NOTE

You Know More Than You Think: *State v. Townsend*, Imputed Knowledge, and Implied Consent Under the Washington Privacy Act

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I. INTRODUCTION

The Washington Privacy Act[1] ("WPA") was probably the last thing on Donald Townsend's mind in May 1999 as he attempted to arrange a sexual liaison with "Amber," whom he thought was a thirteen year-old girl.[2] Using Internet-based e-mail and ICQ,[3] Townsend sent increasingly graphic messages to Amber indicating his desire to have sex with her.[4] Unbeknownst to Townsend, Amber was actually a Spokane County police detective, Jerry Keller, who had been alerted to Townsend's proclivities by an informant.[5] During May and June 1999, Townsend and Amber exchanged numerous e-mails and ICQ messages that Detective Keller stored on his computer so he could "read the messages at his leisure and print them for later use as evidence."[6] Ultimately, Townsend

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1. WASH. REV. CODE §§ 9.73.010–9.73.140 (2004).

2. State v. Townsend, 147 Wash. 2d 666, 670, 57 P.3d 255, 257 (2002).

3. ICQ is an Internet discussion software program that allows users to communicate as if they are talking on the phone, but typing on the keyboard. *Id.*

4. *Id.* at 670–71, 57 P.3d at 257-258.

5. *Id.* at 670, 57 P.3d at 257.

6. *Id.*

scheduled a rendezvous with Amber at a Spokane area hotel, where Detective Keller arrested Townsend.[7]

Townsend was charged in state court with attempted second-degree rape of a child.[8] Other than his physical presence at the hotel, most of the evidence against Townsend consisted of print-outs of the messages that Detective Keller had downloaded and saved on his computer.[9]

Under Washington law, the recording of a private conversation is illegal unless all the participants consent.[10] Evidence obtained in violation of the all-party consent rule is inadmissible in a civil or criminal case.[11] Because of the similarity between Keller's act of saving the Internet communications to his computer, and of unlawfully recording private conversations, Townsend moved to exclude the evidence obtained from these recordings.[12] The court denied Townsend's motion in a memorandum decision that later was incorporated into formal findings of fact and conclusions of law.[13] The court then found Townsend guilty after a bench trial.[14] Townsend timely appealed and the court of appeals affirmed the trial court's decision.[15] The Washington Supreme Court granted certiorari.[16] In an en banc decision with three opinions, the court held that Townsend's e-mail and ICQ messages were admissible because Townsend had impliedly consented to their recording.[17]

The court decided *Townsend* wrongly. As Washington is one of only twelve states that require the consent of all parties prior to the

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7. *Id.* at 671, 57 P.3d at 258.

8. Brief for Appellant at 2, State v. Townsend, 105 Wash. App. 622, 20 P.3d 1027 (19304-7-III). Townsend was charged under WASH. REV. CODE § 9A.44.076 (1999). *Id.*

9. State v. Townsend, 147 Wash. 2d 666, 671, 57 P.3d 255, 258 (2002).

10. WASH. REV. CODE § 9.73.030(1)(a) (2004) ("[I]t shall be unlawful for . . . the state of Washington [or] its agencies . . . to intercept or record any . . . [p]rivate communication transmitted by telephone, telegraph, radio, or other device . . . without first obtaining the consent of all the participants in the communication.").

11. WASH. REV. CODE § 9.73.050 (2004) ("Any information obtained in violation of RCW 9.73.030 . . . shall be inadmissible in any civil or criminal case in all courts of general or limited jurisdiction in this state, except with the permission of the person whose rights have been violated . . . .").

12. *Townsend*, 105 Wash. App. at 626, 20 P.3d at 1030.

13. *Id.* at 626–27, 20 P.3d at 1030.

14. *Id.*

15. *Id.* at 622, 20 P.3d at 1027. Townsend also appealed based on the fact that Amber was non-existent and it was factually impossible to take a substantial step toward the rape of a non-existent child. *Id.* at 630–31, 20 P.3d at 1032. The court rejected this argument also. *Id.* This ground for appeal is beyond the scope of this Note.

16. State v. Townsend, 144 Wash. 2d 101, 632 P.3d 283 (2001).

17. *See* State v. Townsend, 147 Wash. 2d 666, 676, 57 P.3d 255, 260 (2002).

recording of a private conversation,[18] the *Townsend* decision was inconsistent with the majority of Washington Supreme Court decisions that have strongly supported the protections of the WPA.[19] Most striking, however, was the court's faulty reasoning. By combining an incorrect understanding of computer technology with a factually unsupported inference, the court concluded that Donald Townsend impliedly consented to the recording of his messages.

Townsend is worth examining for two additional reasons. First, *Townsend* illustrates the palpable need for the legislature to update the WPA. The underlying problem in *Townsend* was the application of a statute that was written in the era of rotary telephones to the issues that arise in modern electronic communications. Because of the inherent differences between electronic and traditional media, novel questions invariably arise that cannot be readily answered by resorting to existing doctrines.[20] Finally, the plain language of the current statute has absurd results when applied to the modern infrastructure of the Internet.

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18. Gary L. Bostwick & Jean-Paul Jassy, *Flanagan's Wake: Newsgatherers Navigate Uncertain Waters Following* Flanagan v. Flanagan, 23 LOY. L.A. ENT. L. REV. 1, 10 n.50 (2002). The other states are the following: California (CAL. CODE §§ 630–637.5), Connecticut (CONN. GEN. STAT. §§ 52-184a, 52-570d, 53a-187 to 53a-189, 54-41a to 54-41t), Florida (FLA. STAT. ch. 934.01–934.10), Illinois (720 ILL. COMP. STAT. §§ 5/14-1 to 5/14-9, 725 ILL. COMP. STAT. §§ 5/108A, 5/108B), Maryland (MD. CODE ANN., Cts. & Jud. Proc. §§ 10-401 to 10-414), Massachusetts (MASS. GEN. LAWS ch. 272, § 99), Michigan (MICH. STAT. ANN. § 750.539), Montana (MONT. CODE ANN. § 45-8-213), New Hampshire (N.H. REV. STAT. ANN. §§ 570-A:1 to 570-A:11, 644:9), Oregon (one-party consent for phone conversations, two-party consent for any other conversation), OR. REV. STAT. §§ 133.721–133.739, 165.535–165.549), and Pennsylvania (PA. CONS. STAT. ANN. §§ 5701-50). *See also* Carol M. Bast, *What's Bugging You? Inconsistencies and Irrationalities of the Law of Eavesdropping*, 47 DEPAUL L. REV. 837, Appendix B at 928 (1998); *but see* DEL. CODE ANN. tit. 11, § 1336 and tit. 11, § 2402(c)(4) (Delaware changed from two-party to one-party consent in 1999).

19. For instance, in *State v. Faford*, 128 Wash. 2d 476, 488, 910 P.2d 447, 452 (1996), the persistent eavesdropping of a nosy neighbor on wireless telephone conversations was held to be in violation of the WPA. The court opined in the following way:

> We recognize as technology races ahead with ever increasing speed, our subjective expectations of privacy may be unconsciously altered. Our right to privacy may be eroded without our awareness, much less our consent. We believe our legal right to privacy should reflect thoughtful and purposeful choices rather than simply mirror the current state of the commercial technology industry.

Id. at 485, 910 P.2d at 451 (quoting State v. Young, 123 Wash. 2d 173, 186, 867 P.2d 593, 598 (1994) (holding that police use of a thermal imaging device to perform warrantless search of a defendant's residence violated Washington Constitution)).

Given the unambiguous language of the court in *Faford*, it seems incongruous that just six years later, despite the WPA not being amended during that time, the court would make what amounted to an about-face, holding against privacy rights in *Townsend*, which, like *Faford*, involved a new technology.

20. William DeCoste, *Sender Beware, the Discoverability and Admissibility of E-Mail*. 2 VAND. J. ENT. L. & PRAC. 79, 82 (2000).

Part II of this Note discusses the historical background of privacy as it relates to communications technologies, how this historical background has informed the evolution of the WPA, and how Washington courts have interpreted the WPA. Part III presents the facts of *Townsend*, a discussion of the court's analysis, and an examination of the resulting fallout. Part IV concludes with several suggestions for reform of the WPA.

II. THE BACKGROUND OF PRIVACY

Privacy is at the very soul of being human.[21] Privacy, or the Right to Be Let Alone, is perhaps the most personal of all legal principles.[22] Although some argue that privacy is a product of modern culture,[23] legal rights to privacy appeared 2000 years ago in Jewish laws.[24] The Talmud explains that "a person's neighbor should not peer or look into his house."[25] There are nearly as many definitions of privacy as there are scholars who have written about the topic.[26] The elements of privacy have been said to include seclusion, informational control, and autonomy of personal life[27] Privacy also comprises secrecy, anonymity, and solitude.[28] "Most scholars view privacy as a concept pertaining to the individual."[29] However, privacy also promotes culturally desirable attributes such as a healthy, liberal, democratic, and pluralistic society.[30] The forces within society that lead to the invasion of privacy are just as powerful. These include our innate curiosity about others, social control, and the desire to gain an economic or social advantage.[31] Eavesdropping statutes, such as the WPA, generally address an individual's desire to control information about themselves, and to preserve whatever degree

21. WHITFIELD DIFFIA & SUSAN LANDAU, PRIVACY ON THE LINE, THE POLITICS OF WIRETAPPING AND ENCRYPTION 126 (1998).

22. MORRIS L. ERNST & ALAN U. SCHWARTZ, THE RIGHT TO BE LET ALONE 1 (1977).

23. *Id.*

24. *See* DIFFIA & LANDAU, *supra* note 21, at 126 ("[If one man builds a wall opposite his fellow's] windows, whether it is higher or lower than them . . . it may not be within four cubits [If higher, it must be four cubits higher, for privacy's sake] (quoting HERBERT DANBY, THE MISHNAH 367 (Oxford University Press 1933)).

25. DIFFIA & LANDAU, *supra* note 21, at 126.

26. For a substantive discussion of several analytical views of privacy, *see* Bast, *supra* note 18, at 881–85.

27. William C. Heffernan, *Privacy Rights*, 29 SUFFOLK U. L. REV. 737, 745–46 (1995).

28. Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 424 (1980).

29. Bast, *supra* note 18, at 885.

30. *Id.*

31. *Id.* at 890.

of seclusion they might desire.[32] Privacy statutes counterbalance our societal desire to hunt out and punish non-conforming behavior.[33]

The balance of Part II will provide context for the court's analysis in *Townsend*. Subpart A will discuss how privacy has been analyzed under the United States Constitution in the face of evolving technology. Subpart B will discuss the question of one-party versus all-party consent. Subpart C will discuss privacy in Washington, including the evolution of the WPA. Subpart D is a review of court holdings that have interpreted the WPA.

A. The Evolution of Technology and Eavesdropping Under the Federal Constitution

Prior to the American Revolution, British soldiers and customs agents entered homes and offices at will and searched any person or place they wished.[34] This practice was so resented that Sam Adams said that he regarded the unrest over general searches "as the Commencement of the Controversy between Great Britain and America."[35] The value of security in the sanctity of one's home is not only fundamental to our way of thinking, but the Fourth Amendment[36] codification of this right distinguishes America from the rest of the world. Our nation began not only by inventing a new form of government but also by declaring that one purpose of government was the protection of individual rights.[37] "To secure these rights," wrote Thomas Jefferson, "governments are instituted among men."[38]

Although privacy is fundamental, our conception of whether we are entitled to statutory protection has evolved over time.[39] The courts have redefined our conception of privacy as technology has changed the way we communicate.[40] In fact, technology is continually diminishing an individual's actual privacy.[41] Prior to the invention of telephones,

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32. *Id.* at 882.

33. *Id.* at 895.

34. Ira Glasser, *The Struggle for a New Paradigm: Protecting Free Speech and Privacy in the Virtual World of Cyberspace*, 23 NOVA L. REV. 627, 638 (1999).

35. *Id.*

36. The Fourth Amendment reads as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

37. Glasser, *supra* note 34, at 655.

38. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

39. Bast, *supra* note 18, at 900.

40. *Id.*

41. *Id.* at 902.

computers, bugs, wiretaps, laser interferometers, and thermal imaging, one could simply stroll out of earshot of others to communicate confidential information.[42] Eavesdropping[43] was a risky business, punished by the colonists through the application of English common law.[44] Other than clandestinely listening in on a conversation, the only other way to obtain intelligence was through the use of a spy. Either way, someone who wanted to keep a conversation private could exercise a substantial degree of control over exposure of the conversation. Secret conversations could be held where no one else could hear them. Suspected spies could be dealt with harshly. However, as technology changed the way we communicate, each new mode of communicating private information has given rise to a new way of intercepting the information.[45] Unfortunately, statutory protection against unwanted intrusion has lagged well behind adoption of invasive technologies.[46]

For example, today we take it for granted that the contents of a first-class envelope are private. Although a postal delivery system has existed since the beginning of our nation's history, it took a United States Supreme Court decision in 1878, *Ex parte Jackson,*[47] to hold that the government could not open first-class mail without a search warrant.

More closely related to Internet communications, the courts were just as sluggish in recognizing a privacy right in telephone conversations. Fifty years after the introduction of the telephone, the Court declined to

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42. DIFFIA & LANDAU, *supra* note 21, at 2.

43. Purportedly the practice of standing underneath the eaves of a building and listening to conversations occurring within. *See* Bast, *supra* note 18, at 891.

44. DIFFIA & LANDAU, *supra* note 21, at 128.

45. Bast, *supra* note 18, at 891.

46. The following illustrates the point:

> The lesson is that when new technologies develop the law must develop along with them to maintain a proper balance between individual rights and government power. Just as the invention of the printing press ushered in new laws that upset the balance and weakened the right of free speech for centuries, so did the invention of the telephone when the law failed to keep pace at the outset, permanently altering the balance of power between the government and the individual, and ushering in an era of declining privacy rights that has not yet ended.

See Glasser, *supra* note 34, at 644.

47. The Court held the following:

> Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be.

96 U.S. 727, 733 (1878) (Field, J.).

Interestingly, Justice Field's testament to the Fourth Amendment protection of the mail did not benefit the petitioner, who argued unsuccessfully that the statute was unconstitutional. *Id.* at 738.

extend Fourth Amendment protection to telephone conversations.[48] In *Olmstead v. United States*, a Seattle-based bootlegger was convicted using evidence derived from several telephone wiretaps placed by federal prohibition agents.[49] The government tapped eight residential and business telephones and compiled 775 pages of notes.[50] The Court reasoned that no constitutional violation had taken place since nothing material was searched, such as "the house, his papers, or his effects."[51] The Court justified this outcome by stating that the phone lines were not part of a person's house, any more than "the highways along which they are stretched."[52]

Of the four dissents in *Olmstead,* the following passage from Justice Brandeis's dissent is oft quoted:

> When the Fourth and Fifth Amendments were adopted, [f]orce and violence were then the only means known to man by which a government could directly effect self-incrimination. Subtler and more far-reaching means of invading privacy have become available to the government. Discovery and invention have made it possible for the government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet.[53]

Even the telephone companies,[54] who filed a brief as amici, saw the issue much in concert with Brandeis. "[I]t is better that a few criminals escape than that the privacies of life of all the people be exposed to the agents of the government, who will act at their own discretion . . . unrestrained by the courts."[55]

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48. Olmstead v. United States, 277 U.S. 438 (1928).

49. *Id.* at 456.

50. *Id.* at 471.

51. *Id.* at 464

52. *Id.* at 465.

53. *Id.*

54. Pacific Telephone & Telegraph Co., American Telephone & Telegraph Co., United States Independent Telephone Ass'n, and Tri-State Telephone & Telegraph Co. *Id.* at 452.

55. *Id.* at 479 n.12 (quoting the amicus brief of the telephone companies). Olmstead also protested the admissibility of the wiretap evidence on the basis that, in procuring the evidence, the government violated a 1909 Washington statute that provided, "[e]very person . . . who shall intercept, read, or in any manner interrupt or delay the sending of a message over any telegraph or telephone line . . . shall be guilty of a misdemeanor." *Id.* at 468 n.7, *citing* REM. COMP. STAT. § 2656(18) (1922) (current version at WASH. REV. CODE § 9.73.010 (2004)). The majority found this fact irrelevant, citing the common-law rule that the admissibility of evidence is not affected by the illegality of the means by which it was obtained. *Id.* at 467. In response, Justice Brandeis wrote the following:

> To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.

It was not until 1967, nearly 100 years after the introduction of the telephone, that the Court recognized the constitutional right of privacy in telephone conversations.[56] In *Katz v. United States*, federal investigators placed a listening device on the outside of a telephone booth such that they could hear the defendant's side of the conversations.[57] The Court opined that "one who occupies [a telephone booth], shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be rebroadcast to the world."[58] The two-fold test[59] for whether a person is entitled to Fourth Amendment protection from electronic eavesdropping, enunciated by Justice Harlan in his concurrence, has eclipsed the majority opinion as precedent.[60] That is, (1) whether the person has exhibited a subjective expectation of privacy, and (2) whether the expectation is one that society is prepared to recognize.[61]

B. One-Party Versus All-Party Consent

What *Katz* left unanswered was the question of whether a participant in a conversation (such as a government informant) could assent to a recording and thereby ameliorate what would otherwise be a Fourth Amendment privacy violation. This is analogous to the situation in *Townsend*, where Detective Keller recorded Townsend's e-mail and ICQ messages without Townsend being aware of the recording.

United States v. White,[62] a plurality opinion, established the constitutionality of the one-party consent rule.[63] The *White* Court held

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Id. at 485.

56. Katz. v. United States, 389 U.S. 347 (1967).

57. *Id.* at 348.

58. *Id.* at 351.

59. First, that a person must have exhibited an actual (subjective) expectation of privacy; second, that the expectation is that society is prepared to recognize as reasonable. *Id.* at 361.

60. *See* Bast, *supra* note 18, at 842.

61. The subjective intention of the parties is one of the factors used by Washington courts to determine if a communication is private. The courts also consider other factors bearing on the reasonableness of the participants' expectations, such as the duration and subject matter of the communication, the location of the communication, the presence of potential third parties, and the role of the nonconsenting party and his or her relationship to the consenting party. State v. Townsend, 147 Wash. 2d 666, 673–74, 57 P.3d 255, 259 (2002).

62. 401 U.S. 745 (1971).

63. *Id.* at 753–54. *White* established the constitutionality of the one-party consent rule on the narrowest of grounds. Four justices (White, Stewart, Blackmun, and Berger) held that one-party consent did not offend the Fourth Amendment. *See id.* Douglas, *id.* at 756, Harlan, *id.* at 768, and Marshall, *id.* at 795, wrote separate dissenting opinions arguing that judicial authorization was required even in the case where the government agent was a participant in the conversation. Brennan, although concurring in the result, also adopted the dissent's position that the Fourth Amendment required judicial authorization for electronic eavesdropping, even when the government agent doing the recording was in a face-to-face conversation with the suspect. *Id.* at 755 (Brennan,

that neither a recording device carried on the body of an agent, nor a radio that transmits to recording equipment (or agents) located elsewhere, constituted a Fourth Amendment violation.[64] The plurality drew an analogy with the situation of an undercover agent, or even a traitor, who would be free to testify in court regarding what he saw, or take notes regarding conversations.[65] The plurality reasoned that if the conduct of an agent does not violate a defendant's reasonable expectations of privacy, then the fact that that same agent might be equipped with electronic equipment is of no consequence.[66] By placing his trust in the confidant, the defendant assumed this risk.[67]

Douglas, in a voluminous dissent, began by stating that "what the ancients knew as 'eavesdropping,' we now call 'electronic surveillance'; but to equate the two is to treat man's first gunpowder on the same level as the nuclear bomb. . . . Electronic surveillance is the greatest leveler of human privacy ever known." [68] Quoting Justice Brennan's dissent in *Lopez v. United States*: [69]

> [T]here is a qualitative difference between electronic surveillance, whether the agents conceal the devices on their persons or in walls or under beds, and conventional police stratagems such as eavesdropping and disguise. The latter do not so seriously intrude upon the right of privacy. The risk of being overheard by an eavesdropper or betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we speak. But as soon as electronic surveillance comes into play, the risk changes crucially. There is no security from that kind of eavesdropping, no way of mitigating the risk, and so not even a residuum of true privacy.[70]

The *White* plurality saw the issue as quantitative, that one always runs the risk of having secrets divulged by a confident. The plurality concluded that electronic eavesdropping is much more accurate than a

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J., concurring). Justice Black, in a one-sentence concurrence, directed readers to his dissent in *Katz*, in which he argued that intangible conversations are outside the realm of the Fourth Amendment which, by its plain language, protects only "persons, houses, papers, and effects." *See Katz*, 389 U.S. at 365–66. In summary, of the justices who held that the Fourth Amendment protections were applicable to private conversations, four reasoned that the one-party consent rule was constitutional and four reasoned that it was not.

64. *Id.* at 753.

65. *Id.* at 751.

66. *Id.*

67. *Id.*

68. *Id.* at 756.

69. 373 U.S. 427 (1963).

70. *White*, 401 U.S. at 759.

person's memory and will probably lead to more effective evidence.[71] The one-party consent rule remains the federal standard.[72]

C. Privacy in Washington

Unlike the federal constitution, the Washington State Constitution, adopted in 1889, explicitly provides for the protection of privacy.[73] Only the constitutions of nine other states have a similar provision.[74] Of this list, Washington, California, Florida, Illinois, and Montana also require the permission of all parties to a telephone conversation before it can be legally recorded.[75] Whether the all-party consent rule arose from the explicit constitutional recognition of privacy, or is merely a result of the same forces that shaped the constitutional provision is an open question.

The Washington State Constitutional Convention rejected the language of the federal constitution's Fourth Amendment and intentionally provided greater protection of individual rights.[76] Unlike the federal constitution, the Washington Constitution clearly recognizes an individual's right to privacy with no express limitations.[77]

Washington first enacted a privacy statute in 1909.[78] The first statute governing electronic eavesdropping was enacted in 1967 (interestingly, the same year as the *Katz* decision), making it unlawful for anyone not operating under judicial authorization to intercept or divulge certain communications without the consent of all persons engaged in the communication.[79] The law further provided that a court-ordered wiretap

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71. *See id.* at 753.

72. *See* Ferguson v. City of Charleston, 532 U.S. 67, 94 (2001) ("However strongly a defendant may trust an apparent colleague, his expectations in this respect are not protected by the Fourth Amendment when it turns out that the colleague is a government agent regularly communicating with the authorities.").

73. "Invasion of Private Affairs or Home Prohibited. No person shall be disturbed in his private affairs, or his home invaded, without authority of law." WASH. CONST. art. I, § 7.

74. Those states are the following: Alaska (ALASKA CONST. art. I, § 22), Arizona (ARIZ. CONST. art. II, § 8), California (CAL. CONST. art. I, § 1), Florida (FLA. CONST. art. I, § 23), Hawaii (HAW. CONST. art. I, § 6), Illinois (ILL. CONST. art. 1, § 6), Louisiana (LA. CONST. art. 1, § 5), Montana (MONT. CONST. art. II, § 10), and South Carolina (S.C. CONST. art. I, § 10).

75. A moderate correlation exists between having a specific privacy provision in a state constitution and two-party consent statutes in that same state. Of the ten states that have specific state constitution-based privacy provisions, half are one-party consent states, half are all-party consent states. Of the twelve states with all-party consent statutes, seven do not mention privacy in their constitutions.

76. State v. Young, 123 Wash. 2d 173, 179, 867 P.2d 593, 596 (1994).

77. *Id.* at 180, 867 P.2d at 597.

78. The statute provided the following: "Every person . . . who shall intercept, read or in any manner interrupt or delay the sending of a message over any telegraph or telephone line . . . shall be guilty of a misdemeanor." REM. COMP. STAT. 1922, § 2656(18) (1909) (current version at WASH. REV. CODE § 9.73.030).

79. State v. O'Neill, 103 Wash. 2d 853, 878, 700 P.2d 711, 725 (1985).

can be authorized only when there are reasonable grounds to believe that national security or human life is endangered, or that arson or a riot is about to occur.[80]

Portions of the WPA have been amended from time to time as required to deal with issues perceived by the legislature.[81] For example, in 1977 the Senate entered a proposal that would have replaced Washington's all-party consent rule with a one-party consent rule, similar to that of the federal government.[82] Although this proposal was rejected, a provision was adopted that gave law enforcement personnel some latitude by enabling law enforcement officials to obtain court orders where they are parties to the communication.[83] The legislature also incorporated an explicit procedure for obtaining consent,[84] along with a provision that required after-the-fact notice (within thirty days) to the person targeted for surveillance, whether or not the surveillance is ultimately authorized.[85]

The present one-party consent law permits a law enforcement officer who is a party to the communication to intercept, transmit, or record an otherwise private conversation with prior judicial consent, by written or telephonic permission, from a judge or magistrate.[86] An authorization under this section is valid for seven days, and may be renewed for one additional seven-day period.[87] Although this type of one-party authorization would have been available to Detective Keller in the case of Donald Townsend, there is no indication in the record that he sought judicial authorization for his surveillance activities.

D. Interpreting the Washington Privacy Act

What makes the decision in *Townsend* especially noteworthy is that it represents a significant departure from past decisions that have usually

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80. WASH. REV. CODE § 9.73.040 (2003). This provision has remained unchanged since being enacted in 1967.

81. *O'Neill*, 103 Wash. 2d at 882, 700 P.2d at 727.

82. *O'Neill*, 103 Wash. 2d at 878, 700 P.2d at 725, *citing* S.B. 2419, 45th Leg., Exec. Sess. (Wash. 1977).

83. *Id.* at 879, 700 P.2d at 725.

84. The procedure is as follows:

> Where consent by all parties is needed pursuant to this chapter, consent shall be considered obtained whenever one party has announced to all other parties engaged in the communication or conversation, in any reasonably effective manner, that such communication or conversation is about to be recorded or transmitted: PROVIDED, That if the conversation is to be recorded that said announcement shall also be recorded.

WASH. REV. CODE § 9.73.030 (2004).

85. *Id.* § 9.73.140 (2004).

86. *Id.* § 9.73.090 (2) (2004).

87. *Id.* § 9.73.090 (4).

interpreted the WPA in a way that is strongly protective of privacy rights. The Washington Supreme Court has held that the legislative intent of the WPA is clearly to protect the privacy of individuals, even in the course of a public trial, from the public dissemination of illegally obtained information.[88] A brief analysis of a number of Washington cases involving the WPA gives rise to the conclusion that the legislature and the judiciary highly value the protection of Washington citizens from unauthorized eavesdropping.

For instance, in *State v. Wanrow,* the court held that the WPA barred evidential use of a recording of an emergency phone call that a witness made immediately after seeing a shooting.[89] The admission of the tape-recorded message was held to be prejudicial and the case was remanded for reconsideration without the recording.[90] Washington courts have also held that recorded information obtained by federal officers, although consistent with federal law, is inadmissible in Washington courts.[91] Additionally, Washington courts have held that not only is information directly derived from illegal transmissions or recordings inadmissible in court, but the visual observations of the investigating officers, made concurrently with the audio tapes, are also inadmissible.[92]

The testimony of a nosy neighbor who had persistently listened in on cordless telephone conversations via a police scanner was held inadmissible under the WPA.[93] The court also held that the trial court

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88. State v. Wanrow, 88 Wash. 2d 221, 233, 559 P.2d 548, 555 (1977). The *Wanrow* court stated the following:

> Both the language and the history of RCW 9.73 make it clear the legislature's primary purpose in enacting these statutes was the protection of the privacy of individuals . . . even in the course of a public trial, of illegally obtained information. This purpose is best furthered by giving only limited effect to the [emergency recording] exception.

89. *Id.* at 233, 559 P.2d at 555. The statute was subsequently amended to provide for evidentiary use of the type of recording at issue in *Wanrow*. § 9.73.090(1)(a).

90. *Wanrow,* 88 Wash. 2d at 233, 559 P.2d at 555.

91. State v. Williams, 94 Wash. 2d 531, 617 P.2d 1012 (1980). In *Williams*, federal agents made tape recordings of their conversations with the defendants under the auspices of the one-party consent rule underlying the federal wiretap statue, Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510–2520. *Id.* Although these recordings were admissible in federal court, the Washington Supreme Court held that they were made in violation of the WPA. *Id.* at 549, 617 P.2d at 1022. The court, holding that federal officers were "individuals" within the meaning of the WPA, not only suppressed the admission of the tapes themselves but also testimony of the federal officers concerning their content. *Id.* at 536–37, 617 P.2d at 1015–16.

92. State v. Fjermestad, 114 Wash. 2d 828, 791 P.2d 897 (1990). In *Fjermestad*, police officers conducting drug investigations routinely wore body wires for safety reasons. *Id.* at 829, 791 P.2d at 898. The officers, although aware of the WPA, also used the body wires to record evidence for a drug bust without first seeking judicial authorization. *Id.* In addition to suppressing the recordings, the Washington Supreme Court also held that the visual observations of the officers, such as their impressions of the physical gestures of the suspect, were also inadmissible. *Id.* at 836–37, 791 P.2d at 902.

93. State v. Faford, 128 Wash. 2d 476, 488, 910 P.2d 447, 453 (1996).

erred by admitting evidence subsequently seized by the police pursuant to the nosy neighbor's tips.[94]

Despite this extensive record of enforcing privacy rights, Washington courts are not entirely one-sided. For example, a police officer listening in on a telephone conversation via a "tipped receiver" did not violate the WPA because no *device* was used to record or transmit the conversation.[95] A person who leaves a message on a telephone answering machine has actual knowledge that their messages are being recorded, and therefore has no reasonable expectation of privacy.[96] However, both situations are distinguishable from the majority of decisions cited above. In the case of the tipped receiver, the court is drawing the line as to what constitutes a "device" within the meaning of the WPA. In the case of the answering machine, actual knowledge of the recording waives one's expectation of privacy.

III. ANALYSIS OF STATE V. TOWNSEND

Against this backdrop of state and federal decisions, it is possible to analyze the *Townsend* court's reasoning. Subpart A of this section presents the facts of *Townsend.* Subpart B contains the court's decision. Subpart C presents an analysis of the court's reasoning. Subpart D discusses the likely effect of the court's decision.

A. The Facts

Michael Ivers, the informant, first "met" Donald Townsend over the Internet[97] in 1998.[98] After a short while, Ivers discontinued this initial

94. *Id.* In *Faford,* the court also upheld the trial court's ruling that precluded the State from introducing various manufacturer's warnings of the "possibility" that conversations on wireless telephones could be intercepted, holding that the warning of a possible interception did not establish a likelihood of interception. *Id.* at 487, 910 P.2d at 452. Additionally, the court adopted a very broad definition of "transmission" that included a radio scanner's conversion of inaudible radio waves into audible sound. *Id.* at 483, 910 P.2d at 450.

95. In *State v. Corliss,* 123 Wash. 2d 656, 662, 870 P.2d 317, 320 (1994), the court adopted a plain-language reading of the statute, holding that a police officer who listened in on a drug deal while an informant "tipped" the telephone receiver in the officer's direction had not used a "device designed to transmit or record" within the meaning of the WPA and thus no violation of the WPA took place.

96. In *Marriage of Farr,* 87 Wash. App. 177, 184, 940 P.2d 679, 683 (1997), the court held that the fact that an answering machine's only function is to record messages satisfied the WPA's implied notice requirement that a party consents to his or her communication being recorded when another party has announced, "in any reasonably effective manner," that the conversation will be recorded.

97. The Internet is nothing more or less than tens of thousands of interconnected computer networks that follow a number of common rules (protocols) for sending messages, file transfers, and dozens of other specific kinds of transmissions. ALAN E. BRILL, THE TECHNOLOGIES OF PRIVACY AND PRIVACY INVASION: AN INTRODUCTION, 748 PLI/PAT 85, 94 (2003).

contact because Townsend stated he wanted to have sexual intercourse with young girls ages twelve, thirteen, and fourteen.[99] However, in 1999 some friends told Ivers that someone using the "handle" of "Big Red" was harassing a nineteen-year-old female acquaintance.[100] Ivers, knowing this to be Townsend, resumed Internet discussions with him, posing as two sisters, seventeen-year-old "Cassie" (with the e-mail handle of "Angelheart"), and fourteen-year-old "Tammy."[101] Tammy and Cassie's initial communications with Townsend were general, but gradually became sexually explicit.[102] Townsend eventually told Tammy and Cassie that he had a key to this place downtown where there was a model train and he could meet them to engage in sexual activity.[103] At this point Ivers contacted Spokane County Detective Keller.[104]

Detective Keller set up a sting operation on the Internet by assuming the guise of a thirteen-year-old girl named "Amber" by using a Hotmail[105] account with a screen name[106] of "ambergirl87." Ivers then introduced Amber to Townsend.[107] From May 21, 1999 to June 1, 1999, Detective Keller communicated with Townsend via e-mail.[108] On June 1, at Townsend's urging, Keller set up an ICQ[109] account and began engaging in private chats.[110] The ICQ chats were more sexually explicit than the e-mail communications that preceded them.[111] They included

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98. Brief of Appellee at A-12, State v. Townsend, 105 Wash. App. 622, 20 P.3d 1027 (2001) (No. 19304-7-III).

99. *Id.* at A-12, 13.

100. *Id.* at A-13.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. MSN Hotmail is the world's largest provider of free, web-based e-mail. With Hotmail, anyone can read and receive e-mail messages from any computer in the world connected to the World Wide Web with an Internet connection. MSN, *at* http://help.msn.com/!data/en_us/data/HMFAQv7.its51/$content$/HM_FAQ_WhatIsHotmailUnAuth.htm (last visited July 10, 2004).

106. Screen names are codes akin to nicknames, CB handles, and the like. No two screen names may be exactly alike. United States v. Maxwell, 45 M.J. 406, 411 (C.A.A.F. 1996).

107. Brief of Appellee at A-13, State v. Townsend, 105 Wash. App. 622, 20 P.3d 1027 (No. 19304-7-III).

108. *Id.* at A-14.

109. ICQ means "I Seek You." It is a species of Internet communication invented by two Israeli programmers that avoids the infrastructure associated with traditional e-mail. Rather than sending messages through centralized e-mail servers, where they wait in storage to be downloaded, ICQ messages find their way directly to the destination computer. Margo Lipschitz Sugarman, *Annus Mirabilis*, THE JERUSALEM REPORT.COM, *available at* http://www.jrep.com/Info/10thAnniversary/1998/Article-12.html (last visited July 10, 2004).

110. Appellee's Brief at A-14, *Townsend*, (No. 19304-7-III).

111. *Id.* at A-14.

graphic discussions about having sexual intercourse, how one becomes pregnant, and how they could avoid pregnancy.[112]

Eventually, a rendezvous was scheduled for June 4, 1999, at Cavanaugh's, a local hotel.[113] In the last ICQ communication prior to this meeting, Townsend asked for directions to the hotel, and told Amber he would get on the bus after he cooked dinner.[114]

Just before 6:30 p.m., Townsend knocked on the door of room 119 at the hotel and asked for Amber.[115] He was arrested and transported to Detective Keller's office and Mirandized.[116] Upon questioning, he admitted that he came to the hotel to have sexual intercourse with Amber, who he thought to be thirteen years old, but had changed his mind during the trip over.[117]

Townsend was charged in Spokane County Superior Court with attempted second-degree rape of a child.[118] Prior to trial, Townsend moved to dismiss the charge under the theory that Detective Keller's recording and printing of his private e-mails and ICQ communications was done without his consent, and were therefore inadmissible under the WPA.[119] However, his motion to suppress the print-outs of the e-mail messages was denied.[120] After a bench trial, Townsend was found guilty and sentenced to eighty-nine months in prison.[121] Townsend appealed, in part, on the theory that the trial court erred in admitting the e-mail and ICQ messages that Detective Keller had recorded and subsequently printed out for use as evidence.[122] The court of appeals held that although the e-mail communications fell under the auspices of the WPA,

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112. *Id.* at A-15.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. State v. Townsend, 147 Wash. 2d 666, 671, 57 P.3d 255, 258 (2002). Townsend was charged under WASH. REV. CODE § 9A.44.076 (1999). *See* Brief for Appellant at 2, State v. Townsend, 105 Wash. App. 622, 20 P.3d 1027 (2001) (19304-7-III).

119. WASH. REV. CODE § 9.73.030(1)(a) (2004). ("[I]t shall be unlawful for . . . the state of Washington [or] its agencies . . . to intercept or record any . . . [p]rivate communication transmitted by telephone, telegraph, radio, or other device . . . without first obtaining the consent of all the participants in the communication."); *id.* § 9.73.050 ("Any information obtained in violation of RCW 9.73.030 . . . shall be inadmissible in any civil or criminal case in all courts of general or limited jurisdiction in this state, except with the permission of the person whose rights have been violated . . . .").

120. *Townsend*, 147 Wash. 2d at 671, 57 P.3d at 258.

121. *Id.*

122. *See id.* at 671–72, 57 P.3d at 258.

Townsend had impliedly consented to their recording.[123] Review was granted by the Washington Supreme Court.[124]

B. The Washington Supreme Court's Decision

In a decision that yielded three opinions, the court upheld Townsend's conviction.[125] Six of the justices, although finding the WPA applicable, agreed with the appeals court and affirmed the conviction on the basis that Townsend had "impliedly" consented to Detective Keller's recording. Two justices never reached the question of Townsend's consent. Rather, they held the WPA inapplicable where the recording equipment was integral to the communications equipment.[126] The dissent agreed with the majority that the statute was applicable, and that the recording device did not need to be separate from the communications equipment, but found that there was no basis from which to infer Townsend's consent to the recording of his messages.[127]

C. The Court's Analysis

The question of the applicability of the WPA to Townsend's e-mail and ICQ messages was one of first impression.[128] Although e-mail and ICQ messages are not mentioned in the WPA, the court did not question whether Internet messages fit within the definition of a "communication transmitted by telephone, telegraph, radio, or other device."[129] Ultimately, there were three contested questions. First, were the messages private? Second, was Detective Keller's computer a "device electronic or otherwise designed to record"? Finally, did Townsend impliedly consent to the recording of his messages?[130] I shall examine each of these questions *seriatim*.

1. Were Townsend's Messages Private?

Internet messages are of three types:[131] chat,[132] instant messaging or ICQ,[133] and e-mail.[134] Townsend and Detective Keller exchanged both e-

123. *Id.* at 672, 57 P.3d at 258.

124. State v. Townsend, 144 Wash. 2d 1016, 32 P.3d 283 (2001).

125. *Townsend*, 147 Wash. 2d at 666, 57 P.3d at 244 (8-1 decision) (Bridge, J., concurring) (Sanders, J., dissenting).

126. *Id.* at 680, 57 P.3d at 262.

127. *See id.* at 685–87, 57 P.3d at 265.

128. Brief of State at A-16, State v. Townsend, 105 Wash. App. 622, 10 P.3d 1027 (No. 19304-7-III).

129. *See Townsend*, 147 Wash. 2d at 672, 57 P.3d at 258–59. (quoting WASH. REV. CODE § 9.73.030(1) (2004)).

130. *Townsend*, 147 Wash. 2d at 673–75, 57 P.3d at 259–60.

131. United States v. Maxwell, 45 M.J. 406, 411 (C.A.A.F. 1996).

mail and instant messages. To determine whether a communication is private, Washington courts use a "factors" analysis, in which the following are considered: (1) the subjective intention of the parties to the communications; (2) the duration and subject matter; (3) the location of the communication and the presence of potential third parties; and (4) the role of the non-consenting party and his or her relationship to the consenting party.[135] Interestingly, the *Townsend* court only addressed Townsend's subjective intention, holding that "it is readily apparent from the undisputed facts that Townsend's subjective intention was that his messages to Amber were for her eyes only."[136] The court's total failure to address the question of the underlying privacy of e-mail communications is inconsistent with the majority of other courts who have addressed the question of the discoverability of e-mail.[137]

2. Were Townsend's Messages Recorded by a "Device"?

In order to fall within the auspices of the WPA, the private communication must be intercepted or recorded by "any device

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132. Chat communications, as implemented by America Online, take place in a virtual "room," usually specified by subject, where up to approximately twelve participants can maintain a group discussion. Once a user enters a chat room, all the other participants are notified, and text typed by one participant is visible to all. This form of communication is similar to a telephone party line. *Id.* Messages sent in chat rooms lose any semblance of privacy. *Id.* at 419.

133. Instant messages, such as ICQ, allow a user to send a brief message of no more than 500 characters to another user who happens to be online at the time. These messages are not stored on the e-mail server but are sent directly to the recipient's computer. ICQ messages are similar to a telephone conversation. *Id.* at 411.

134. E-mail is a personal communication sent directly from one user to another. *Id.* The recipient need not be logged into his computer at the time the e-mail is sent. *Id.* The only authorized way to have access to an e-mail message is to be the recipient of the original message or of a forwarded message. *Id.* A user must log onto the e-mail server in order to retrieve his e-mail. *Id.* E-mail transmissions are not unlike other forms of modern communication. *Id.* Drawing a parallel to the sender of a first-class letter, if one seals the envelope and addresses it to another person, one can reasonably expect the contents to remain private and free from the eyes of police absent a search warrant. *Id.* This is similar to the maker of a telephone call who also has a reasonable expectation that police officials will not intercept the conversation. *Id.* Drawing from these parallels, the transmitter of an e-mail message enjoys a reasonable expectation that police officials will not intercept the transmission without probable cause and a search warrant. *Id.* at 417–18.

135. *Townsend*, 147 Wash. 2d at 673–74, 57 P.3d at 259.

136. *Id.* at 674, 57 P.3d at 259. For example, one of Townsend's messages directed Amber to "not tell anyone about us." *Id.* The court also considered the sexual subject matter of the communication as strongly suggestive of Townsend's intent to keep the communications private. *Id.* Despite this being a case of first impression, the court did not analyze the other elements.

137. At least one author has argued that the potential presence of third parties negates any expectation of privacy in Internet communications. *See* BRILL, *supra* note 97, at 98; *see also, e.g.*, United States v. Maxwell, 45 M.J. 406, 411–12, 417–19 (C.A.A.F. 1996) (discussing the varying expectations of privacy in e-mail, instant messaging, and chat rooms); Fisher v. Mt. Olive, 207 F. Supp.2d 914, 927 (W.D. Wis. 2002) (holding that it is disputed whether an e-mail account is a place that a reasonable person would consider private).

electronic or otherwise designed to record and/or transmit."[138] In the case of *Townsend*, Detective Keller stored Townsend's messages on his computer.[139] Both the majority[140]and the dissent[141] held that Detective Keller's computer was a device as contemplated by the WPA, with the concurring opinion holding that it was not because the device that records must be separate from the equipment used in the communication.[142] Ultimately, the majority cited the plain language of the statute which prohibits recording by "any device."[143]

The concurring opinion cited one additional factor that militates toward a finding that e-mail communications should be exempt from the WPA's prohibition on recording: To incorporate e-mail communications under the WPA would create the absurd result of making all electronic communication via computers criminal, since e-mail messages are routinely recorded, and therefore e-mail messages are inherently in violation of the WPA.[144] Seemingly, the concurrence in *Townsend* made a very coherent argument that the WPA does not apply to e-mail messages. In this case, the concurrence appears to have the better-reasoned argument.[145] Furthermore, the majority acknowledges that its broad interpretation of the term "device" creates an issue with respect to the infrastructure underlying e-mail communications, since electronic communications are routinely stored.[146]

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138. WASH. REV. CODE § 9.73.030 (2004).

139. *Townsend*, 147 Wash. 2d at 670, 57 P.3d at 257.

140. *Id.*

141. *Id.* at 686, 57 P.3d at 265.

142. *Id.* at 682–83, 57 P.3d at 263–64.

143. *Id.* at 675 n.2, 57 P.3d at 260 n.2. However, there is substantial precedent for the concurrence's reading of the statute. For example, in *State v. Corliss*, 78 Wash. App. 976, 982, 900 P.2d 564, 567 (1995), the court held that an investigating officer had not used a "device" within the meaning of the WPA when he listened in on the defendant's telephone conversation while an informant "tipped" the receiver in his direction. Similarly, in *State v. Gonzales*, 78 Wash. App. 976, 982, 900 P.2d 564, 567 (1995), the officer simply answered a ringing telephone in the defendant's residence, and in *State v. Bonilla*, 23 Wash. App. 869, 873, 598 P.2d 783, 786 (1979), the officer listened to a conversation on an extension telephone. In each, the appellate courts held that there was no violation of the WPA because a separate device was not used. Given the *Townsend* holding that the WPA does not require that the recording device be separate from the recording equipment, the reasoning in each of the aforementioned cases (*Corliss, Gonzales,* and *Bonilla*), may no longer be good law. *See Townsend*, 147 Wash. 2d at 675 n.2, 57 P.3d at 260 n.2.

144. *See id.* at 684, 57 P.3d at 264; *see also* State v. Fjermestad, 114 Wash. 2d 828, 835, 791 P.2d 897, 901 (1990) ("[S]tatutes should be construed to effect their purpose and unlikely, absurd, or strained consequences should be avoided.").

145. *See also* Decoste, *supra* note 20, at 81. Organizations typically save the date on their e-mail servers on a routine basis. *Id.* This backup storage is also a form of recording that arguably runs afoul of the WPA.

146. *See Townsend*, 147 Wash. 2d at 675 n.2, 57 P.3d at 260 n.2. The majority wrote the following: "While one could certainly mount a cogent argument for the proposition that the [WPA]

3. Did Townsend Impliedly Consent to the Recording of His Messages?

Donald Townsend utilized two types of Internet communications, e-mail and instant messaging.[147] Because these two types of communications have different characteristics, the court analyzed them separately.

a. E-mail Messages

The majority concluded that Donald Townsend impliedly consented to the recording of his e-mail messages.[148] Their reasoning is summarized as follows: (1) The WPA provides that "a party is deemed to have consented to a communication being recorded when another party has announced in an effective manner that the conversation would be recorded";[149] (2) all information received or transmitted by the computer is recorded and stored on the computer's hard drive and is therefore available for later retrieval;[150] and (3) Townsend is properly deemed to have consented to the recording of his messages.[151] Each of these assertions is problematic and will be examined in sequence.

i. Was Townsend effectively notified that his conversations would be recorded?

In support of its assertion that Townsend impliedly consented to the recording of his e-mail messages, the majority cited the following wording from the WPA: "A party is deemed to have consented to a communication being recorded when another party has announced in an effective manner that the conversation would be recorded."[152] However, the statute continues as follows: "PROVIDED, that if the conversation is to be recorded that said announcement shall also be recorded."[153] For purposes of simplicity, I will refer to this language as the "Implied Consent" clause.

The Implied Consent clause that the court omits from the opinion is critical. What it describes is the statutory method for obtaining the implied consent of a participant in a recorded conversation. Note that the

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should not apply . . . the language of the statute covers such recording. The legislature may, however, wish to consider amending the statute in light of developments in technology."

147. *See id.*, 147 Wash. 2d at 671, 57 P.3d at 258.

148. *Id.* at 676, 57 P.3d at 260.

149. *Id.* at 675, 57 P.3d at 260, *quoting* WASH REV. CODE § 9.73.030(1)(a) (2004).

150. *See id.* at 676–77 n.3, 57 P.3d at 260–61 n.3 ("Townsend, as a user of e-mail had to understand that computers are . . . message recording device[s] and that his e-mail messages would be recorded on the computer of the person to whom the message was sent.").

151. *Id.*

152. *Id.* at 676, 57 P.3d at 260.

153. WASH. REV. CODE § 9.73.030(3) (2004) (Capitalization in original).

capitalization of the word "PROVIDED" is included in the statute. The legislature clearly intended that the words that follow are of special importance. The special importance of this phrase takes on additional significance when one examines the legislative history of the WPA. In 1977, the Washington Senate entered a proposal that would have aligned what was Washington's all-party consent rule with the federal government's one-party consent rule.[154] Ultimately, the legislature rejected this proposal, but they did adopt other changes, including the Implied Consent clause quoted above.[155] What can be readily inferred from this sequence of events is that the legislature was reluctant to abrogate the privacy rights of Washington citizens, and the "PROVIDED" language was put in place as an explicit protection against exactly the kind of surreptitious recording that the WPA was intended to prevent.

The issue arising from the court's omission of the Implied Consent clause is readily apparent. By omitting this language, the court judicially modifies the evidentiary level required for implied consent. The legislature's apparent intent for their inclusion of this wording was that a permanent record of this announcement be available to unambiguously indicate that the person being recorded was on notice that their conversation would be recorded. Applying this rule, which appears to have been designed for aural recordings, to the case of e-mail messages, such a record could have been in the form of an e-mail from Detective Keller to Donald Townsend. Or, in the alternative, some instruction that appeared on Townsend's computer prior to the sending of the message. No record of this type was introduced into evidence. Therefore, as an initial matter, the statutory requirement for implied consent under the WPA was not met. As stated in the dissenting opinion: "The majority engrafts by inference an unstated consent exception to Washington's privacy act. . . . Inference plus implication equals loss of privacy."[156]

It is illuminating to examine a similar circumstance where a court held that sufficient notice did exist to infer implied consent for officials to record telephone conversations. In *United States v. Green*,[157] a federal

154. *See* State v. O'Neill, 103 Wash. 2d 853, 878–79, 700 P.2d 711, 725 (1985), *citing* S. B. 2925, 45th Leg., Exec. Sess. (1977); Eng. S. B. 2419, 45th Leg., Exec. Sess. (1977).

155. Laws 1977, Exec. Sess., ch. 363, § 1.

156. *Townsend*, 147 Wash. 2d at 685, 57 P.3d at 265 (Sanders J., dissenting). Unlike the implied consent exceptions judicially grafted by the *Townsend* court, such exceptions are explicitly provided for in several Washington statutes. *See, e.g.*, § 7.70.050 (4) (2004) (implied consent of unconscious patient to emergency medical treatment); § 16.08.050 (2004) (implied consent for entry upon another's property); § 26.16.030 (2) (2004) (implied consent of spouse to give away community property); § 46.64.040 (2004) (implied consent of nonresident highway user to submit to service of Washington process).

157. 842 F. Supp. 68 (W.D.N.Y. 1994).

district court held that implied consent to record a private conversation was found where a prison inmate made phone calls from a prison phone.[158] However, this instance occurred in a factual setting vastly different from that of *Townsend.* In *Green,* the defendant had attended a prisoner orientation where he was told that phone calls would be monitored, and had been given a prison handbook with the same information.[159] Furthermore, every prison telephone had a placard next to it alerting the defendant of the prison's monitoring capabilities.[160] However, there was no explicit warning that the prisoner's conversations might be recorded. In reluctantly affirming a magistrate's finding that the prisoner had impliedly consented to this recording, the district court noted that "[o]ur holding should not, however, be construed as approving the government's failure to seek proper authorization. . . . Such conduct deserves no encouragement, but is rather to be deprecated; we do so."[161]

The contrast between *Green* and *Townsend* is apparent. The defendant in *Green* was on actual notice with respect to the monitoring of his conversations, and the fact of his incarceration cannot be overlooked.[162] In contrast, Townsend, although contemplating a socially reprehensible act, had no overt warning that his conversations with Amber were being recorded, and his circumstances did not give rise to any inference similar to that reluctantly engrafted by the *Green* court.

ii. All information received or transmitted by the computer is recorded and stored on the computer's hard drive.

This assertion, upon which both the majority and the concurrence relied without citation,[163] is not necessarily true. To understand why, a brief discussion of computer technology is necessary.

Computers typically contain four types of memory: read-only memory (ROM), random-access memory (RAM), permanent storage (a hard drive, floppy disks, or other storage media), and virtual memory (which is an extension of the RAM temporarily stored on the hard drive).[164] ROM is typically used for machine functions and is not available for user storage.[165] RAM is cleared every time a person loads a

158. *Id.* at 70.

159. *Id.*

160. *Id.*

161. *Id.* at 72 (citing United States v. Harrelson, 754 F.2d 1153, 1171 (5th Cir. 1985)).

162. *Id.* at 70.

163. State v. Townsend, 147 Wash. 2d 666, 677 n.3, 681, 57 P.3d 255, 261 n.3, 263 (2002).

164. MICHAEL MEYERS, A+ ALL-IN-ONE CERTIFICATION EXAM GUIDE, 5, 18, 82, 198 (3d ed. 2001).

165. *Id.* at 198.

new program or turns the computer off.[166] Virtual memory is a portion of the hard drive that has been converted for use as additional RAM,[167] however, a sophisticated computer programmer or forensic analyst can probably access the virtual memory data stored on a hard drive, even when a typical computer user would not know the data were stored there.[168] In order for information to be saved (or "recorded" in the language of the WPA) for later retrieval it must be saved to a computer's hard drive.[169]

The court, having already asserted that "all information received or transmitted by the computer is stored on the hard drive,"[170] then proceeds to contradict this very fundamental assumption in its discussion of ICQ communications.[171] For instance, the court asserts that "unlike e-mail, ICQ technology does not require that messages be recorded for later use.[172] The court goes on to say that "[w]hether the ICQ communication is saved [longer than is required to answer] depends on the computer software used by the recipient.[173] Paradoxically, the court describes and documents an exception to what, in another portion of the opinion, is presented as an absolute rule. Apparently, ICQ messages are useful enough to some without being permanently recorded. It follows, then, that not *all* information must be saved to the computer's hard drive in order to be useful. Furthermore, other authorities simply do not support the court's blanket assertion, or, at a minimum, raise a reasonable doubt as to its universality.[174]

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166. *Id.*

167. *Id.* at 82.

168. Jason M. Paroff, David H. Schultz & Kristin M. Nimsger, *Electronic Discovery in Technology Litigation*, 734 PLI/PAT 297, 373 (2003).

169. The issue of whether the temporary storage of information to RAM constitutes "recording" in the language of the WPA has not been considered in Washington case law, but the issue should be addressed. The term "record" has an ordinary meaning of "[a] documentary account of past events, usually designed to memorialize those events; information that is inscribed on a tangible medium or that, having been stored in an electronic or other medium, is retrievable in perceivable form." BLACK'S LAW DICTIONARY 1279 (7th ed. 1999). However, this definition considers only the noun form of the word, whereas the usage in the WPA is as a verb. *See* WASH. REV. CODE § 9.73.030(1) (2004). Nevertheless, given the definition of the noun form and the context in which the word is used in the WPA, the drafter's intention was to prohibit the making of a record of a conversation that is capable of being retrieved in perceivable form. Using this reasoning, the temporary storage of information in RAM is not "recording" within the meaning of the WPA, but the permanent storage of information on the hard drive or other permanent storage devices is "recording."

170. State v. Townsend, 147 Wash. 2d 666, 677 n.3, 57 P.3d 255, 261 n.3 (2002).

171. *Id.* at 676–77, 57 P.3d at 260–61.

172. *Id.*

173. *Id.* at 677, 57 P.3d at 261.

174. *See* David T. Cox, *Litigating Child Pornography and Obscenity Cases in the Internet Age*, 4 SUM J. TECH. L. & POL'Y 114 (1999). "*Most* e-mail programs keep copies of every message." *Id.* (Emphasis added). "Each program functions differently with regard to how many messages are

The court's flawed assumption regarding the universality of a computer's recording of information seriously undermines the court's next assertion, that Townsend had to know that his messages would be recorded on the computer of the recipient.[175]

iii. Did Townsend know that his e-mail messages would be recorded on the computer of the recipient?

The *Townsend* court held that "Townsend, as a user of e-mail had to understand that computers are, among other things, a message recording device and that his e-mail messages would be recorded on the computer of the person to whom the message was sent."[176] The factual premise underlying the court's assertion is less than absolute. Although it is plausible that Townsend understood that his messages *could* be recorded by the computer of the recipient, this is far different than knowing that they *would* be recorded. Although the court attempts to compare Townsend's act of sending the e-mail messages to that of leaving a message on a telephone answering machine, the two are radically different.[177] The answering machine has but one purpose, and a telephone answering machine also has an incoming greeting where the caller is invited to leave a message.[178] Given the fact that telephone answering machines have been in common use for many years and have but one purpose, familiarity with answering machines as recording devices can be reasonably inferred. They are distinct from the underlying telephone call; they announce themselves and invite the user to leave a message. Familiarity with computers as recording devices cannot be reasonably inferred because of their novelty and the fact that they have myriad purposes, and there is no real incentive to understand the details of computer communications.[179] Furthermore, there is no indication that

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saved and where they are saved, at what point they are saved and how messages are deleted. The best way to test these variables is to get on the machine in question and start up the e-mail program." *Id.* at 116.

175. *Townsend*, 147 Wash. 2d at 676, 57 P.3d at 260.

176. *Id.*

177. *Id. Compare In re* Marriage of Farr, 87 Wash. App. 177, 184, 940 P.2d 679, 683 (1997). In *Farr*, the court held that a telephone answering machine recording was admissible under the WPA because "an answering machine's only function is to record messages." *Id.* The court further reasoned, "[k]nowing that [his] messages were being recorded, [the defendant] had no reasonable expectation of privacy." *Id.*

178. The fact that the greeting is recorded also fulfills the statutory requirement that states, "PROVIDED, That if the conversation is to be recorded that said announcement shall also be recorded." WASH. REV. CODE § 9.73.030(3) (2004).

179. *See* BRILL, *supra* note 97, at 94. "The power of the technology is that all of the nuts and bolts . . .underlying the process need not be known by the average user." *Id.* In other words, much of what goes on inside a computer occurs without the user's awareness. For example, the default folder containing a user's local cache of Hotmail messages (on a personal computer running Outlook 2002)

the court made any finding of fact with regard to Townsend's level of familiarity with computer technology that might have led it to the conclusion that Townsend had any awareness that his e-mail messages could be recorded on the computer of his recipient. The limited facts available imply that Townsend was not a particularly adept computer user.[180]

The court erred in applying the doctrine of implied consent to Donald Townsend's e-mail messages. First, the requirements for implied consent under the WPA were not met. Second, the court employed the erroneous factual premise that all messages are recorded on a computer's hard drive. Third, the court imputed this knowledge to Townsend and misapplied the analogy of a computer's cached record of e-mail messages to a telephone answering machine.

b. ICQ Messages

Although the analysis of Townsend's e-mail messages applies equally to the recording of his ICQ messages, the facts are slightly different. The court cited two reasons why it was appropriate to impute to Townsend the knowledge that his ICQ messages could be recorded.[181] First, the court felt that the fact that Townsend encouraged the fictitious Amber to set up an ICQ account strongly suggested a familiarity with the technology.[182] Second, the ICQ software used by Townsend contained a privacy policy that specifically warned users that their messages could be recorded.[183] Yet, within the same paragraph, the court states that "no evidence was presented at trial that Townsend had acquainted himself with the ICQ policy."[184]

Neither of these bases alone or combined is sufficient to impute to Townsend the knowledge that his ICQ messages would be recorded. The fact that Townsend had encouraged Amber to set up an ICQ account is not probative of Townsend's level of technical expertise. Although it is conceivable that it would be challenging to explain the process of configuring a computer for ICQ communications to a thirteen-year-old girl, Townsend was actually encouraging Detective Keller, who was no

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is buried well within the directory structure at C:\Documents and Settings\<*Username*>\Local Settings\Application Data\Microsoft\Outlook. *See* OL2002: How to Move the Hotmail .PST Cache File, *available at* http://support.microsoft.com/?kbid=300593 (last visited July 10, 2004).

180. *See* Brief of State at A-15–16, State v. Townsend, 105 Wash. App. 622, 20 P.3d 1027 (No. 19304-7-III). The owner of Townsend's Internet service provider, Compufun, had been to the Townsend residence on two occasions to check the Internet configurations. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

doubt well versed in computers and more than eager to comply with Townsend's request. In other words, where Townsend might need to explain the process of configuring a computer for ICQ communications in detail to a thirteen-year-old girl, Detective Keller probably required no assistance.

In further support of the proposition that Townsend possessed limited knowledge of computer technology is the fact that the owner of Townsend's Internet service provider testified that he had been out to the Townsend's residence on two occasions to check Internet settings.[185] This fact does not correlate with the court's conclusion that Townsend was a particularly knowledgeable Internet user and does not support a finding that Townsend had familiarized himself with the ICQ privacy policy.

In addition, it is highly speculative as to whether Townsend ever read the privacy policy that accompanied the ICQ software. This privacy policy was in the form of a clickwrap[186] license agreement. With this type of license, a party wishing to install a particular software program is presented with a scrollable text box[187] that contains the program's license agreement. Furthermore, the party is not permitted to complete the installation until the party clicks on a "Next" button to indicate that they accept all the terms.

Washington courts have adopted the majority position that clickwrap agreements form binding contracts.[188] However, this is a far different proposition than imputing knowledge of the terms of the agreement for purposes of criminal prosecution. Absent advance notice that the terms of a clickwrap agreement may be used in support of criminal charges, there is simply no reason to presume that a user will familiarize himself with a multi-page license agreement, when a simple click of the mouse will make it all go away. As the court in *Townsend* correctly stated, "[t]he more pertinent question is whether Townsend was

185. *See supra* text accompanying note 180.

186. *See* Specht v. Netscape Commun. Corp., 306 F.3d 17, 22 n.4 (2nd Cir. 2002) ("This kind of online software license agreement has come to be known as 'clickwrap,' by analogy to 'shrinkwrap,' used in the licensing of tangible forms of software sold in packages.").

187. The actual license agreement that was presented to Donald Townsend is unavailable. If downloaded by July 10, 2004, the ICQ agreement presented in the scrollable text box would occupy ten pages of single-spaced text if pasted into Microsoft Word.

188. *See* M.A. Mortenson, Inc. v. Timberline Software Corp., 140 Wash. 2d 568, 583–84, 998 P.2d 305, 313 (2000) (*citing* ProCD, Inc. v. Zeidenberg, 86 F.3d 1147 (7th Cir. 1996)). In *Mortenson*, the court held that the purchaser of software had assented to the terms of a license agreement where the terms were included in the shrinkwrap package, manuals, protective devices, and are referenced each time the software is used. *Id.* at 584, 998 P.2d at 313. *But see Specht*, 306 F.3d at 32 (holding that a license is not binding where the license could not be displayed on visible screen without scrolling).

aware that the software [on a recipient's computer] was or could be defaulted [to record incoming messages]."[189]

Assuming that Townsend had familiarized himself with the ICQ policy, this fact still does not rise to the notice required under the WPA. The WPA explicitly stipulates that "consent shall be considered obtained whenever one party has announced . . . that such communication or conversation *is about to be* recorded or transmitted."[190] At the most, the dissent asserts, a technologically astute communicator might be aware that under some circumstances his ICQ messages *might* be recorded.[191]

The court erred in determining that Townsend had impliedly consented to the recording of his e-mail and ICQ messages. The wording of the statute is extremely clear on the requirements for implied consent. There is no indication that Townsend was aware that his messages were being recorded, and certainly no indication that he had given his consent for them to be recorded.

D. The Effect of Townsend

Donald Townsend was sentenced to prison for eighty-nine months for his conviction on the charge of attempted second-degree rape of a child.[192] The record does not include an indication of any substantial evidence beyond Detective Keller's print-outs of Townsend's messages. If the court had applied the reasoning of *State v. Fjermestad*,[193] where even the officer's visual observations made concurrently with an illicit recording were held inadmissible, the case against Townsend would have been substantially weakened.

Although the court in Townsend held that e-mail and ICQ messages are within the auspices of the WPA, the court's implied consent doctrine leads to the conclusion that Washington's all-party consent rule is no longer enforceable as it pertains to e-mail and ICQ messages. Consequently, law-enforcement officials now have the green light to utilize evidence derived from e-mails and ICQ messages sent to them by the object of their surveillance, even when acting without judicial authorization. What *Townsend* left unanswered is whether *all* users of e-mail and ICQ messages are imputed with the knowledge that their communications will be recorded.[194] Similarly, are *all* users of ICQ

189. State v. Townsend, 147 Wash. 2d 666, 677, 57 P.3d 255, 261 (2002).

190. WASH. REV. CODE § 9.73.030(3) (2004).

191. *Townsend*, 147 Wash. 2d at 685, 57 P.3d at 265 (Sanders, J. dissenting).

192. *Id.* at 671, 57 P.3d at 258.

193. State v. Fjermestad, 114 Wash. 2d 828, 829, 791 P.2d 897, 898 (1990).

194. With regard to the e-mail messages, "in sum, because Townsend, as a user of e-mail had to understand that computers are, among other things, a message recording device and that his e-mail messages would be recorded on the computer of the person to whom the message was sent, he is

software presumed to have familiarized themselves with its ten pages of terms?[195] The court's language in *Townsend* strongly supports this interpretation. As a result, the all-party consent rule under the WPA is probably no longer applicable to e-mail messages. Police officials are now free to "record" e-mail and ICQ messages, so long as they are party to them, without obtaining prior judicial authorization. Given the privacy provisions in the Washington Constitution, the legislative history of the WPA, and the trend of judicial interpretations consistently favoring the preservation of privacy rights, this decision marks a significant break. Although *Townsend's* holding could be construed as a mere recognition of the realities of technological innovation, the Washington Supreme Court has, on two occasions, refused to let technological innovation dictate their interpretation of the WPA, holding, on one occasion, that "our legal right to privacy should reflect thoughtful and purposeful choices rather than simply mirror the current state of the commercial technology industry."[196]

The court's decision in *Townsend* will also encourage law enforcement officials to push the boundaries of the WPA. The available information indicates that Detective Keller could have obtained prior judicial authorization for his monitoring activities.[197] Courts have an obligation to see that police investigators follow prescribed procedures. If the police fail to obtain proper authorization, and a criminal goes free, society pays the price. By sanctioning Detective Keller's monitoring, the court has encouraged the police to push the boundaries of legality.

IV. CONCLUSION

Townsend stands for the proposition that electronic privacy is exponentially more complex today than it was in 1967, the year when the Washington Legislature first enacted a prohibition on electronic eavesdropping. As was the case with conventional mail and the telephone, it may be a considerable length of time before the level of privacy afforded an e-mail message is solidified. For example, even

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properly deemed to have consented to the recording of those messages." *Townsend*, 147 Wash. 2d at 676, 57 P.2d at 260.

195. With regard to the ICQ messages, the court summarized, "[a]lthough no evidence was presented at trial establishing that Townsend had acquainted himself with the ICQ privacy policy, his familiarity with it may reasonably be inferred." *Id.* at 678, 57 P.3d at 261–62. The court continued, "[w]e are satisfied, in sum, that Townsend was informed by ICQ software privacy policy and by his general understanding of ICQ technology that the recording of ICQ messages by a recipient is a possibility." *Id.*

196. State v. Faford, 128 Wash. 2d 476, 485, 910 P.2d 447, 451 (1996) (quoting State v. Young, 123 Wash. 2d 173, 184, 867 P.2d 593, 598 (1994)).

197. WASH. REV. CODE § 9.73.090 (2004); *see* discussion accompanying note 88, *supra*.

though the *Townsend* court held that e-mail messages are private within the meaning of the WPA,[198] it is less clear that this expectation is supported by the reality of the Internet. At least one authority has compared the privacy expectation of an e-mail message to that of a post card, with the destination address and the message openly available to anyone who handles the message.[199] The *Townsend* court never considered this aspect of the technology and, like many other courts that have considered the issue, applied a legal doctrine developed for more traditional forms of communication.[200] This ignores the reality that privacy was not originally a basic operating premise of the Internet.[201]

The Washington Legislature has not kept pace with the realities of modern communications[202] and, at a minimum, should enact the following changes:

If the legislature concludes that the WPA does *not* apply to Internet messages, the following language should be added: The Act's proscription against the unauthorized recording of private messages shall not apply to the recording of e-mail and ICQ messages on the computer of the intended recipient, and shall permit the evidentiary use of such messages.[203]

If the legislature concludes that the all-party default is the appropriate standard for e-mail and ICQ messages, some clarifying language is needed to ensure that the doctrine of implied consent is consistently applied. Furthermore, language should be included within the WPA to exempt the automatic caching of e-mail messages. An exception could be crafted to permit the caching of e-mail messages on the computer of the recipient, yet prohibit their evidentiary use. Such an exception would be consistent with the spirit and past interpretation of the WPA. I suggest the following language: *This Act shall not prohibit the automatic caching of e-mail messages routinely performed on the computer of the intended recipient. However, such messages are not*

198. *Townsend*, 147 Wash. 2d at 674, 57 P.3d at 259.

199. BRILL, *supra* note 97, at 98.

200. Decoste, *supra* note 20, at 87–88.

201. BRILL, *supra* note 97, at 108.

202. The trade-off between the one-party and all-party consent rule is essentially a give and take between the ability of the police to readily obtain relevant and accurate evidence and the degree of privacy we, as a society, believe is necessary. *See* Bast, *supra* note 18, at 911–15.

203. The emerging issue of Internet telephony must also be considered. Internet telephony is the transmission of voice messages via the Internet instead of a public switched telephone network. Internet Telephony: What is it? *At* http://www.cs.tcd.ie/courses/baict/bac/jf/projects/99/telephony/ (last visited July 10, 2004). Since Internet telephony is similar to the aural communications that are the conventional domain of the WPA, they are distinguishable from e-mail and ICQ messages, and their recording should continue to require the permission of all parties to the communication.

admissible as evidence by the intended recipient without judicial authorization pursuant to RCW 9.73.090(2).

Additionally, the legislature should address the fact that e-mail servers, because they routinely record e-mail messages, are technically in violation of the WPA.[204] The appropriate language could readily be inserted into section 9.73.070, which currently exempts activities conducted by common carriers in the construction, maintenance, repair, and operations of the common carrier's communications facilities.[205] I suggest the following: *This Act shall not prohibit the routine recording of e-mail messages on the e-mail server of an e-mail provider that has been authorized by the intended recipient. However, such messages are not admissible as evidence by the intended recipient without judicial authorization pursuant to RCW 9.73.090(2).*

There is also a significant question as to whether federal law should preempt state law in this area. The federal government has enacted a comprehensive body of law regarding communications technologies.[206] To date, Washington courts have held that federal privacy law does not preempt the state from enacting statutes that provide greater protection than federal law.[207] In fact, during the debate concerning the Omnibus Crime Control and Safe Streets Act of 1968,[208] Congress specifically provided for the possibility that individual states may want to apply a more stringent privacy standard than that permitted under federal law.[209]

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204. *See* State v.Townsend, 147 Wash. 2d 666, 675 n.2, 57 P.3d 255, 260 n.2 (2002).

205. WASH. REV. CODE § 9.73.070(1) provides: "The provisions of this chapter shall not apply to any activity in connection with services provided by a common carrier pursuant to its tariffs on file . . . ." A suggested starting point for appropriate language could read: *The provisions of this chapter shall also not apply to computer systems employed as electronic mail servers, to the extent of their essential function as recorders of electronic mail, PROVIDED the operator of the mail server has an agreement on file with the user to provide electronic mail services.*

206. *See, e.g.*, The Privacy Act of 1974, 6 U.S.C. § 552a (2004); Electronic Communications Privacy Act, 18 U.S.C. §§ 2510–2522, 2701–2711 (2004); The USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of the U.S.C.); Communications Decency Act of 1006, Pub. L. No. 104-104, 110 Stat. 133 (codified as amended at 47 U.S.C. § 223 (Supp. II 1997)).

207. State v. Williams, 94 Wash. 2d 531, 539, 617 P.2d 1012, 1017 (1980). *See also infra* text accompanying note 211.

208. Current version at 18 U.S.C. § 2516 (2004).

209. "No applications may be authorized unless a specific State statute permits it. The State statute must meet the minimum standards reflected as a whole in the proposed chapter. The proposed provision envisions that States would be free to adopt more restrictive legislation or no legislation at all, but not less restrictive legislation." S. REP. NO. 90-1097, at 2187 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2187. *But see* Journal of the House at 2031 (Wash. 1967), dialog regarding Engrossed Senate Bill No. 507 Prohibiting certain wiretapping and eavesdropping as follows:

> Question by Mr. Backstrom: "I have continuously offered my objections because of eavesdropping. Do we have it clear that this bill precludes eavesdropping?" Answer by Mr. Heavey: "Right now we have no laws that prevent eavesdropping. . . . This law prevents them from doing it, but it does permit, in rare instances with court approval, the prosecuting attorney or attorney general to eavesdrop or tap lines. I want to point out that

However, we may be at the point where the federal government's occupation of the field of regulating electronic communications is so pervasive so as to make out an argument for federal preemption. There would be advantages to having a consistent law regulating the monitoring of electronic communications that applies uniformly across all fifty states.[210] In light of the events of September 11, 2001, should Washington reconsider its all-party consent rule?

In fact, the reaction from the legislature seems to be just the opposite. Within the Washington Legislature there is an initiative to scale back the expansion of federal eavesdropping powers passed pursuant to the September 11 attack.[211] The legislature does not appear to be ready to surrender its heritage of affording an enhanced degree of privacy rights to Washington's citizens. However, only time will tell if the abrogation of the all-party consent rule for e-mail and ICQ messages, manifest under *Townsend*, is a temporary aberration or the new norm. If one applies the lessons learned with respect to conventional mail and the telephone, the direction that the court adopted in *Townsend* will affect the citizenry's rights for a very long time.

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this in no way circumvents the federal laws of wiretapping because they take precedence over our laws."

Curiously, it appears from this 1967 dialog that the legislature understood that federal law would preempt state law.

210. Although an extensive discussion of federal preemption is beyond the scope of this Note, a cogent argument could be made that, given the fact that state borders are irrelevant to Internet communications, and the expanding role of Internet communications in the national economy, Congress could assert preeminence under its Commerce Clause powers. It also appears that the Washington Legislature understood that federal law would preempt state law. *See supra*, text accompanying note 206.

211. *See* S.J.M. 8053 (Wash. First Reading Feb. 4, 2004). The Memorial's authors indicate that certain provisions of the U.S.A. Patriot Act (Public Law 107-56) are inconsistent with the WPA, as follows:

> WHEREAS, We believe these civil liberties are precious and are now threatened by certain provisions of the U.S.A. P.A.T.R.I.O.T. Act . . . which:
>
> Reduces judicial supervision of telephone and internet surveillance; Expands the government's ability to conduct searches with and without warrants; Grants the FBI broad access to sensitive and personal information without having to show evidence of a crime, without a court order and, in some instances, without having to notify the target and demonstrate that the information relates to terrorism; and
>
> WHEREAS, The Senate of the State of Washington and the House of Representatives of the State of Washington concur that the fight against terrorism must not be waged at the expense of the essential rights and liberties of the residents of this state, as contained in the United States Constitution and Bill of Rights and the Constitution of the State of Washington.

Id.