in *Burgess v. Burgess*, the Florida Supreme Court held that the doctrine of interspousal tort immunity does not bar a civil cause of action for money damages brought by one spouse against the other under the Florida wiretapping statute.<sup>59</sup> The court found that the statute applied to "any person" and did not distinguish between married and unmarried individuals.<sup>60</sup> Furthermore, the court stated that interspousal immunity must be denied in these situations since the purpose of the doctrine is to preserve marital harmony.<sup>61</sup> Applying the doctrine in situations where one spouse secretly intercepts the private telephone conversations of the other spouse without fear of punishment, the court opined, only encourages such actions, thereby destroying any marital harmony that previously existed.<sup>62</sup>

The Delaware Superior Court in *State v. Jock* faced a similar interspousal immunity argument.<sup>63</sup> Although the state recognized the doctrine of interspousal immunity, the court declined to apply the doctrine to exclude a husband from suit under the Delaware wiretapping statute for illegally intercepting his wife's telephone conversations.<sup>64</sup> The court held that the justifications for interspousal immunity did not apply in a wiretap prosecution, noting that allowing interspousal wiretapping would do nothing to foster marital harmony, the very purpose of the doctrine.<sup>65</sup> In addition, the court concluded that an exception for interspousal wiretapping violates the privacy interests of innocent third parties.<sup>66</sup>

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<sup>58</sup> See, e.g., *Kratz*, 477 F. Supp. at 475 (stating that a Title III cause of action "is provided by federal law and cannot be subverted by any state law or policy"); *Jones*, 542 F.2d at 672 n.22 (noting that husbands and wives have always been regarded as separate individuals in criminal proceedings).

<sup>59</sup> 447 So. 2d 220, 223 (Fla. 1984).

<sup>60</sup> *Id.* at 222.

<sup>61</sup> *Id.* at 222-23.

<sup>62</sup> *Id.*

<sup>63</sup> 404 A.2d 518 (Del. Super. Ct. 1979).

<sup>64</sup> See *id.* at 520.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

### C. State Wiretapping Statutes

States may regulate the wiretapping field by enacting wiretapping statutes, although they are not required to do so.<sup>67</sup> Title III provides only “the minimum” constitutional protection against unauthorized interception.<sup>68</sup> States may enact stricter standards if they determine that such standards are necessary to protect their citizens constitutional right of privacy from wiretapping.<sup>69</sup> However, a state cannot pass a law with less stringent standards than the federal law.<sup>70</sup> Courts must decide whether Title III preempts the state statute to determine which statute applies in a particular case.<sup>71</sup> The Massachusetts Supreme Court in *Commonwealth v. Vitello* held that a federal statute will preempt a state statute that “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>72</sup> States can avoid preemption by enacting statutes that either closely resemble the

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<sup>67</sup> Stacy L. Mills, *He Wouldn't Listen To Me Before, But Now . . . : Interspousal Wiretapping and an Analysis of State Wiretapping Statutes*, 37 BRANDEIS L.J. 415, 420 (1998). Section 2516(2) of Title III indicates that Congress did not intend to regulate the field of wiretapping entirely. It provides that:

The principle prosecuting attorney of any State . . . if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire, oral, or electronic communications, may apply to such judge for, and such judge may grant in conformity with § 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire, oral, or electronic communications by investigative or law enforcement officers having the responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of [an offense].

18 U.S.C. § 2516(2) (2000).

<sup>68</sup> Richard I. Zuber, *Domestic Eavesdropping and Wiretapping: Admissibility of Intercepted Communications*, 21 COLO. LAW. 455, 456 (1992).

<sup>69</sup> *Id.*; see also 18 U.S.C. § 2516(2) (2000).

<sup>70</sup> Mills, *supra* note 67, at 420.

<sup>71</sup> Mills, *supra* note 67, at 420.

<sup>72</sup> 337 N.E.2d 819, 835 (Mass. 1975).

federal statute, or are more restrictive, but not more permissive than Title III.<sup>73</sup>

State wiretapping statutes are usually modeled after Title III, and generally only deviate from the federal statute in minor ways.<sup>74</sup> A majority of states have taken a similar position to Title III in refusing to recognize an explicit interspousal wiretapping exception in their statute.<sup>75</sup> Nonetheless, a minority of states have placed language in their wiretapping statute that can be construed to contain a possible interspousal exemption.<sup>76</sup> Given the reluctance of most federal courts confronting the interspousal wiretapping issue to recognize an interspousal exception to Title III, the

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<sup>73</sup> *Id.*

<sup>74</sup> *See, e.g.*, FLA. STAT. ANN. § 934.03(1) (West 2000); MINN. STAT. ANN. § 626A.02(1) (West 2000); VA. CODE ANN. § 19.2-62(A) (Michie 2000); WIS. STAT. ANN. § 968.31(1) (West 2000); *see also* Mills, *supra* note 67, at 430. Like Title III, these state statutes prohibit the intentional interception, use, or disclosure of wire and oral communications, as well as make it unlawful to have another person commit these acts. *See* FLA. STAT. ANN. § 934.03(1) (West 2000); MINN. STAT. ANN. § 626A.02(1) (West 2000); VA. CODE ANN. § 19.2-62(A) (Michie 2000); WIS. STAT. ANN. § 968.31(1) (West 2000). In addition, these state statutes punish the intentional use of interception devices, or having another person utilize those devices to intercept communications. *Id.*

<sup>75</sup> *See, e.g.*, DEL. CODE ANN. tit. 11, § 2402 (West 2000); MD. CODE ANN., CTS. & JUD. PROC. § 10-402 (West 2000); N.J. STAT. ANN. § 2A:156A-3 (West 2000); *see also* Mills, *supra* note 67, at 433.

<sup>76</sup> For example, Kentucky has adopted a wiretapping statute that does not include an express exception, but instead, an implicit suggestion of a possible interspousal exemption. *See* KY. REV. STAT. ANN. § 526.020 (Banks-Baldwin 2000). The commentary states that the statute does not prohibit the "tapping of one's own phone." *Id.* This language may be construed as an interspousal exception. *See* Mills, *supra* note 67, at 433. Similarly, the language of Oregon's wiretapping statute may also create an interspousal exception. Mills, *supra* note 67, at 433. The statute makes it unlawful for any person to use an interception device to obtain a phone conversation, tamper with telephone equipment in order to intercept communications, and use an intercepting device to tape private conversations. *See* OR. REV. STAT. § 165.540(1) (West 1999). However, among those persons exempt from these prohibitions are "subscribers or members of their family who perform the acts . . . in their homes." *Id.* § 165.540(3). Therefore, it seems that it is not a crime in Oregon for a spouse to intercept a family member's private telephone communications. *See* Mills, *supra* note 67, at 433.

remaining state courts will also likely hold no exception exists.<sup>77</sup> Alternatively, until the federal cases finding an implied interspousal exception are overruled, state courts are free to recognize the interspousal exception in their wiretapping statute.<sup>78</sup>

#### *D. State and Federal Court Decisions*

During the last three decades, state and federal courts have debated the legality of interspousal wiretapping. Of those states confronted with the wiretapping issue, most state courts have held their statutes do not contain an interspousal exception for a variety of reasons.<sup>79</sup> Several courts have held that an exemption does not exist based on the statutory language,<sup>80</sup> while others focus on the lack of specific statutory provisions regarding an explicit spousal exception.<sup>81</sup> In addition to state courts, federal circuit courts have grappled over the possibility of whether an implied interspousal immunity exception exists in Title III. Four circuit courts have held that Title III prohibits interspousal wiretapping,<sup>82</sup> while two circuits have found an implied exception to Title III that renders the prohibition inapplicable to spouses.<sup>83</sup>

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<sup>77</sup> Mills, *supra* note 67, at 433.

<sup>78</sup> Mills, *supra* note 67, at 433-34.

<sup>79</sup> See *W. Va. Dep't of Health & Human Res. ex rel. Wright v. David L.*, 453 S.E.2d 646 (W. Va. 1994); *Ransom v. Ransom*, 324 S.E.2d 437 (Ga. 1985); *Markham v. Markham*, 272 So. 2d 813 (Fla. 1973); *M.G. v. J.C.*, 603 A.2d 990 (N.J. Super. Ct. Ch. Div. 1991), *overruled on other grounds by Smith v. Whitaker*, 713 A.2d 20 (N.J. Super. Ct. App. Div. 1991); *Standiford v. Standiford*, 598 A.2d 495 (Md. Ct. Spec. App. 1998).

<sup>80</sup> See, e.g., *David L.*, 453 S.E.2d at 646; *Ransom*, 324 S.E.2d at 437; *Markham*, 272 So. 2d at 813.

<sup>81</sup> See *M.G.*, 603 A.2d 990; *Standiford v. Standiford*, 598 A.2d 495 (Md. Ct. Spec. App. 1991).

<sup>82</sup> *Thompson v. Dulaney*, 970 F.2d 744 (10th Cir. 1992); *Heggy v. Heggy*, 944 F.2d 1537 (10th Cir. 1991); *Kempf v. Kempf*, 868 F.2d 970 (8th Cir. 1989); *Platt v. Platt*, 951 F.2d 159 (8th Cir. 1989); *Pritchard v. Pritchard*, 732 F.2d 372 (4th Cir. 1984); *United States v. Jones*, 542 F.2d 661 (6th Cir. 1976).

<sup>83</sup> See *Anonymous v. Anonymous*, 558 F.2d 677, 677 (2d Cir. 1977); *Simpson v. Simpson*, 490 F.2d 803, 805-06 (5th Cir. 1974).

### 1. State Decisions Interpreting State Wiretapping Statutes

Like their federal counterparts, most state courts have declined to recognize an interspousal exception in their wiretapping statutes.<sup>84</sup> In *M.G. v. J.C.*, for example, the New Jersey Superior Court refused to acknowledge an interspousal exception to its wiretapping statute because it did not contain a specific exception for wiretapping spouses.<sup>85</sup> In that case, a husband, suspicious that his wife was having an affair, secretly tapped their home telephone.<sup>86</sup> Given that there was no New Jersey authority regarding interspousal wiretapping, the court looked to federal case law for guidance in interpreting the statute.<sup>87</sup> The court's interpretative guidance was eased by the fact that the New Jersey statute is nearly identical to the federal statute.<sup>88</sup> The court held that because the New Jersey statute did not include an express exception for interspousal wiretapping, the court would not provide one.<sup>89</sup> This is the same line of reasoning federal courts have used in concluding that if Congress had intended to create an explicit exception in Title III for interspousal wiretapping, it would have provided for one.<sup>90</sup> Thus, the court's decision in this case "forms part of the emerging national consensus that interspousal wiretapping is prohibited under state and federal law."<sup>91</sup>

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<sup>84</sup> See, e.g., *Lizza v. Lizza*, 631 F. Supp. 529 (E.D.N.Y. 1986); *Kratz v. Kratz*, 477 F. Supp. 463 (E.D. Pa. 1979); *People v. Otto*, 831 P.2d 1178 (Cal. 1992); *Standiford v. Standiford*, 598 A.2d 495 (Md. Ct. Spec. App. 1991).

<sup>85</sup> 603 A.2d 990, 994 (N.J. Super. Ch. Div. 1991).

<sup>86</sup> *Id.* at 991.

<sup>87</sup> *Id.* at 992.

<sup>88</sup> *Id.*; see also N.J. STAT. ANN. § 2A:156A-3 (West 2000).

<sup>89</sup> *M.G.*, 603 A.2d at 994.

<sup>90</sup> See, e.g., *Thompson v. Dulaney*, 970 F.2d 744 (10th Cir. 1992); *Heggy v. Heggy*, 944 F.2d 1537 (10th Cir. 1991); *Platt v. Platt*, 951 F.2d 159 (8th Cir. 1989); *Kempf v. Kempf*, 868 F.2d 970 (8th Cir. 1989); *Pritchard v. Pritchard*, 732 F.2d 372 (4th Cir. 1984); *United States v. Jones*, 542 F.2d 661 (6th Cir. 1976).

<sup>91</sup> Alan M. Grosman, *Tapping Into Trouble: Wiretapping and Divorce*, 157 N.J. LAW. 16, 20 (1993).

Similarly, the Maryland Court of Special Appeals in *Standiford v. Standiford* held that the Maryland wiretapping statute contained no explicit exception regarding the interception of a spouse's communication.<sup>92</sup> The case arose under the Maryland Wiretapping and Electronic Surveillance Act,<sup>93</sup> which resembles the New Jersey statute.<sup>94</sup> In *Standiford*, a wife sued her ex-husband for intercepting her private telephone calls for nearly three years.<sup>95</sup> The husband moved to dismiss the action, claiming that the Maryland statute was not intended to apply to spousal wiretaps where the spouse acted alone to intercept the calls, and was the sole subscriber to a telephone company's services.<sup>96</sup> However, the court held that the Maryland statute "clearly and unambiguously" prohibited all unauthorized interceptions and contained no exemption for interspousal wiretapping.<sup>97</sup>

The West Virginia Supreme Court of Appeals in *West Virginia Dep't of Health & Human Resources ex rel. Wright v. David L.* also declined to recognize an interspousal exception in its state wiretapping statute.<sup>98</sup> A husband, who no longer lived with his wife, suspected she was abusing their children.<sup>99</sup> He surreptitiously tape-recorded conversations between his wife and their children in the wife's house, and sought to introduce the tapes in court.<sup>100</sup> Although the West Virginia statute authorizes wiretapping when the tapper reasonably believes the recordings will prove the commission of certain enumerated crimes (such as kidnaping, escaping from prison and selling drugs), it fails to include child abuse and neglect.<sup>101</sup> Thus, given that child abuse was not an enumerated exception to the statute, the court held the tapes were inadmissible.<sup>102</sup> Furthermore, the court found that the statute clearly and

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<sup>92</sup> 598 A.2d 495, 499 (Md. Ct. Spec. App. 1991).

<sup>93</sup> MD. CODE ANN., CTS. & JUD. PROC. § 10-402 (West 2000).

<sup>94</sup> Grosman, *supra* note 91, at 19.

<sup>95</sup> *Standiford*, 598 A.2d at 497.

<sup>96</sup> *Id.* at 498.

<sup>97</sup> *See id.* at 499.

<sup>98</sup> 453 S.E.2d 646 (W. Va. 1994).

<sup>99</sup> *Id.* at 648.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 651 n.7; *see also* W. VA. CODE § 62-1D-8 (2000).

<sup>102</sup> 453 S.E.2d at 651 n.7.

unambiguously prohibits the recording of conversations between spouses.<sup>103</sup>

## 2. *Federal Decisions Interpreting Title III*

The Fifth Circuit was the first federal court of appeals to address the issue of whether Title III contains an implied exception for interspousal wiretapping.<sup>104</sup> In *Simpson v. Simpson*, a husband who suspected that his wife had been unfaithful during their marriage, attached a wiretapping device to the household telephone to intercept conversations between his wife and another man.<sup>105</sup> Following their divorce the wife filed a civil action under Title III.<sup>106</sup> Although the *Simpson* court conceded that “[t]he naked language of Title III, by virtue of its inclusiveness, reaches this case,”<sup>107</sup> it nevertheless concluded that Congress did not intend to prohibit this kind of conduct. Following a “long, exhaustive, and inconclusive”<sup>108</sup> search of Title III’s legislative history, the court found that the statute was not intended to reach domestic conflicts normally left to state law.<sup>109</sup> Thus, the court found that the

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<sup>103</sup> *Id.* at 652.

<sup>104</sup> *Simpson v. Simpson*, 490 F.2d 803 (5th Cir. 1974).

<sup>105</sup> *Id.* at 804.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 805.

<sup>108</sup> *Id.*

<sup>109</sup> *See id.*; *see also* *Janecka v. Franklin*, 684 F. Supp. 24, 26 (S.D.N.Y. 1987) (holding that a former husband’s tape recording of telephone calls made to his home by his ex-wife to speak with their children did not violate Title III). In analyzing *Anonymous v. Anonymous*, 558 F.2d 677 (2d Cir. 1977), a case where a husband intercepted and taped his wife’s telephone conversations with their eight-year-old daughter and the court determined that his actions did not violate the federal wiretap statute, the *Janecka* court concluded that,

[i]n emphasizing that custody disputes were matters clearly to be handled by the state courts, the court in *Anonymous* was, in essence, stating its conclusion that Congress did not intend that the federal wiretap statute furnish a vehicle for the importation into federal court of matters too peculiarly within the exclusive province of state tribunals. Nothing more clearly belongs in state, not federal, court than a contested custody proceeding.

*Janecka*, 684 F. Supp. at 26.

husband was immune from prosecution for intercepting his wife's telephone conversations.<sup>110</sup>

The Sixth Circuit in *United States v. Jones* challenged the *Simpson* court's recognition of an implied interspousal exception to Title III.<sup>111</sup> In *Jones*, a husband intercepted and recorded his estranged wife's conversations while present at her residence.<sup>112</sup> The court declined to follow the *Simpson* decision, calling its conclusion "untenable because it contradicts both the explicit language of the statute and the clear intent Congress expressed in the Act's legislative history."<sup>113</sup> The court found that the "explicit language" of Title III concerns "any person" who violates the section and declared that if Congress had intended to create an interspousal exception to the "blanket prohibition" of unauthorized wiretaps in Title III, it would have explicitly provided for one.<sup>114</sup> Moreover, the court stated that Congress was well aware of the fact that wiretaps were used in domestic relations cases.<sup>115</sup> Thus, the court determined that Title III was intended to impose a "broad prohibition" on such surveillance,<sup>116</sup> and because the statute failed to create an explicit exception for interspousal wiretapping, no exemption could be implied.<sup>117</sup>

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<sup>110</sup> *Simpson*, 490 F.2d at 810.

<sup>111</sup> 542 F.2d 661 (6th Cir. 1976).

<sup>112</sup> *Id.* at 663.

<sup>113</sup> *See id.* at 667.

<sup>114</sup> *Id.* at 671.

<sup>115</sup> *See id.* at 668. The court noted that the Senate report accompanying Title III clearly established that the purpose of the Act was to create an across-the-board ban on all unauthorized electronic surveillance:

Title III has its dual purpose (1) protecting the privacy of wire and oral communications, and (2) delineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized. To assure the privacy of oral and wire communications, Title III prohibits all wiretapping and electronic surveillance by persons other than duly authorized law enforcement officers.

*Id.* (quoting S. REP. NO. 1097, 90th Cong. 2d Sess. 70 (1968), reprinted in U.S.C.A.N., 90th Cong., 2d Sess. at 2153).

<sup>116</sup> *Jones*, 542 F.2d at 669.

<sup>117</sup> *Id.* at 673.

A 1979 Pennsylvania federal district court decision in *Kratz v. Kratz* was a significant development toward the current majority view on interspousal wiretapping.<sup>118</sup> In *Kratz*, an estranged husband, who became suspicious of his wife's extra-marital activities, placed a voice-activated tap on the family phone.<sup>119</sup> From the wiretap, the husband learned that his wife was having an affair, and that she and her lover were planning a trip together to London.<sup>120</sup> Months after the tap had been installed, the wife experienced some difficulties with the phone and had it repaired.<sup>121</sup> The phone company's repair crew discovered the tap and reported it to the police.<sup>122</sup> The police arrested the husband and charged him with violating Pennsylvania's electronic surveillance statute.<sup>123</sup> The wife and her boyfriend subsequently filed suit against the husband for damages under Title III.<sup>124</sup> The court agreed with the *Jones* doctrine, finding that the legislative history and plain language of Title III did not provide for a domestic relations exception to the statute.<sup>125</sup>

A majority of the federal courts have adopted the interpretation of Title III and its legislative history as advanced by the Sixth Circuit in *Jones*.<sup>126</sup> The Fourth Circuit agreed that the plain language of Title III includes interspousal wiretapping, and its legislative history evinces a positive congressional intent to cover domestic wiretapping situations.<sup>127</sup> The Eighth Circuit overturned a district court decision, stating that "[e]xtending federal law into such a purely domestic matter runs counter to the tradition federal

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<sup>118</sup> 477 F. Supp. 463 (E.D. Pa. 1979).

<sup>119</sup> *Id.* at 465-66.

<sup>120</sup> *Id.* at 466.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 466 n.6; *see also* 18 PA. CONS. STAT. ANN. § 5703 (West 2000).

<sup>124</sup> *Kratz*, 477 F. Supp. at 467.

<sup>125</sup> *Id.* at 468-69.

<sup>126</sup> *See, e.g.,* *Heggy v. Heggy*, 944 F.2d 1537, 1539 (10th Cir. 1991) (holding that Title III applies to interspousal wiretaps); *Kempf v. Kempf*, 868 F.2d 970, 973 (8th Cir. 1989) (holding that Title III prohibits all wiretapping activities unless specifically excepted); *Pritchard v. Pritchard*, 732 F.2d 372, 373-74 (4th Cir. 1984) (same); *see also* Moriarty, *supra* note 24, at 404.

<sup>127</sup> *See Pritchard*, 732 F.2d at 373-74.

courts have followed in leaving family matters to the discretion of the state courts.”<sup>128</sup> The Tenth Circuit also refused to recognize an interspousal exception to Title III, focusing on § 2511(1), which “prohibits the interception, use, or disclosure of wire communications by *any person* except as specifically provided in the statute.”<sup>129</sup>

The courts, however, have been unwilling to extend the rule espoused in *Jones* to domestic relations cases where parents intercept their children’s conversations with third parties, such as the other parent. Parental wiretapping has become increasingly common in the wake of such violent behavior as exhibited in the Columbine massacre. The Second Circuit in *Anonymous v. Anonymous* was the first court of appeals to examine parental wiretapping.<sup>130</sup> In *Anonymous*, a husband secretly intercepted and recorded his ex-wife’s conversations with their eight-year-old daughter.<sup>131</sup> After exploring the legislative history<sup>132</sup> and referring to the Fifth Circuit’s rationale in *Simpson*, the court concluded that when Congress enacted Title III, it was more concerned with organized crime than domestic wiretaps.<sup>133</sup> Given that Congress intended to refrain from invading the sphere of domestic relations, the husband’s actions did not “rise to the level of criminal conduct intended to be covered by [Title III].”<sup>134</sup>

Until 1991, no court had determined whether Title III applied in a situation where a child sued his custodial parent for the interception of his telephone conversations by way of wiretap within the family home without his knowledge or consent. The Tenth Circuit delivered an opinion on the issue in the case of

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<sup>128</sup> *Kempf v. Kempf*, 677 F. Supp. 618, 622 (E.D. Mo. 1988), *rev’d*, 868 F.2d 970 (8th Cir. 1989).

<sup>129</sup> *Heggy*, 944 F.2d at 1540.

<sup>130</sup> 558 F.2d 677 (2d Cir. 1977).

<sup>131</sup> *Id.* at 677.

<sup>132</sup> *Id.* at 679 (“[W]e, like Professor Schwartz, [who testified for the A.C.L.U. before the House Judiciary Committee] 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.”).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

*Newcomb v. Ingle*.<sup>135</sup> In *Newcomb*, a mother intercepted and recorded telephone conversations of her minor son and ex-husband within the family home, without her son's knowledge or consent.<sup>136</sup> During one such conversation, the father instructed the minor child on how to set fire to his mother's home.<sup>137</sup> The child's mother reported the incident to a fire investigator.<sup>138</sup> The tapes were used in her son's prosecution for arson.<sup>139</sup> The child brought a civil action against his mother, grandfather and county prosecutor, alleging violations of Title III.<sup>140</sup> The court held that the federal wiretapping statute did not prohibit the mother's action.<sup>141</sup> While recognizing that an analogy could be made to the interspousal wiretapping cases that had been previously decided, the court nonetheless stated that the issue of parental wiretapping was "qualitatively different" from interspousal wiretapping.<sup>142</sup>

#### E. Vicarious Consent Standard

Another issue raised in parental wiretapping cases is Title III's exception for consensual interceptions.<sup>143</sup> Parents faced with

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<sup>135</sup> *Newcomb v. Ingle*, 944 F.2d 1534 (10th Cir. 1991). In *Newcomb*, the court stated that "[n]o cases address the situation we have here [a situation where a minor child sues his custodial parent for telephone interceptions made within the family home]." *Id.* at 1535-36. However, a custodial parent's wiretap within the family home of a child's non-custodial parent was considered earlier in the case of *Anonymous v. Anonymous*, 558 F.2d 677 (2nd Cir. 1977) which analyzed the fact pattern as an interspousal wiretap case. See also *Platt v. Platt*, 951 F.2d 159, 159 (8th Cir. 1989) (involving a custodial mother intercepting, monitoring and recording minor child's telephone conversations with father).

<sup>136</sup> 944 F.2d at 1535.

<sup>137</sup> *Id.* Based on the recorded conversation, the assistant county attorney, brought charges against the father resulting in a conviction. *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* All charges were dismissed. *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 1536.

<sup>142</sup> *Id.* at 1535-36. For a discussion on how parental wiretapping is "qualitatively different" from interspousal wiretapping, see *infra* note 186 and accompanying text.

<sup>143</sup> David J. Anderman, *Title III at a Crossroads: The Ordinary Course of Business in the Home, the Consent of Children, and Parental Wiretapping*, 141

liability under the federal statute for tapping their children's phone conversations have defended themselves on the theory that parents vicariously consented to the conversation on behalf of the child.<sup>144</sup> Section 2511(2)(d) provides a safe harbor from liability by declaring that "[i]t shall not be unlawful . . . for a person . . . to intercept a wire, oral, or electronic communication, where . . . one of the parties to the communication has given prior consent to such interception."<sup>145</sup> The statute fails to address whether one of the parties to the communication, namely a child, may be represented by a parent for consent purposes.<sup>146</sup> However, most courts have found that parents can vicariously consent to the tapping of their minor child's phone conversations under the theory that parents are acting in their children's best interests.<sup>147</sup>

A Utah federal district court was the first court to address whether parents can vicariously consent to wiretapping their children's phone conversations.<sup>148</sup> In *Thompson v. Dulaney*, Mrs. Dulaney recorded phone conversations between her minor children and her husband during divorce proceedings and a child custody battle.<sup>149</sup> Mrs. Dulaney entered the transcripts of these conversations into the custody proceedings and was subsequently awarded custody of the children.<sup>150</sup> Mr. Dulaney sued for compensatory and punitive damages under Title III.<sup>151</sup> Mrs. Dulaney defended on the ground that as the children's mother, she consented to the conversation on behalf of the children.<sup>152</sup> The district court held that:

[A]s long as the guardian has a good faith basis that is objectively reasonable for believing that it is necessary to

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U. PA. L. REV. 2261, 2288 (1993).

<sup>144</sup> Moriarty, *supra* note 24, at 418.

<sup>145</sup> 18 U.S.C. § 2511(2)(d) (2000).

<sup>146</sup> Bogosavljevic, *supra* note 25, at 333.

<sup>147</sup> *See, e.g.*, *Pollock v. Pollock*, 154 F.3d 601 (6th Cir. 1998); *Campbell v. Price*, 2 F. Supp. 2d 1186 (E.D. Ark. 1998); *Thompson v. Dulaney*, 838 F. Supp. 1535 (D. Utah 1993); *Silas v. Silas*, 680 So. 2d 368 (Ala. Civ. App. 1996).

<sup>148</sup> *See Thompson*, 838 F. Supp. at 1535.

<sup>149</sup> *Id.* at 1537.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 1537-38.

<sup>152</sup> *Id.* at 1543-44.

consent on behalf of her minor children to the tapping 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 children.<sup>153</sup>

In this case, Mrs. Dulaney's good-faith basis was that Mr. Dulaney attempted to undermine the children's relationship with her, and was thus harassing the children.<sup>154</sup> The court emphasized in a footnote that it was limiting its holding regarding vicarious consent to the circumstances present in the case.<sup>155</sup> "Thus, the *Thompson* court implemented a case-by-case analysis [to determine] whether the vicarious consent defense was permissible."<sup>156</sup>

An Arkansas federal district court was the next court to address the vicarious consent issue.<sup>157</sup> In *Campbell v. Price*,<sup>158</sup> a father tape-recorded his minor daughter's conversations with her mother, without first obtaining either's consent, to determine why his daughter would cry and become so emotional after speaking with her mother on the telephone.<sup>159</sup> The child's mother sued the child's father for damages under Title III.<sup>160</sup> The court concluded that the father acted in accordance with a good faith view towards his daughter's best interests.<sup>161</sup>

The most recent court to confront vicarious consent was the Sixth Circuit in *Pollock v. Pollock*.<sup>162</sup> Like the *Thompson* and *Campbell* courts, the *Pollock* court extended the consent exception to permit a parent to vicariously consent to the taping of telephone conversations on behalf of his minor child.<sup>163</sup> In *Pollock*, Mrs. Pollock recorded conversations between her minor daughter and her ex-husband.<sup>164</sup> Mr. Pollock subsequently brought an action

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<sup>153</sup> *Id.* at 1544.

<sup>154</sup> *Id.* at 1542, 1544.

<sup>155</sup> *Id.* at 1544 n.8.

<sup>156</sup> Bogosavljevic, *supra* note 25, at 335.

<sup>157</sup> *Campbell v. Price*, 2 F. Supp. 2d 1186 (E.D. Ark. 1998).

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 1187.

<sup>160</sup> *Id.* at 1188.

<sup>161</sup> *Id.* at 1191.

<sup>162</sup> 154 F.3d 601 (6th Cir. 1998).

<sup>163</sup> *Id.* at 610.

<sup>164</sup> *Id.* at 602.

against Mrs. Pollock under Title III.<sup>165</sup> In her defense, Mrs. Pollock argued that she recorded the conversations between her daughter and Mr. Pollock because she “noticed a gradual change” in her daughter, and believed her daughter was subjected to “emotional and psychological pressure” that was “detrimental to [her] and perhaps rose to the state of abuse or emotional harm or injury.”<sup>166</sup> In other words, Mrs. Pollock claimed that the recordings were motivated by concern for her daughter’s best interests. Although the Sixth Circuit found that a question of material fact existed as to Mrs. Pollock’s motives, and reversed the district court’s decision granting summary judgment, the court nevertheless concluded that the doctrine of vicarious consent exempted Mrs. Pollock from liability under Title III.<sup>167</sup> The court applied the *Thompson* standard and emphasized that the recording parent must demonstrate “a good faith, objectively reasonable basis for believing [that] such consent was necessary for the welfare of the child.”<sup>168</sup>

In addition to the federal courts, one state court has also adopted the vicarious consent defense.<sup>169</sup> In *Silas v. Silas*, the Alabama Court of Civil Appeals determined that a father had the authority to consent on behalf of his minor son to tape-record phone conversations with the child’s mother.<sup>170</sup> The court modified the *Thompson* standard and held that the parent must have a “good faith basis that is objectively reasonable for believing that the minor child is being abused, threatened, or intimidated by the other parent.”<sup>171</sup> Although the *Silas* test has the added threshold of proving that the child is abused, threatened, or intimidated by

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<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 604 (citations omitted).

<sup>167</sup> *Id.* at 610. Although Mrs. Pollock claimed that she was acting in her daughter’s best interests, the child’s father and stepmother accused Mrs. Pollock of recording the conversations out of anger. *Id.* at 605.

<sup>168</sup> *Id.*

<sup>169</sup> *Silas v. Silas*, 680 So. 2d 368 (Ala. Civ. App. 1996).

<sup>170</sup> *Id.* at 372.

<sup>171</sup> *Id.* at 371. The child would become extremely upset and cry during the telephone conversations with his mother. *Id.* Psychologists testified that the tapes indicated that the mother was verbally abusing the child, and such abuse was damaging to the child. *Id.* at 371-72.

the other parent, the sole purpose of this stringent test is to protect the child from physical and emotional harm.<sup>172</sup>

The foregoing decisions are in accordance with the long-standing recognition by courts that a parent should be permitted to decide what is best for his or her own child.<sup>173</sup> This deference to parents is founded in the quasi-constitutional rights of parental autonomy and familial privacy.<sup>174</sup> Supporters of parental consent on behalf of their minor children argue that parental rights are fundamental rights.<sup>175</sup> Thus, parents should be afforded wide discretion to make decisions on behalf of their children because they are in the best position to determine their children's needs.<sup>176</sup> Although critics of the vicarious consent exception argue that such an exception seriously erodes a child's privacy

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<sup>172</sup> Killian, *supra* note 37, at 572.

<sup>173</sup> See, e.g., *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (noting that “[o]ur jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children . . . More important[ly], historically [the law] 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) (noting that “[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.”); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (recognizing that “the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”).

<sup>174</sup> See, e.g., *Bellotti v. Baird*, 443 U.S. 622, 642-44 (1979) (holding that parental consultation for a minor's decision to obtain an abortion is desirable and in the best interests of the minor); *Wisconsin v. Yoder*, 406 U.S. 205, 229-234 (1972) (affirming Amish parents' right to decline to send their children to a formal high school after they graduate from the eighth grade); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925) (sustaining parents' authority to provide religious with secular schooling, and the child's right to receive it, as against the state's requirement of public school attendance); see also Julieann Karkosak, *Tapping Into Family Affairs: Examining the Federal Wiretapping Statute as It Applies to the Home*, *Pollock v. Pollock*, 154 F.3d 601 (6th Cir. 1998), U. CIN. L. REV. 995, 1017 (2000).

<sup>175</sup> Karkosak, *supra* note 174, at 1017.

<sup>176</sup> Karkosak, *supra* note 174 at 1017.

interests,<sup>177</sup> parents, not courts, should decide whether an encroachment on their child's privacy interests is appropriate. It is logical to vicariously consent to intercepting a minor child's conversations if it is necessary for the protection of such child.

## II. PARENTAL IMMUNITY

Since its inception, the doctrine of parental immunity has been the subject of debate in courts across the country.<sup>178</sup> As the doctrine evolved, courts articulated several rationales in favor of its application.<sup>179</sup> These courts were prompted to reconsider the doctrine because of the harsh inequities that often resulted from its application.<sup>180</sup> Originally, courts carved out exceptions to the doctrine, imposing liability for specific parental conduct.<sup>181</sup> Over

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<sup>177</sup> Bogosavljevic, *supra* note 25, at 343.

<sup>178</sup> Sean S. Modjarrad, *Hartman v. Hartman: Is "Parental Immunity" Recognized?*, 22 AM. J. TRIAL ADVOC., 463, 463 (1998).

<sup>179</sup> Isabel Wingerter, *Parent-Child Tort Immunity*, 50 LA. L. REV. 1131, 1131 (1990).

<sup>180</sup> Modjarrad, *supra* note 178, at 463. For example, the rationale that parental immunity should exist by analogy to interspousal immunity fails because the legal unity of the husband and wife, which was the basis for interspousal immunity, never existed at common law between parent and child. *See* Gail D. Hollister, *Parent-Child Immunity: A Doctrine in Search of Justification*, 50 FORDHAM L. REV. 489, 496 (1982). Children have had separate legal identities from their parents and could sue and be sued. *Id.* at 497. The rationale that parental immunity should exist because of the fear that the injured child's recovery may be inherited by the tortfeasor parent also fails because the injured child should not be required to remain uncompensated because of the unlikely possibility that he might predecease his parent, thus leaving his parent to inherit his own adverse judgment. *Id.* In addition, the fear that family resources would be depleted to the detriment of other innocent siblings if parental immunity did not exist, fails to address the issue of whether sufficient reason exists to require the tort victim to bear the burden of the injuries so that his siblings can avoid a potential decrease in their standard of living or anticipated inheritance. *Id.* at 498-99.

<sup>181</sup> *See, e.g.,* *Ard v. Ard*, 414 So. 2d 1066, 1067-68 (Fla. 1982) (holding that the doctrine of parental immunity in a negligence case is waived to the extent of the parent's available liability insurance coverage); *Felderhoff v. Felderhoff*, 473 S.W.2d 928, 933 (Tex. 1971) (holding a father liable for injuries sustained to his son that occurred during the conduct of purely business activity); *see also*

time, however, courts began to abrogate parental immunity either partially or entirely.<sup>182</sup>

Although many commentators and courts have questioned the continuing viability of the doctrine, it should be reconsidered and revived in the context of parental wiretapping. When the doctrine developed in the late nineteenth century, no one could have anticipated a situation like the one that arose at Columbine High School in April, 1999.<sup>183</sup> Many people blamed the parents of the students who committed the shootings, and were incredulous that the parents were unaware their children were planning such an elaborate scheme in their own home.<sup>184</sup> 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.

#### A. *Development of the Parental Immunity Doctrine*

At first glance, it seems as if all the reasons for not recognizing interspousal immunity as a defense under Title III cases are equally applicable to parental immunity.<sup>185</sup> However, one commentator has stated that the two doctrines should be treated as qualitatively different:

The child-versus-parent scenario presents an even more fragile balance: a plaintiff who sues his or her spouse under the Act will in all probability seek a divorce, thereby

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Modjarrad, *supra* note 178, at 463.

<sup>182</sup> See, e.g., *Turner v. Turner*, 304 N.W.2d 786 (Iowa 1981) (limiting parental immunity to instances that are within the area of parental authority and discretion); *Anderson v. Stream*, 295 N.W.2d 595 (Minn. 1980) (abolishing parental immunity in favor of a "reasonable care standard"); *Gibson v. Gibson*, 479 P.2d 648 (Cal. 1971) (abrogating parental immunity and adopting a "reasonably prudent parent standard").

<sup>183</sup> See *supra* note 1.

<sup>184</sup> See e.g., *Talk of the Nation*, *supra* note 5.

<sup>185</sup> Moriarty, *supra* note 24, at 415.

severing all ties with his or her former mate. In contrast, a child and his or her parent will almost always have a continuing bond with one another – nothing analogous to a “divorce” is likely. Thus, although it is not clear how the courts will rule on the parental immunity issue, it is clear that interspousal wiretapping is indeed “qualitatively different” from parent-child wiretapping.<sup>186</sup>

The modern trend among courts in interpreting the language and accompanying legislative history of Title III has been to include all persons, including spouses.<sup>187</sup> Although Title III’s legislative history does not specifically address parental wiretapping, courts must consider the policy of preventing suits between children and their parents before concluding that Congress intended to prohibit *all* private electronic surveillance.

The parental immunity doctrine bars unemancipated minors from bringing causes of action for injuries sustained as a result of their parent’s tortious actions.<sup>188</sup> Unlike the interspousal immunity doctrine, parental immunity does not have its origins in the common law of England.<sup>189</sup> Instead, parental immunity is essentially an American doctrine that emerged later in this country in three state court decisions, commonly referred to as “The Great Trilogy.”<sup>190</sup> Although all of “The Great Trilogy” cases have been overturned, they illustrate the history and rationale behind the parental immunity doctrine.

In 1891, *Hewellette v. George* laid the foundation for the modern doctrine of parental immunity.<sup>191</sup> In *Hewellette*, an

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<sup>186</sup> Niemeyer, *supra* note 40, at 248.

<sup>187</sup> Niemeyer, *supra* note 40, at 249.

<sup>188</sup> Chance McLeod, Jilani v. Jilani: *The Erosion of the Parental Tort Immunity Doctrine in Texas*, 28 HOUS. L. REV. 717, 717 (1991).

<sup>189</sup> Foldi v. Jeffries, 461 A.2d 1145, 1147 (N.J. 1983).

<sup>190</sup> Roller v. Roller, 79 P. 788 (Wash. 1905), *overruled in part* by Borst v. Borst, 251 P.2d 149 (Wash. 1952); McKelvey v. McKelvey, 77 S.W. 664 (Tenn. 1903), *overruled* by Broadwell v. Holmes, 871 S.W.2d 471 (Tenn. 1994); *Hewellette v. George*, 9 So. 885 (Miss. 1891), *overruled* by *Glaskox v. Glaskox*, 614 So. 2d 906 (Miss. 1993).

<sup>191</sup> 9 So. 885 (Miss. 1891). In *Hewellette*, the court never made a distinction between actions for negligent, reckless or intentional torts. The *Glaskox* court, which later overruled *Hewellett*, held that the doctrine of parental immunity could

unemancipated minor sued his mother for personal injury damages after he was falsely imprisoned in an insane asylum.<sup>192</sup> Without citing precedent and basing its decision solely on policy grounds, the court held that so long as the parent and child are under a reciprocal familial obligation to perform certain duties involved in that relationship, a child cannot seek civil redress for personal injuries resulting from a parent's wrongdoing.<sup>193</sup> The court reasoned that such claims would undermine "[t]he peace of society, . . . and a sound public policy, designed to subserve the repose of families and the best interests of society."<sup>194</sup>

Twelve years later, in *McKelvey v. McKelvey*, the Tennessee Supreme Court precluded a minor child from recovering civil damages for alleged cruel and inhumane treatment suffered at the hands of her stepmother and father.<sup>195</sup> Analogizing parental immunity to spousal immunity, the court determined that the former is essential to maintaining family harmony and unity, and protecting parents' right to control and discipline their children.<sup>196</sup>

The final case in "The Great Trilogy" was *Roller v. Roller*.<sup>197</sup> In *Roller*, the Washington Supreme Court refused to entertain an unemancipated minor's claim for damages against her father who had been convicted of raping her.<sup>198</sup> The court supported the adoption of the parental immunity doctrine, citing several rationales. First, the court found that there was a possibility that the parent might inherit his own adverse judgment if the minor child died.<sup>199</sup> Second, the court reasoned that it would be difficult to distinguish between heinous parental misconduct warranting recovery, and less serious torts that should not be recoverable.<sup>200</sup>

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not be maintained in automobile accident cases, where a minor was injured as a result of the parent's negligent operation of a motor vehicle. *Glaskox*, 614 So. 2d at 912.

<sup>192</sup> *Hewellette*, 9 So. at 887.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> 77 S.W. 664, 664 (Tenn. 1903).

<sup>196</sup> *Id.* at 665.

<sup>197</sup> 79 P. 788 (Wash. 1905).

<sup>198</sup> *Id.* at 789.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

Third, the court feared that family resources might be depleted at the expense of other children.<sup>201</sup> Finally, the court noted the analogy between parental immunity and the ancient common law interspousal immunity doctrine.<sup>202</sup>

Following the course of *Hewellette*, *McKelvey* and *Roller*, the vast majority of decisions dealing with parental immunity since 1905 applied the immunity doctrine to relieve parents from liability.<sup>203</sup> However, many criticized the doctrine on the grounds that it was counter-productive to the family unit, conflicted with a child's constitutionally guaranteed right to due process, and produced unfair results when applied.<sup>204</sup> As a result, such courts modified the parental immunity doctrine.<sup>205</sup> Some courts have partially abrogated the doctrine by creating exceptions to it.<sup>206</sup> Other courts have fully abrogated the doctrine and substituted an alternative standard for determining parental immunity.<sup>207</sup>

In 1963, the Wisconsin Supreme Court in *Goller v. White* declared that parent-child immunity was abrogated entirely except to exercise parental control and authority over the child, or ordinary parental discretion with respect to such matters as food, clothing, and other care.<sup>208</sup> Thus, although the *Goller* standard eliminates

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<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 788-89. "The major justification for both types of immunity is that it 'promotes family harmony' by encouraging the private settlement of disputes." Anderman, *supra* note 143, at 2305.

<sup>203</sup> Thomas J. Herthel, *Parental Immunity in Alabama: Let's Not Let Parents Get Away with Murder-An Argument to Reexamine the Issue*, 25 CUMB. L. REV. 409, 413 (1994-95). By the 1960's all but a few jurisdictions declined to adopt the parental immunity doctrine. *Id.* at 412. Those jurisdictions were the District of Columbia, Hawaii, Nevada, North Dakota, South Dakota, Utah and Vermont. *Id.*

<sup>204</sup> Modjarrad, *supra* note 178, at 468.

<sup>205</sup> Modjarrad, *supra* note 178, at 468.

<sup>206</sup> Modjarrad, *supra* note 178, at 468.

<sup>207</sup> Brenda K. Harmon, *Parent-Child Tort Immunity: The Supreme Court of Illinois Finally Gives This Doctrine the Attention It's Been Demanding*, 19 S. ILL. U. L.J. 633, 639 (1995).

<sup>208</sup> 122 N.W.2d 193, 198 (Wisc. 1963). The court went on to say that allowing a child to sue would not disrupt family harmony because "the existence of insurance tends to negate any possible disruption of family harmony and discipline." *Id.*

absolute parental immunity, it acknowledges the importance of protecting a parent's right to exercise authority and discretion over his or her children.<sup>209</sup> In adopting the *Goller* rule, the Texas Supreme Court in *Felderhoff v. Felderhoff* concluded that it was not "out of date" to be concerned with the welfare of the family and that if children were allowed to file lawsuits against their parents, the exercise of parental duties and responsibilities would be seriously impeded.<sup>210</sup>

One alternative standard to the parental immunity doctrine is the "reasonable prudent parent standard" articulated in *Gibson v. Gibson*.<sup>211</sup> The California Supreme Court disagreed with *Goller's* implications that a parent has "carte blanche to act negligently toward his child."<sup>212</sup> Instead, the court held that the proper test of a parent's conduct should address the question of what an ordinarily reasonable and prudent parent would have done in similar circumstances.<sup>213</sup> As one commentator observed, "The reasonable parent standard does not prevent a parent from exercising ordinary discretion in choosing the appropriate manner in which to raise his children; it only provides an injured child recourse against a parent who fails to provide the care a 'reasonable parent' would have provided under like circumstances."<sup>214</sup>

The New York Court of Appeals in *Holodook v. Spencer* adopted a different alternative standard to parent-child immunity.<sup>215</sup> The court rejected the reasonable parent standard and established the "no-duty" rule.<sup>216</sup> The court did not find a need to create or consider immunity on behalf of the parents, because it concluded that parents have no legal duty in the first place to supervise their children adequately.<sup>217</sup>

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<sup>209</sup> See Harmon, *supra* note 207, at 640.

<sup>210</sup> 473 S.W.2d 928, 933 (Tex. 1971).

<sup>211</sup> 479 P.2d 648 (Cal. 1971).

<sup>212</sup> *Id.* at 652-53

<sup>213</sup> *Id.* at 653.

<sup>214</sup> Carolyn A. Andrews, *Parent-Child Torts in Texas and the Reasonable Prudent Parent Standard*, 40 BAYLOR L. REV. 113, 125 (1988).

<sup>215</sup> 324 N.E.2d 338 (N.Y. 1974).

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

Finally, the *Restatement (Second) of Torts* proposed a change in the parental immunity doctrine.<sup>218</sup> Although the Restatement rejects parental immunity, it provides that “[r]epudiation of general tort immunity does not establish liability for an act or omission that, because of the parent-child relationship, is otherwise privileged or is not tortious.”<sup>219</sup> This section acknowledges that certain parental functions such as authority and supervision are discretionary, and considers those actions so closely related to parental discretion that liability should not be imposed for them.<sup>220</sup> Consequently, the Restatement adopted the reasonable prudent person standard enunciated in *Gibson*, yet also accounted for the unique relationship between parent and child as did the *Goller* court.<sup>221</sup> Together, these alternative theories form the foundation of the present trend to abrogate, either in part or in full, the parental immunity doctrine.

*B. Justifications for Applying the Parental Immunity Doctrine to Title III*

While it has fallen out of favor over the years, the parental immunity doctrine is occasionally raised as a defense in tort suits between parents and their children. However, in light of increasing violence among juveniles, the doctrine should be revived in the context of parental wiretapping. The same public policy reasons for upholding the doctrine that were advanced by courts in the past continue to have merit today. Two justifications that continue to have the greatest substance are the need to preserve family harmony<sup>222</sup> as well as the need for parents to have discretion in

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<sup>218</sup> RESTATEMENT (SECOND) OF TORTS § 895G (1979).

<sup>219</sup> See *id.*; see also *Cates v. Cates*, 619 N.E.2d 715, 729 (Ill. 1993) (holding that immunity should be limited “to conduct inherent to the parent-child relationship; such conduct constitutes an exercise of parental authority and supervision over the child or an exercise of discretion in the provision of care to the child.”).

<sup>220</sup> Sandra Haley, *The Parental Tort Immunity Doctrine: Is It a Defensible Defense?*, 30 U. RICH L. REV. 575, 596 (1996).

<sup>221</sup> *Id.*

<sup>222</sup> See Modjarrad, *supra* note 178, at 477 (noting that “[t]he rationale behind the doctrine of parental immunity was to preserve family harmony”).

exercising authority over their children.<sup>223</sup> Courts should not be involved in deciding matters between parents and children that concern decisions parents are uniquely equipped to make because of the very nature of the parent-child relationship.<sup>224</sup> By definition, such matters involve parental discretion in care, supervision and discipline.<sup>225</sup>

The first and most often cited justification is derived from the idea that the family is the "cradle of civilization."<sup>226</sup> Indeed, the majority of commentators deem the protection and preservation of tranquility and harmony within the family unit as the most significant justification for parental immunity.<sup>227</sup> Supporters of the argument justify their beliefs based on the fact that the doctrine encourages smooth functioning and integrity of the social unit.<sup>228</sup> A second argument in favor of parental immunity is the need to inhibit interference with parental discipline and control.<sup>229</sup> Allowing children to sue their parents can undermine parents' disciplinary authority over their children.<sup>230</sup>

The New Jersey Supreme Court in *Foldi v. Jeffries* cogently described the importance of retaining the limited parental immunity doctrine for matters concerning the exercise of parental authority:

There are certain areas of activities within the family sphere involving parental discipline, care, and control that should and must remain free from judicial intrusion. Parents should be free to determine how the physical, moral, emotional, and intellectual growth of their children

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<sup>223</sup> See Andrews, *supra* note 214, at 121-22; Robert A. Belzer, *Child v. Parent: Erosion of the Immunity Rule*, 19 HASTINGS L.J. 201, 204 (1967); Herthel, *supra* note 203, at 412; Hollister, *supra* note 180, at 504-05; Wingerter, *supra* note 179, at 1136.

<sup>224</sup> *Cates*, 619 N.E.2d at 728.

<sup>225</sup> See *id.*

<sup>226</sup> Belzer, *supra* note 223, at 203.

<sup>227</sup> Belzer, *supra* note 223, at 203; Harmon, *supra* note 207, at 367; Herthel, *supra* note 203, at 412; Modjarrad, *supra* note 178, at 477.

<sup>228</sup> Belzer, *supra* note 223, at 203; Harmon, *supra* note 207, at 412.

<sup>229</sup> Andrews, *supra* note 214, at 121-22; Belzer, *supra* note 223, at 204; Herthel, *supra* note 203, at 412; Hollister, *supra* note 180, at 504-05; Wingerter, *supra* note 179, at 1136.

<sup>230</sup> Wingerter, *supra* note 179.

can be best promoted. That is, both their duty and their privilege. Indeed, every parent has a unique philosophy of the rearing of children. That philosophy is an outgrowth of the parent's own economic, educational, cultural, ethical, and religious background, all of which affect the parent's judgment in how his or her children should be prepared for the responsibilities of adulthood. Such philosophical considerations come directly to the fore in matters of parental supervision . . .

The parent is clearly in the best position to know the limitations and capabilities of his or her own children. These intangibles cannot be adequately conveyed within the formal atmosphere of a courtroom. Nor do we believe that a court or a jury can evaluate these highly subjective factors without somehow supplanting the parent's own individual philosophy.<sup>231</sup>

In a society where it has become increasingly common for children to attempt to "divorce" their parents,<sup>232</sup> parents must be reassured that they can exercise supervision and control over their children without the fear of being sued. 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.<sup>233</sup> "[M]any changes have taken place in society that challenge the original presumption that parents are able to control their children effectively."<sup>234</sup> Allowing parents to wiretap their chil-

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<sup>231</sup> 461 A.2d 1145, 1152 (N.J. 1983).

<sup>232</sup> See, e.g., *Kingsley v. Kingsley*, 632 So. 2d 780 (Fla. Dist. Ct. App. 1993) (involving an unemancipated minor who filed a petition to terminate the parental rights of his natural parents). I use the term "divorce" in the parent-child context to refer to a minor initiating an action to terminate parental rights.

<sup>233</sup> See Catherine Clements, *Williams v. Garcetti: The Constitutionality of Holding Parents Criminally Liable for the Acts of Their Children*, 25 GOLDEN GATE U. L. REV. 117 (1995) (noting that youth violence and crime has risen over the years); see also Howard Davidson, *No Consequences-Re-Examining Parental Responsibility Laws*, 7 STAN. L. & POL'Y REV. 23 (1995-96) (noting that the level of juvenile violent crime has risen over the past decade).

<sup>234</sup> Toni Weinstein, *Visiting the Sins of the Child on the Parent: The Legality of Criminal Parental Liability Statutes*, 64 S. CAL. L. REV. 859, 879 (1991).

dren's phone conversations can help them gain access to information that might provide their children with appropriate medical or psychological treatment.<sup>235</sup> 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.<sup>236</sup> Resorting to surveillance tactics to keep children out of danger is a measure that clearly falls within the boundaries of parental 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. The continuing rise in school violence, as evinced by the recent Columbine High School shootings,<sup>237</sup> undoubtedly justifies the need for parents to monitor their children's activities without the fear of liability.

If a case like *Newcomb* arises again, where a child sues his parents for wiretapping his private telephone conversations, the courts should apply the standard developed in *Cates v. Cates*.<sup>238</sup> Unlike the standard evinced in *Goller v. White*, which fully abrogated the parental immunity doctrine in lieu of its two-exception standard, the Illinois court did not abrogate the doctrine entirely.<sup>239</sup> Instead, the Illinois Supreme Court took a significant step by restricting parental immunity to "conduct inherent to the parent-child relationship."<sup>240</sup> A characteristic of the autonomous relationship between a parent and child is the parent's authority to assess the daily risks the child confronts, and to make choices regarding the most appropriate and reasonable manner to protect the child.<sup>241</sup> Wiretapping the family phone is an activity that

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<sup>235</sup> See Jacqueline L. Salmon, *More Parents Are Spying on Their Kids*, CHI. SUN-TIMES, Mar. 21, 1999, at 43.

<sup>236</sup> See Julie Baumgardner, *Parents Should Look at World Through Eyes of Adolescents*, CHATTANOOGA TIMES/CHATTANOOGA FREE PRESS, Feb. 4, 2001, at E3.

<sup>237</sup> See *supra* note 1.

<sup>238</sup> 619 N.E.2d at 729.

<sup>239</sup> *Id.*; see also Harmon, *supra* note 207, at 650.

<sup>240</sup> See *Cates*, 619 N.E.2d at 729; see also Harmon, *supra* note 207, at 650.

<sup>241</sup> See *Bang v. Tran*, No. 9419, 1997 WL 538739, at \*5 (Mass. App. Div. Aug. 18, 1997) (citing Samuel Mark Pipino, *In Whose Best Interest? Exploring*

certainly falls within the purview of the *Cates* standard. Parents have an obligation to protect their children by assuring that they stay out of trouble and are kept safe from harm. Thus, parental surveillance is a legitimate means to further these ends. If the parental immunity privilege is not revived in some form to render parental wiretapping exempt from Title III, then Congress should amend Title III to provide such an exception.

### III. STATE AMENDMENTS

In recognition of the need to protect children from societal harms, Virginia and Georgia have sought to amend their wiretapping statutes to allow a parent to wiretap his or her child's telephone conversations. This trend reflects the growing concern that both parents and society have about children's safety and well-being. Children are not only innocent victims of criminal activity, they are often participants in such activity. However, it is difficult for parents to monitor their children's activities, especially if their children are reluctant or unwilling to confide in them, which is often the case.<sup>242</sup> Although society may be uncomfortable relying on a parent's argument that the wiretapping was done in good faith or the best interests of a child, no one other than a parent is in a better position to make such a determination.<sup>243</sup>

#### A. *Virginia's Proposed Amendment*

On January 24, 2000, Virginia House of Delegates Representative Ward L. Armstrong introduced a bill to the House Committee for the Courts of Justice, proposing to amend Virginia's wiretapping statute. The amendment provided that:

It shall not be a criminal offense under this chapter for a person to intercept a wire, electronic, or oral communica-

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*the Continuing Viability of the Parental Immunity Doctrine*, 53 OHIO ST. L.J. 1111, 1127 (1992)).

<sup>242</sup> See Baumgardner, *supra* note 236, at E3 (noting that one way children deal with the conflict that results from parents' need to feel in control and children's desire for freedom is by keeping their feelings inside).

<sup>243</sup> See *supra* notes 173-177 and accompanying text.

tion, where such person is (I) a party to the communication, or one of the parties to the communication has given prior consent to such interception, or (II) the spouse, parent, or guardian of one of the parties to the communication and the communication occurs using any telephone in the residence of such spouse, parent or guardian.<sup>244</sup>

Mr. Armstrong is a trial attorney who, over the last twenty years, has had several clients discover vital information by wiretapping telephone conversations, particularly in the context of domestic disputes.<sup>245</sup>

Frank Ferguson, Virginia's Deputy Attorney General in Charge of Local Inter-Governmental Affairs, testified before the Committee when the bill came up for review, but the Committee ultimately decided not to act on it.<sup>246</sup> The Committee, relying upon federal preemption principles, declared that the bill violated Title III.<sup>247</sup> According to the Committee, the bill was more permissive than federal wiretapping laws because it permitted interceptions of communication not allowed under federal law.<sup>248</sup> The Committee stated that Virginia could not allow a broader ability to search than the federal wiretap statute allows and therefore, because the

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<sup>244</sup> H.R. 1370(B)(2) (Va. 2000).

<sup>245</sup> Telephone interview with Ward L. Armstrong, Virginia House of Delegates Representative (Oct. 26, 2000). According to Mr. Armstrong, if a minor child uses a parent's telephone in the parent's home, then the parent should be able to monitor and intercept the child's conversations. *Id.* Although he believes in minors' privacy rights, Mr. Armstrong also believes that if a parent is suspicious that a child is involved in drugs or some other illegal activity, then the parent should determine the certainty of these suspicions. *Id.* Thus, Mr. Armstrong views parental wiretapping as intervention and not punishment. *Id.*

<sup>246</sup> Telephone interview with Frank Ferguson, Virginia's Deputy Attorney General in Charge of Local Inter-Governmental Affairs (Oct. 26, 2000). Mr. Ferguson informed me that to kill a bill in Committee, it does not need to be voted down; it can be killed as a result of inaction, which was the case here. *Id.*

<sup>247</sup> 18 U.S.C. §§ 2510-2522 (2000).

<sup>248</sup> U.S. CONST. art. VI, cl. 2. When states and the federal government pass legislation on the same subject matter, the Supremacy Clause provides that the federal law is supreme and the conflicting state law is rendered void. *Id.*

Virginia bill was less restrictive, the federal statute preempted it.<sup>249</sup>

### B. Georgia's New Law

As of April 20, 2000, parents in Georgia can legally monitor and intercept their minor child's telephone conversations to ensure the welfare of such child. Georgia's wiretapping statute was amended to provide the following:

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 of 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 telephone conversation or electronic communication to the district attorney or a law enforcement officer. A recording . . . of any such conversation . . . made by a parent or guardian in accordance with this subsection . . . shall be admissible in a judicial proceeding.<sup>250</sup>

This new law is a result of a case that began three years ago in Cobb County, Georgia.<sup>251</sup> Kyle "Rick" Bishop, a thirty-eight-year-old man, lived with his wife in Cobb County.<sup>252</sup> The victim,

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<sup>249</sup> For a discussion on this topic, see *supra* notes 67-73 and accompanying text.

<sup>250</sup> GA. CODE ANN. § 16-11-66(d) (2000).

<sup>251</sup> See *Bishop v. State*, 526 S.E.2d 917 (Ga. App. 1999), *cert. denied*, 2000 GA. LEXIS 465 (May 26, 2000).

<sup>252</sup> *Id.* at 918.

a thirteen-year-old girl, lived with her family across the street from the Bishops.<sup>253</sup> Bishop and the victim's family were good friends.<sup>254</sup> Until the middle of 1996, the victim was an excellent student.<sup>255</sup> Over the next year, the victim failed several of her classes and experienced a significant change in demeanor.<sup>256</sup> One February afternoon, the victim presented her mother with a phony permission slip for a non-existent, overnight school field trip.<sup>257</sup> The victim's mother became suspicious about the trip and contacted the school.<sup>258</sup> When she asked the victim to explain the permission slip, the victim stated that Bishop had asked her to go with him for the weekend to "Bike Week" in Daytona Beach, Florida.<sup>259</sup> When the victim's parents confronted Bishop, he told them the victim was "troubled," had been stalking him, and tried to invite herself along on the trip.<sup>260</sup>

One evening, the victim's mother became aware that the victim was talking to someone on the telephone.<sup>261</sup> The mother lifted up the phone receiver and heard the victim talking to Bishop.<sup>262</sup> According to the mother, Bishop and the victim spoke using sexual terms and discussed killing the victim's parents.<sup>263</sup> After the police denied the parents' request to wiretap the phone line, the victim's parents purchased a tape recorder and recorded several conversations between Bishop and the victim.<sup>264</sup>

Prior to Bishop's arrest and indictment on child molestation, aggravated child molestation, and aggravated sexual battery, Bishop moved to suppress the contents of the audiotapes of the conversations between himself and the victim, asserting the victim's privacy

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<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

rights.<sup>265</sup> The trial court denied Bishop's motion to suppress and ruled that the tapes were admissible under a "vicarious consent exception to Title III as applied in other jurisdictions."<sup>266</sup> The court held that the victim's parents could consent to the taping because they had "a good faith objectively reasonable basis for believing that it was necessary to consent [to such taping] on behalf of their thirteen-year-old daughter."<sup>267</sup>

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.<sup>268</sup> The court relied on the specific limiting language of Georgia's wiretapping statute, which provided that when one party to a conversation is under the age of eighteen, the only person who can consent to an interception is a superior court judge, although the judge must also have the consent of the minor child.<sup>269</sup> Thus, the court reasoned that such language precluded the application of the vicarious consent exception.<sup>270</sup> 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."<sup>271</sup>

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<sup>265</sup> *Id.* at 919, 922. As a general principle, a litigant must assert his own legal rights and interests, and may not rely on the rights and interests of third parties. *Harris v. Evans*, 20 F.3d 1118, 1121 (11th Cir. 1994). However, there are several factors that may justify exceptions to the general rule against third-party standing: "the litigant must have suffered an injury-in-fact, thus giving him or her a sufficiently concrete interest in the outcome of the issue in dispute; the litigant must have a close relation to the third party; and there must exist some hindrance to the third party's ability to protect his or her own interests." *Id.* at 1122 (internal quotation marks omitted). None of these factors justify granting Bishop third-party standing.

<sup>266</sup> *Bishop*, 526 S.E.2d at 920 (internal quotation marks and citations omitted).

<sup>267</sup> *Id.* (internal quotation marks omitted).

<sup>268</sup> *Id.* at 922.

<sup>269</sup> GA. CODE ANN. § 16-11-66(b) (2000).

<sup>270</sup> *Bishop*, 526 S.E.2d at 921-22.

<sup>271</sup> *Id.* at 922. This language is similar to the language used in *Thompson v. Dulaney*, 838 F. Supp. 1535, 1544 (D. Utah 1993).

Several members of the Georgia House of Representatives<sup>272</sup> 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.<sup>273</sup> 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.<sup>274</sup> Mr. Stokes stated that when the bill was originally drafted, the drafters intended to make the bill consistent with federal law, but the result was more restrictive. 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.<sup>275</sup>

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.<sup>276</sup> 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.<sup>277</sup> He stated that although the new

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<sup>272</sup> These members include Jim Stokes, Stephanie Stuckey, Judith Manning, Don Edwin Wix, and Rich Golick.

<sup>273</sup> See GA. CODE ANN. § 16-11-66(d).

<sup>274</sup> Telephone interview with Jim Stokes, Member of the Georgia House Judiciary Committee (Oct. 2000).

<sup>275</sup> *Id.* Mr. Stokes said that the bill probably would not have made it out of the House Judiciary Committee if it were not for him limiting it; the Committee wanted to be certain that the new law was not too expansive. *Id.* Although the bill was originally drafted to solely address the issue at hand, Mr. Stokes and I agreed that the language as amended is not all that limiting; the law has much broader implications than intended. *Id.*

<sup>276</sup> Telephone interview with Jim Stokes, Member of the Georgia House Judiciary Committee (Oct. 2000).

<sup>277</sup> *Id.*; see also *Ginsburg v. New York*, 390 U.S. 629, 639 (1968) (“[C]onstitutional interpretation has consistently recognized that the parents’ claim to authority in their own household to direct the rearing of their children is basic in the structure of our society.”); *Jones v. United States*, 308 F.2d 307, 310 (D.C. Cir. 1962) (observing that parents’ legal duty to control their children is created both by statute and the parent-child relationship) (footnotes omitted)

law is susceptible to a constitutional challenge because of its breadth, he feels quite comfortable with it.<sup>278</sup>

Judith Manning, also a member of the Georgia House of Representatives, is a former member of the Department of Family and Children Services Board.<sup>279</sup> Throughout her career, she witnessed many sexual molestation cases where parents were semi-aware of their children's physical abuse.<sup>280</sup> Ms. Manning met with the victim and her family, and she became involved in the *Bishop v. State*<sup>281</sup> case "because it was clear to her that Bishop was 'overwhelmingly guilty' and the girl's parents were helpless, going into trial with hearsay evidence."<sup>282</sup> Although Ms. Manning acknowledged that the United States Constitution prevents unreasonable invasions of privacy, this 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

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(quoting *People v. Beardsley*, 113 N.W. 1128, 1129 (1907)).

<sup>278</sup> Telephone interview with Jim Stokes, Member of the Georgia House Judiciary Committee (Oct. 2000).

<sup>279</sup> Telephone interview with Judith Manning, Member of the Georgia House of Representatives (Oct. 2000).

<sup>280</sup> *Id.*

<sup>281</sup> 526 S.E.2d 917 (Ga. Ct. App. 1999).

<sup>282</sup> Jeffrey Widmer, *Convicted Molester May Get 100 Years*, MARIETTA DAILY J., Oct. 18, 2000, at 1B (quoting the remarks of Judith Manning). Ms. Manning stated that people like Bishop prey on others like the victim in this case, who had a poor self-image and was not strong enough to stand up to him. Telephone interview with Judith Manning, Member of the Georgia House of Representatives (Oct. 2000). Expressing her disgust with the case, Ms. Manning stated that Bishop used, abused, and molested the victim to a sickening point. *Id.* He beguiled her to the point where she thought he was enamored with her, and gave her several keepsakes as a token of their "pre-engagement." *Id.* In the beginning, the victim was too scared to turn on Bishop. *Id.* She did not have the clear judgment necessary to testify against him right away, because Bishop clouded her mind so severely, in a sense telling her that her parents were demons and he was there to save her. *Id.* Bishop had the ability to persuade and control the victim, and used such control in a perverse manner to take over what should have been the victim's free and independent judgment. *Id.* He had the attitude that since he hadn't been caught before, it was okay for him to continue such heinous acts. *Id.* Bishop declared his innocence in the last breath he took before he was convicted. *Id.*

personal appearance.<sup>283</sup> 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.<sup>284</sup> Thus, 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.<sup>285</sup>

The drafters intended the bill to be narrowly tailored in order to protect children in situations such as the *Bishop* case; the new statute, however, has broader applicability.<sup>286</sup> The new law grants parents wide discretion and autonomy to exercise authority over their children, and vests children's right to privacy with the parents. It allows parents to determine the maturity of their children and use telephone wiretapping to protect them accordingly.

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.<sup>287</sup> Sentencing took place on November 29, 2000, and Bishop was sentenced to ten years for each count, a sum total of thirty years.<sup>288</sup> He is required to serve ninety percent of that sentence, or twenty-seven years.<sup>289</sup>

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<sup>283</sup> *Bishop*, 526 S.E.2d at 517.

<sup>284</sup> Telephone interview with Judith Manning, Member of the Georgia House Representatives (Oct. 2000).

<sup>285</sup> *Id.*

<sup>286</sup> Telephone interview with Rich Golick, Member of the Georgia House of Representatives (Oct. 2000).

<sup>287</sup> Widmer, *supra* note 282, at 1B.

<sup>288</sup> Telephone interview with Mr. Manning, Commercial Real Estate Broker and Appraiser (Feb. 21, 2001).

<sup>289</sup> *Id.*

C. *Time for a Change: Amending Title III to Resemble Georgia's New Law*

As the trend of children killing children in schools around the country grows, the issue of parental responsibility and control over their children's behavior and activities is receiving greater attention than ever before.<sup>290</sup> To prevent tragic events like the Columbine High School massacre<sup>291</sup> from occurring in the future, it is necessary to afford parents the legal means to gain knowledge about their children's plans and take action before their children engage activities that are seriously harmful to themselves or others. One cannot expect parents to reasonably know of their children's

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<sup>290</sup> On October 1, 1997, sixteen-year-old Luke Woodham killed his mother before killing three students and wounding seven others at his high school in Pearl, Mississippi. Mirah A. Horowitz, *Kids Who Kill: A Critique of How The American Legal System Deals With Juveniles Who Commit Homicide*, 63 LAW & CONTEMP. PROBS. 133, 133 (2000). On December 1, 1997, in West Paducah, Kentucky, fourteen-year-old Michael Carneal killed three students at a high school prayer meeting. *Id.* On March 24, 1998, in Jonesboro, Arkansas, thirteen-year-old Mitchell Johnson and eleven-year-old Andrew Golden killed four schoolmates and a teacher. *Id.* On May 21, in Springfield, Oregon, fifteen-year-old Kip Kinkel killed his parents before opening fire in the school cafeteria, shooting twenty-four classmates, killing two of them. *Id.* On April 20, 1999, Dylan Klebold, seventeen, and Eric Harris, eighteen, killed thirteen people at Columbine High School in Littleton, Colorado, and subsequently committed suicide. *Id.* On March 5, 2001, a fifteen-year-old freshman opened fire in a restroom at his high school in Santee, California, killing two students and wounding thirteen other people. Ben Fox, *Alleged School Gunman Shot Randomly*, ASSOCIATED PRESS, Mar. 6, 2001, available at 2001 WL 15177333. On March 7, 2001, at Bishop Neumann High School in Williamsport, Pennsylvania, a fourteen-year-old girl shot and wounded a classmate in the school cafeteria. Edward Wong, *Girl, 14, Arrested After a Classmate is Shot in Pennsylvania*, N.Y. TIMES, Mar. 8, 2001, at 20. On March 22, 2001, eighteen-year-old Jason Hoffman, a senior at Granite Hills High School in El Cajon, California, opened fire near the school's administration building, wounding three students and a teacher, before he was shot and wounded by a police officer. Jeff Adler & William Booth, *Five Wounded in Month's 2nd Calif. School Shooting; Suspect, 18, Shot by Police Officer, in Serious Condition*, WASH. POST, Mar. 23, 2001, at A03.

<sup>291</sup> See *supra* note 1.

propensities for wrongful acts. Adding a provision to Title III that resembles § 16-11-66(d) of Georgia's wiretapping statute, allowing parents to monitor and intercept a minor child's telephone conversations with or without the consent of the child, will provide parents with the necessary legal tool they need to inform themselves of their children's activities.

Georgia's new law is broad in the sense that it does not simply authorize interception of communications when there is reasonable cause to believe the interception would provide evidence of the commission of or involvement in certain enumerated crimes, such as drug use or child abuse, but instead, authorizes parents to use their discretion to decide when to monitor and intercept a minor child's conversation.<sup>292</sup> While the basis for a parent's objectively reasonable or good faith belief to intercept a child's phone calls may not always be clear, both the courts and the legislatures must allow parents to use their discretion in these types of situations, since they are the ones who are best equipped to determine what is in their child's best interest.<sup>293</sup> Given that the parents typically act in accordance with their child's best interests, they should not be held criminally or civilly liable for taping their children's conversations.

## CONCLUSION

The legislative history accompanying Title III does not indicate that parents are prohibited from monitoring and intercepting their children's phone conversations.<sup>294</sup> To eliminate any uncertainty concerning Title III's applicability to parental wiretapping, Congress should re-draft Title III to resemble Georgia's wiretapping statute, which exempts recording parents from liability as long as it is done to ensure the welfare of a minor child. Parents need wide latitude and discretion to make decisions on behalf of their children, including vicariously consenting to the interception of telephone conversations within the house where the parent and

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<sup>292</sup> See GA. CODE ANN. § 16-11-66(d) (2000) (authorizing parental wiretapping for the broad purpose of ensuring the welfare of a minor child).

<sup>293</sup> See *supra* notes 173-177 and accompanying text.

<sup>294</sup> Killian, *supra* note 37, at 578.

children reside. “[T]he vicarious consent doctrine creates a narrow test which focuses the analysis on why a parent felt compelled to record the child’s conversations.”<sup>295</sup> Such a test is not likely to be abused because the defendant parents have the burden of proving that they acted in the child’s best interests in order to avoid liability under Title III.<sup>296</sup> The vicarious consent exception, however, differs from Georgia’s exception in two major respects. Even with the consent of a party to the conversation, the person intercepting the communication may not be insulated from liability if they attempt to disclose or use the information obtained.<sup>297</sup> In addition, “[a]ny evidence derived from an illegally intercepted oral or wire communication is not admissible at any trial or hearing in any court.”<sup>298</sup> However, Georgia’s law, allowing parents to intercept and record a minor child’s phone conversations, with or without the consent of such child, permits disclosure of the information obtained and the admissibility of the recording in a judicial proceeding.<sup>299</sup> This makes 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 any person(s) responsible for engaging in criminal conduct involving such child as a victim.

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<sup>295</sup> Killian, *supra* note 37, at 578.

<sup>296</sup> Killian, *supra* note 37, at 576.

<sup>297</sup> Bogosavljevic, *supra* note 25, at 327; *see also* 18 U.S.C. § 2511(1)(c)-(d) (2000); *United States v. Wuliger*, 981 F.2d 1497, 1508 (6th Cir. 1992) (“The statute does not expressly provide a ‘consent to use’ exception to section 2511(1)(d)”).

<sup>298</sup> Ann B. Frick & Marjorie J. Long, *Interspousal Wiretapping and Eavesdropping: An Update—Part II*, 24 COLO. LAW. 2569, 2569 (1995). The statutory prohibition reads:

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence at any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

18 U.S.C. § 2515 (2000).

<sup>299</sup> *See* GA. CODE ANN. § 16-11-66(d) (2000).

A parent's reasonable suspicions including, but not limited to, a child's drug or alcohol use, gang affiliation, or participation in other illegal or criminal activities, either as a victim or a perpetrator, is sufficient to warrant close surveillance of such child. By amending the federal wiretapping statute to resemble Georgia's statute, parents will be afforded adequate legal protection to exercise their authority to intercede when they have a good faith, objectively reasonable basis for concern regarding the safety of their children as victims of the criminal conduct of another, or believing there is an attempt to involve such child in criminal activity. In today's world, where horrifying school shootings have become almost commonplace, and parents are held accountable for their children's crimes, it is imperative that parents have access to information that could prevent future tragedies from occurring.