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Civil Aspects of Intrafamily Eavesdropping in Illinois: Caveats to Comprehensive Remedial Weaponry, 12 J. Marshall J. Prac. & Proc. 537 (1979)

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COMMENTS

CIVIL ASPECTS OF INTRAFAMILY EAVESDROPPING IN ILLINOIS: CAVEATS TO COMPREHENSIVE REMEDIAL WEAPONRY

INTRODUCTION

Eavesdropping[1] is an ancient practice which at old common law was condemned as a nuisance and punishable as a criminal offense.[2] At that time, eavesdroppers "listened by the naked ear under the eaves of houses, or their windows, or beyond their walls, seeking private discourse."[3] The contemporary advent of sophisticated mechanical devices transformed covert surveillance into a potent privacy invader which has spawned litigation regarding law enforcement and national security,[4] industrial espionage,[5] and invasions of privacy by communications common

1. "Eavesdropping" is the practice of listening secretly to the private conversations of others. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 411 (1976). Contemporary eavesdropping, with which this comment is concerned, refers to surveillance that is aided by electronic or mechanical devices. *See* J. CARR, THE LAW OF ELECTRONIC SURVEILLANCE 2 (1977) [hereinafter cited as THE LAW OF ELECTRONIC SURVEILLANCE]. "Wiretapping" and "bugging" are the most prevalent methods of intercepting communications. A "wiretap" involves a connection to a wire, usually a telephone line, of a device capable of intercepting or recording conversations transmitted thereon. *Id.* A "bug" is a miniature electronic device which overhears or records a speaker's conversations. *Id. See generally* 29 AM. JUR. PROOF OF FACTS 591 (1972 & Supp. 1978) (includes discussion of mechanical and engineering aspects of electronic surveillance and an exhaustive legal bibliography on eavesdropping of all varieties); H. SCHWARTZ, TAPS, BUGS, AND FOOLING THE PEOPLE (1977).

2. Berger v. New York, 388 U.S. 41, 45 (1967).

3. E. LAPIDUS, EAVESDROPPING ON TRIAL 3 (1974) [hereinafter cited as EAVESDROPPING ON TRIAL].

4. For discussions of present constitutional aspects of the use of surveillance equipment in law enforcement contexts, *see* McNamara, *The Problem of Surreptitious Entry to Effectuate Electronic Eavesdrops*, 15 AM. CRIM. L. REV. 1 (1977); Note, *Placement of Pen Registers By Telephone Company Following Court Order*, 16 AM. CRIM. L. REV. 111 (1977); Note, *Judicial Sealing of Tape Recordings Under Title III*, 15 AM. CRIM. L. REV. 89 (1977).

For an overview of problems involved in national security eavesdropping, *see* EAVESDROPPING ON TRIAL, *supra* note 3, at 96. The most recent judicial treatment of this sub-area is Smith v. Nixon, No. 78-1526 (D.C. Cir. July 12, 1979) (civil suit initiated to remedy governmental interception of plaintiff's communications; entry of summary judgment for defendants reversed on appeal).

5. In industrial espionage cases, eavesdropping occurs when surveil-

carriers.[6] While the prevalence of these eavesdropping activities is recognized, authorities indicate that the most common background for electronic surveillance in the United States is marital discord.[7] Nevertheless, the issue, whether family members possess a remediable right of individual privacy to be free from intrafamily interceptions of their telephonic and other communications, is of recent origin. Judicial treatment has not been uniform.[8]

The most readily discernible feature of modern eavesdropping is its propensity for eliciting a wide array of judicial response. Surveillance has been approved under certain circumstances, most notably in law enforcement contexts.[9] In non-criminal settings, it has been justified by the urgency of the situation.[10] But others have branded it a "dirty business" which should not be allowed to indiscriminately invade privacy.[11] Indeed, eavesdropping problems have long rested on this delicate balance between expediency and personal privacy interests. While family members have zones of protectable constitutional privacy created apart from their familial relationships,[12] non-

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lance devices are employed in order to obtain business secrets. *See generally* THE LAW OF ELECTRONIC SURVEILLANCE, *supra* note 1, at 25. Another important aspect of industrial eavesdropping occurs, however, where a company intercepts communications of employees who are believed to be leaking confidential information to the company's competitors. *See, e.g.*, Briggs v. American Air Filter Co., 455 F. Supp. 179 (N.D. Ga. 1978). *See also* Bianco v. American Broadcasting Cos., 470 F. Supp. 182 (N.D. Ill. 1979).

6. *See, e.g.*, State v. Dwyer, 120 Ariz. 291, 585 P.2d 900 (1978) (reversed murder conviction for failure to exclude evidence obtained by telephone operator who listened to defendant's conversations over a long period of time); Southwestern Bell Tel. Co. v. Ashley, 563 S.W.2d 637 (Tex. Civ. App. 1978) (civil suit for damages for intercepting confidential communications).

7. NATIONAL LAWYERS GUILD, RAISING AND LITIGATING ELECTRONIC SURVEILLANCE CLAIMS IN CRIMINAL CASES § 2.4(c)(1) (1977) (authors document their claim that an enterprising amateur eavesdropper can purchase electronic voice-activated recording devices for as little as forty dollars); Comment, *Interspousal Electronic Surveillance Immunity*, 7 TOL. L. REV. 185, 211 (1975) (eighty percent of eavesdropping complaints involve family disputes) [hereinafter cited as *Interspousal Surveillance Immunity*].

8. *See In re* Marriage of Lopp, 378 N.E.2d 414 (Ind. 1978), *cert. denied*, 99 S. Ct. 1023 (1979) (citing cases in direct conflict). *See* note 210 *infra*.

9. *See, e.g.*, Dalia v. United States, 99 S. Ct. 1682 (1979).

10. *See* Stamatiou v. United States Gypsum Co., 400 F. Supp. 431 (N.D. Ill. 1975), *aff'd*, 534 F.2d 330 (7th Cir. 1976) (necessity in protecting corporate profits from extortion attempt justified technically illegal eavesdropping); Beaber v. Beaber, 41 Ohio Misc. 95, 322 N.E.2d 910 (1974), *aff'd*, No. 4187, Ohio App., 5th Dist., Aug. 4, 1975 (inability to gather evidence by other means justified unlawful interceptions of communications).

11. *E.g.*, White v. Weiss, 535 F.2d 1067, 1071 (8th Cir. 1976); Commonwealth v. Murray, 423 Pa. 37, 50, 223 A.2d 102, 109 (1966) (paraphrasing early privacy opinions confronted with government wiretapping); Olmstead v. United States, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting); *Id.* at 475 (Brandeis, J., dissenting).

12. "[T]he marital couple is not an independent entity. . . , but an asso-

governmental invasions do not impinge upon federal constitutional privacy rights. Instead, these personal privacy infringements, including eavesdropping in domestic relations contexts, have been purportedly reserved to the province of the states.[13] All but a few jurisdictions have legislatively utilized this power in enacting anti-eavesdropping statutes.[14]

The preliminary portions of this comment will examine the general development of sanctions against eavesdropping in Illinois, and the manner in which these prohibitions have been supplemented by federal legislation. Scrutiny will then be narrowed to "intrafamily interceptions of communications through eavesdropping"[15] and the rights and possible rebuttals to civil[16] causes of action for damages and injunctive relief cognizable under Illinois and federal law. Supplementary thereto will be an extrapolation of competing concerns regarding demands, in divorce and child custody disputes, for exclusion of evidence obtained through unlawful eavesdropping. An important issue underlying the entire discussion is whether the family should be

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ciation of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual. . . ." Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

13. Katz v. United States, 389 U.S. 347, 350 (1967).

14. Idaho, Indiana, Mississippi, Missouri, Vermont, West Virginia, and Wyoming do not statutorily proscribe wiretapping or eavesdropping. The National Law Journal, Apr. 16, 1979, at 26. For exhaustive lists of state eavesdropping legislation, *see* notes 59-60 *infra*.

15. "Intrafamily interceptions of communications through eavesdropping" descriptively reduces the scope of this comment. The term "eavesdropping" refers to Illinois legislation prohibiting such practices. *See* note 20 *infra*. The phrase "interceptions of communications" is utilized in federal statutes and the 1970 Illinois Constitution. *See* text accompanying notes 31-33 & 37-43 *infra*. While the language of the invasion of privacy section of the Illinois Constitution seems to encompass visual surveillance, the focus of this comment will be on aural acquisitions of communications. The Illinois and federal statutory sanctions on aural acquisitions have been held not to include implied bans on the covert use of photographic equipment. *See* Cassidy v. American Broadcasting Cos., 60 Ill. App. 3d 831, 377 N.E.2d 126 (1978); Sponick v. Detroit Police Dep't., 49 Mich. App. 162, 211 N.W.2d 674 (1973).

"Intrafamily" refers to the immediate family bonds of spouses and parent-child. While various fact situations are addressed by this comment, two introductory examples are: (1) the attachment of an eavesdropping device to a telephone or the placing of a "room bug" by one spouse, without the other's knowledge, in order to discover marital infidelity or grounds for divorce, and (2) the attachment of a recording device to a telephone by a custodial parent to enable interception of conversations between his estranged or former spouse and the parties' child.

16. Criminal prosecution aspects of eavesdropping will not be dealt with, except when necessary for comparative purposes. The usual prerequisite for statutory civil recovery, however, is civil proof of a violation of criminal eavesdropping provisions. Stamatiou v. United States Gypsum Co., 400 F. Supp. 431, 436 (N.D. Ill. 1975), *aff'd*, 534 F.2d 330 (7th Cir. 1976). *See generally* Annot., 74 A.L.R.2d 855 (1960 & Supp. 1978) (addresses state legislation making wiretapping a criminal offense).

treated as an association of separate individuals or as a single entity, thereby qualifying rights to individual privacy.

THE DEVELOPMENT OF CIVIL RECOVERY FOR UNLAWFUL EAVESDROPPING IN ILLINOIS

Realizing their potential for invading the privacy of human conversation, various jurisdictions, with Illinois at the forefront, legislatively outlawed employment of wiretaps and other mechanical eavesdropping equipment. In 1895, the initial Illinois anti-wiretapping statute was enacted. This legislation, with minor amendments in language, served this state until 1957.[17] At that time, the General Assembly, in attempting to keep pace with technological advancements, expanded the eavesdropping ban beyond taps on telephone lines to encompass the use of all electronic devices. The term "electronic" was dropped in 1961, as it was believed that even that modifier might create an exception to the eavesdropping prohibition. The crux of the latter statutory scheme is in effect today.

The present Illinois statute[18] purports to be an absolute ban on private surveillance.[19] It developed the common law condemnation of eavesdropping into a three-pronged attack on the problem. The backbone of the Illinois scheme is a broad criminal punishment provision[20] which, subject to narrow exceptions not pertinent in intrafamily cases,[21] prohibits using eavesdropping devices[22] in listening to or recording any conversation.

17. The statutory scheme may be found in ILL. REV. STAT. ch. 134, §§ 15(a), 16 (1959), which provided in pertinent part: "[a]ny person . . . who maliciously and wilfully . . . taps any telephone line . . . belonging to another . . . shall be punished. . . ." It is apparent that tapping one's own phone line was not legislatively proscribed.

18. ILL. REV. STAT. ch. 38, §§ 14-1 *et seq.* (1977).

19. ILL. ANN. STAT. ch. 38, §§ 14-1 *et seq.* (Smith-Hurd 1964 & Supp. 1978); Michael, *Electronic Surveillance In Illinois*, 1 LOY. CHI. L.J. 33, 45 (1970) [hereinafter cited as *Electronic Surveillance In Illinois*].

20. An Act To Regulate Eavesdropping, ILL. REV. STAT. ch. 38, § 14-2 (1977) provides: "A person commits eavesdropping when he: (a) Uses an eavesdropping device to hear or record all or any part of any conversation unless he does so (1) with the consent of all of the parties to such conversation or (2) with the consent of any one party . . . in accordance with Article 108A of the Code of Criminal Procedure. . . ."

Article 108A dealing with judicial supervision of the use of eavesdropping devices is beyond the scope of this comment, as it is unlikely that such authorizations would be prevalent in intrafamily situations.

21. The statutory exceptions include: (1) listening to public communications, (2) the overhearing of conversations by employees of communications common carriers in the normal course of their employment, and (3) listening to or recording emergency communications made by law enforcement, fire-fighting, and medical agencies. *See id.* § 14-3.

22. An "eavesdropping device" is any device capable of being used to hear or record conversation whether such conversation is conducted in person, by telephone, or by any other means. *Id.* § 14-1(a).

Eavesdropping is a felony,[23] and those convicted may be punished by up to a $10,000 fine and one to three years imprisonment.[24]

The two remedial devices supplementing the criminal penalties are a civil liability section and an exclusionary rule. Each is conditioned upon a violation of the criminal sanctions of the eavesdropping article. Upon showing a criminal violation by a preponderance of the evidence, injured parties are entitled to injunctive relief, as well as actual and punitive damages.[25] Notwithstanding its availability in a prosecution of an eavesdropper, any evidence obtained in violation of the surveillance ban is inadmissible in any civil or criminal proceeding.[26]

A recent modification strengthened the ban on covert interceptions. The 1961 Act, as originally promulgated, included a one-party consent exception whereby a person could lawfully hear or record a conversation between two others as long as one party had previously acquiesced.[27] Recent amendments require any one-party consent to be coupled with an eavesdropping order authorized by a State's Attorney and Circuit Judge. The rejection of one-party consent gives practical effect to the claim that the state unqualifiedly prohibits mechanical eavesdropping in the private sector. Prior to the 1969 amendment, the recording of a conversation by or with the consent of a party thereto was lawful despite the other party's lack of knowledge and consent. Today the statute comports with the Committee Comments of 1961 which provide that "since no one seems to favor eavesdropping by private individuals . . . the sole question is as to whether the police can."[28] While conceivably circumstances could develop where a consenting spouse, as a criminal complainant, could defend surveillance because of judicial authorization, the one-party consent defense seems to have been effectively eliminated from intrafamily eavesdropping consideration.

The legislative abrogation of the one-party consent exception indicates this state's contempt for eavesdropping. Despite the inclusiveness of the statutory scheme, however, developments in this decade have expanded plaintiffs' possibilities for common law relief and have raised Illinois citizens' freedoms

23. *Id.* § 14-4.

24. *Id.* §§ 1005-8-1 & 1005-9-1.

25. *Id.* § 14-6. (Recovery of damages does not foreclose obtainment of equitable redress).

26. *Id.* § 14-5.

27. *See In re* Estate of Stevenson, 44 Ill. 2d 525, 532, 256 N.E.2d 766, 769 (1970).

28. ILL. ANN. STAT. ch. 38, §§ 14-1 *et seq.* (Smith-Hurd 1964 & Supp. 1978).

from interceptions of communications to constitutional status. In *Leopold v. Levin*,[29] the Illinois Supreme Court acknowledged the novel existence of a common law cause of action for tortious invasion of privacy. This tort has yet to be recognized in an intrafamily eavesdropping situtation, though it has been impliedly acknowledged in a non-governmental surveillance scenario.[30] Illinois public policy, as evidenced by the eavesdropping statutes, indicates that its development probably requires only appellate litigation of such a case.

The 1970 Illinois Constitution elevated prohibitions against interceptions of communications to a fundamental constitutional principle. Article I, section 6 provides, "The people shall have the right to be secure in their persons, houses, papers, and other possessions against unreasonable searches, seizures, *invasions of privacy or interceptions of communications by eavesdropping devices or other means.*"[31] This "secured right" section appears to be the basis of a constitutional cause of action for unreasonable interceptions when it is read in conjunction with Article I, section 12 which commences, "Every person *shall* find a certain remedy in the laws for all injuries and wrongs which he receives to his person, *privacy*, property, or reputation."[32] Far from being merely repetitive of the eavesdropping statutes, the constitutional mandate extends beyond the scope of existing legislation. One element of the offense of eavesdropping and, therefore, the statutory civil cause of action, is the use of an eavesdropping device.[33] The constitutional prohibition, however, is intended to reach non-mechanical means of eavesdropping, such as listening with an unaided ear.[34]

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29. 45 Ill. 2d 434, 259 N.E.2d 250 (1970). In *Leopold*, a right of privacy was recognized in the context of an appropriation of another's name or likeness for commercial gain. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 117 (4th ed. 1971). However, the plaintiff, by virtue of his participation in a highly publicized crime, was held to have remained a public figure in which no right of privacy existed. 45 Ill. 2d at 442, 259 N.E.2d at 254.

30. *See* Cassidy v. American Broadcasting Cos., 60 Ill. App. 3d 831, 377 N.E.2d 126 (1978). *See* note 159 *infra*.

31. ILL. CONST. art. I, § 6 (1970) (emphasis added).

32. ILL. CONST. art. I, § 12 (1970) (emphasis added). *See* Hanson, *Illinois and the Right of Privacy: History and Current Status*, 11 J. MAR. J. 91, 101 (1977) [hereinafter cited as *Illinois and the Right of Privacy*]. The argument that Article I, section 12 "privacy" refers to non-eavesdropping invasions of privacy can be dispensed with. Rather, the Illinois Supreme Court has in dictum restricted constitutional privacy protections to interceptions of communications. *See* Illinois State Employees Ass'n v. Walker, 57 Ill. 2d 512, 523, 315 N.E.2d 9, 15 (1974).

33. People v. 5948 W. Diversey Ave. Second Floor Apt., Chicago, 95 Ill. App. 2d 479, 482, 238 N.E.2d 229, 231 (1968).

34. *Constitutional Commentary*, ILL. ANN. CONST. art. I, § 6 (Smith-Hurd).

FEDERAL SUPPLEMENTATION: REPETITION OR KEY TO SUBSTANTIAL AWARDS?

Federal legislation supplements the comprehensive remedial weaponry of the Illinois statutory, invasion of privacy, and constitutional, trilogy. In 1934, Congress enacted legislation that provided that "no person not being authorized by the sender shall intercept any communication and divulge the existence, contents, [or] substance . . . of such intercepted communication to any person."[35] This statute was effectively superseded by passage of Title III of the Omnibus Crime Control and Safe Streets Act of 1968.[36] The dual purpose of this legislation was to protect the privacy of oral and wire communications and to delineate on a uniform basis the circumstances and conditions under which interceptions could be authorized.[37]

Paralleling its Illinois counterpart, Title III adopted the identical tripartite approach to eavesdropping. Interceptions[38] and disclosures of wire[39] and oral communications[40] are prohibited and punishable by fines of up to $10,000 and not more than

35. Federal Communications Act of 1934, 47 U.S.C. § 605 (1970).

36. Pub. L. No. 90-351, 82 Stat. 197 (June 19, 1968) (codified at 18 U.S.C. §§ 2510-2520 (1970)) [hereinafter referred to as Title III].

37. S. REP. NO. 1097, 90th Cong., 2d Sess. 66, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2112, 2154 [hereinafter cited as S. REP. NO. 1097]. The most cited explanations for the enactment of Title III are: (1) the promotion of more effective crime control, United States v. Kahn, 415 U.S. 143, 151 (1974), (2) widespread dissatisfaction with the outdated Federal Communications Act of 1934, because prohibitions against unauthorized use and publication did not amount to a ban on electronic surveillance per se, United States v. Jones, 542 F.2d 661, 667 n.10 (6th Cir. 1976), (3) bringing legislation in line with Supreme Court opinions, United States v. United States Dist. Ct., 407 U.S. 297, 302 (1972), and (4) bringing legislation in line with technological advancements, 11 GA. L. REV. 427, 433 (1977). *See also* Greenwault, *Wiretapping and Bugging: Striking a Balance Between Privacy and Law Enforcement*, 50 JUDICATURE 303, 304-07 (1967) (discussion of great availability and minimal cost of eavesdropping devices); Note, *The Reasonable Expectation of Privacy*, 9 IND. L. REV. 468 (1976).

38. "Intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device. 18 U.S.C. § 2510(4) (1970); United States v. New York Tel. Co., 434 U.S. 159 (1977) ("aural" is the key Title III "interception" element).

39. Wire communications include telephone transmissions. United States v. Rizzo, 583 F.2d 907, 909 (7th Cir. 1978), *cert. denied*, 99 S. Ct. 1216 (1979). The federal definition requires the wire upon which the communication passes be furnished by one operating facilities for the transmission of interstate or foreign communications. 18 U.S.C. § 2510(1) (1970); United States v. Jones, 580 F.2d 219 (6th Cir. 1978) (affirming award of new trial for prosecutorial failure to prove tapped telephone had been supplied by one engaged in interstate or foreign communications commerce).

40. "Oral communications" means that which are uttered by a person exhibiting an expectation that such communications are not subject to interception, under circumstances justifying such an expectation. 18 U.S.C. § 2510(2) (1970).

five years imprisonment or both.[41] Neither the contents of such intercepted communication nor evidence derived therefrom may be received in evidence in any federal or state judicial proceeding.[42] A civil cause of action is created in favor of aggrieved persons, and the awarding of damages is authorized.[43]

Due to Illinois' pervasive eavesdropping ban, many of the federal civil provisions appear repetitive. The Title III exclusionary rule, while applying to state proceedings, does no more than the Illinois suppression requirement. Actual and punitive damages are awardable in both of the statutory causes of action.[44] But the federal statutes digress from the Illinois remedial scheme by providing broader civil redress in terms of attorneys' fees and liquidated damages. Title III entitles injured litigants to a reasonable attorney's fee and other litigation costs reasonably incurred.[45] In Illinois, it is well-established that attorneys' fees are not recoverable by prevailing parties unless the grant is specifically authorized by statute.[46] The Illinois eavesdropping law does not mention attorneys' fees, and they are therefore not recoverable against a proven eavesdropper.

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41. 18 U.S.C. § 2511(1)(a) (1970) provides, "Except as otherwise specifically provided in this chapter, any person who wilfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication; shall be fined . . . or imprisoned . . . or both."

42. *Id.* § 2515. This ban is not limited to criminal cases or law enforcement contexts. *See* Rickenbaker v. Rickenbaker, 290 N.C. 373, 226 S.E.2d 347 (1976).

43. *Id.* § 2520. Where a defendant discloses that which he unlawfully intercepts, plaintiffs are not entitled to separate recovery for the interception and disclosure activities. Campiti v. Walonis, 467 F. Supp. 464, 466 (D. Mass. 1979).

44. Injunctive relief is authorized only by the Illinois eavesdropping statute. *Compare* ILL. REV. STAT. ch. 38, § 14-6 (1977) *with* 18 U.S.C. § 2520 (1970).

45. 18 U.S.C. § 2520(c) (1970); *see* Campiti v. Walonis, 467 F. Supp. 464 (D. Mass. 1979) ($5000 attorney's fee where damages limited to $1000); *cf.* Jacobson v. Rose, 592 F.2d 515 (9th Cir. 1978) (affirming $12,000 attorney's fee award which matched actual damage recovery).

46. Stamatiou v. United States Gypsum Co., 400 F. Supp. 431, 440 (N.D. Ill. 1975), *aff'd*, 534 F.2d 330 (7th Cir. 1976); People v. Nicholls, 71 Ill. 2d 166, 177, 374 N.E.2d 194, 199 (1978); Meyer v. Marshall, 62 Ill. 2d 435, 442, 343 N.E.2d 479, 483 (1976); House of Vision, Inc. v. Hiyane, 42 Ill. 2d 45, 51-52, 245 N.E.2d 468, 472 (1969); Byers v. First Nat'l Bank, 85 Ill. 423, 427 (1887).

While the general American rule is that attorneys' fees are not recoverable costs, absent statute or agreement of the parties, narrow judicial exceptions have been carved out in Illinois and other states. None of them are pertinent to cases of intrafamily mechanical eavesdropping. *See generally* Hamer v. Kirk, 64 Ill. 2d 434, 356 N.E.2d 524 (1976) (creation of a common fund theory); Serrano v. Priest, 20 Cal. 3d 25, 569 P.2d 1303, 141 Cal. Rptr. 315 (1977) (reviews the bases for common fund, substantial benefit, and private attorney general theories); Sands, *Attorneys' Fees As Recoverable Costs*, 63 A.B.A.J. 510 (1977); Comment, *Constitutionality of the Illinois Cost Statute*, 1976 SO. ILL. L.J. 203 (1976).

Illinois courts have not conclusively determined the meaning of "actual damages" in a surveillance situation. Federal cases, however, conclude that grave emotional upset is remediable.[47] Hence, federal law compensates plaintiffs whose injuries have not physically manifested themselves. Title III can be the key to full recovery; especially where, despite lengthy interception periods, actual damages are minimal or unprovable. While malice must be shown, recovery of punitive damages does not depend on prior proof of actual damages.[48] More important, Title III recovery entails awards of $100 per day of violation of the interception of communication proscriptions.[49] The purpose of this liquidated damages provision is to deter and punish violators.[50] Yet no plaintiff should fail to recognize that this punishment inheres to his benefit, and requires only civil proof of the interception and the length of time upon which a substantial[51] recovery can be achieved.

Problems of Our Federal System and Conflicts of Law

Recognizing that the infusion of national law carries with it a variety of concerns in our federal system, inquiry must focus on problems of federal pre-emption, jurisdiction, and conflicts of law. While one purpose of Title III was to make federal and state legislation consistent, the federal law provides minimum standards, and equally or more stringent state eavesdropping schemes have not been pre-empted.[52] Illinois' exception-less

47. *E.g.*, Gerrard v. Blackman, 401 F. Supp. 1189, 1193 (N.D. Ill. 1975) (hospital officials intercepted patients' communications with family, friends, and attorneys).

48. *Id. Cf.* Jacobson v. Rose, 592 F.2d 515, 520 (9th Cir. 1978) (punitive damages recovery depends on showing defendants acted wantonly, recklessly, or maliciously); Campiti v. Walonis, 467 F. Supp. 464 (D. Mass. 1979) (defendants' belief in the propriety of their interceptions rendered an award of punitive damages inappropriate).

49. 18 U.S.C. § 2520(a) (1970). *Cf.* Campiti v. Walonis, 467 F. Supp. 464 (D. Mass. 1979) (where a plaintiff seeks civil redress against a number of defendants who acted in concert, Title III does not allow the daily liquidated damages award to be multiplied by the number of perpetrators).

50. *See, e.g.*, Jacobson v. Rose, 592 F.2d 515, 520 (9th Cir. 1978); Marks v. Bell Tel. Co. of Pa., 460 Pa. 73, 76, 331 A.2d 424, 426 (1975).

51. *See* Remington v. Remington, 393 F. Supp. 898 (E.D. Pa. 1975) (defendant admitted two and one-half years of covert electronic surveillance). Civil recovery for unlawful interceptions of communications does not deal in trivialities. *See* Southwestern Bell Tel. Co. v. Ashley, 563 S.W.2d 637 (Tex. Civ. App. 1978) (jury awarded one million dollars in damages).

52. People v. Conklin, 12 Cal. 3d 259, 269, 522 P.2d 1049, 1055, 114 Cal. Rptr. 241, 247, *cert. denied*, 419 U.S. 1064 (1974); Commonwealth v. Vitello, 367 Mass. 224, 246, 327 N.E.2d 819, 833 (1975). When a state imposes more rigid requirements than Title III, those will control in all cases except in federal investigations conducted exclusively by federal officers. S. REP. NO. 1097, *supra* note 37, at 2181, 2189. *Accord*, People v. Fidler, 72 Ill. App. 3d 924, 391 N.E.2d 210 (1979) (evidence admissible in state court if obtained in vio-

sanctions are claimed to provide stricter prohibitions against eavesdropping than are found in Title III,[53] and have been repeatedly upheld against pre-emption, as well as constitutional challenges.[54]

Title III expressly applies to state court proceedings and its supplementary remedies are therefore requestable in a civil suit in Illinois courts. Therefore, plaintiffs may plead both state and federal causes of action in state court. Filing suit in federal court is a viable alternative, however, at least in Illinois. Some federal courts have been unwilling to recognize pendent jurisdiction over state eavesdropping causes of action, even where a valid Title III claim has been stated.[55] In *Bianco v. American Broadcasting Companies*,[56] however, a federal district court in Illinois agreed to consider a civil cause of action under the Illinois eavesdropping statutes, after first having dispensed with the Title III claim.[57]

After suit is filed, aspects of conflicts of law might extend inquiry beyond the Illinois and Title III eavesdropping bans. Conflicts problems could permeate intrafamily interception disputes if, for example, estranged spouses or separated family members converse on the telephone from points in different jurisdictions. The recognized rule in such situations is that the law of the locality where the tap exists, and therefore where the interception takes place, governs its validity.[58] This is so even if

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lation of Illinois eavesdropping law by federal officers acting pursuant to Title III).

53. *See Electronic Surveillance In Illinois, supra* note 19, at 45.

54. *See, e.g.*, People v. Giannopoulos, 20 Ill. App. 3d 338, 314 N.E.2d 237 (1974).

55. *See, e.g.*, Remington v. Remington, 393 F. Supp. 898 (E.D. Pa. 1975).

56. 470 F. Supp. 182 (N.D. Ill. 1979).

57. *See id.* at 185. In *Bianco*, defendants' alleged eavesdropping was pleaded as the basis for plaintiffs' state and federal counts. The court determined that under United Mine Workers of Amercia v. Gibbs, 383 U.S. 715 (1966), it had power to adjudicate the state law claim. The court concluded that this was an appropriate situation for the discretionary exercise of pendent jurisdiction. The policy favoring conservation of judicial energy and avoidance of multiplicity of litigation usurped defendants' contentions that the state issues predominated and that a joint trial would confuse the fact finder. 470 F. Supp. at 185.

The court also dispelled defendants' argument that this was a proper case for federal abstention. A federal court can refrain from considering a meritorious claim where a state statute is susceptible of state judicial interpretation which might avoid the necessity of federal constitutional adjudication. *E.g.*, Bellotti v. Baird, 428 U.S. 132 (1976). A similar problem arises when a federal court is confronted with a state statute interpreted only by a state trial court in an unreported, unappealed opinion. *See* Yesterday's Children v. Kennedy, 569 F.2d 431 (7th Cir. 1978). In *Bianco*, there was no constitutional question to avoid, and Illinois appellate courts had construed the state's eavesdropping law on the point to be tried. 470 F. Supp. at 186.

58. Stowe v. Devoy, 588 F.2d 336, 341 n.12 (2d Cir. 1978).

the conversation transgressed jurisdictional boundaries, and the injury to the aggrieved party occurred elsewhere. Illinois telephone users who are eavesdropped upon by someone in a sister state must proceed under that state's law. A number of jurisdictions have patterned their legislation after Title III.[59] But not all states couple civil remedies with criminal punishment.[60] Thus, some plaintiffs may be left to the remedies of Title III and the deliberately developing common law tort of invasion of privacy.

TITLE III CIVIL RECOVERY FOR INTRAFAMILY INTERCEPTIONS OF COMMUNICATIONS

While Title III's attorney's fee and liquidated damages provisions serve to deter eavesdroppers and adequately compensate victims, various pitfalls stand between surveillance discovery and recovery. Not all defenses to a Title III civil claim emanate solely from the infusion of domestic conflicts into a statutory scheme primarily concerned with law enforcement. Tortured interpretations of clear statutory language and a judicially carved intrafamily surveillance exception to federal jurisdiction do, however, originate in applications of Title III to domestic eavesdropping.

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59. CAL. PENAL CODE §§ 631 *et seq.* (West 1970 & 1978 Supp.); COLO. REV. STAT. §§ 18-9-301 *et seq.* (1973); FLA. STAT. ANN. §§ 934.01 *et seq.* (West 1976); KAN. STAT. §§ 21-4001, 22-2514 *et seq.* (1974); MD. CTS. & JUD. PROC. CODE ANN. §§ 10-401 *et seq.* (Cumm. Supp. 1978); MASS. GEN. LAWS ANN. ch. 272, §§ 99 *et seq.* (West 1976); NEB. REV. STAT. §§ 86-701 *et seq.* (1976); NEV. REV. STAT. §§ 200.610 *et seq.* (1975); N.H. REV. STAT. ANN. §§ 570-A: 1 *et seq.* (Supp. 1977); N.J. STAT. ANN. §§ 2A: 156A-1 *et seq.* (West 1976); PA. STAT. ANN. tit. 18, §§ 5701 *et seq.* (Purdon 1977); R.I. GEN LAWS §§ 12-5.1-1 *et seq.* (Supp. 1978); S.D. COMPILED LAWS ANN. § 23-13A-2 (1978); UTAH CODE ANN. §§ 76-9-401 *et seq.* (1978); VA. CODE §§ 19.2-61 *et seq.* (1976); WASH. REV. CODE ANN. §§ 9.73.030 *et seq.* (1977); WIS. STAT. ANN. § 968.31 (West 1978).

60. Among jurisdictions with eavesdropping statutes, the following do not statutorily provide a civil cause of action to the aggrieved person: ALA. CODE § 37-8-210 (1977); ALASKA STAT. § 11.60.280 (1978); ARIZ. REV. STAT. ANN. § 13-3004 (1978); CONN. GEN. STAT. ANN. § 53A-187 (West 1977); DEL. CODE ANN. tit. 11, § 1336 (1975); GA. CODE ANN. §§ 26-3001 *et seq.* (1976); HAW. REV. STAT. § 711-1110 (1976); IOWA CODE ANN. § 727.8 (Supp. 1978); KY. REV. STAT. § 433.330 (1976); LA. REV. STAT. ANN. § 14:332 (West 1978); MICH. COMP. LAWS ANN. § 750.539 (Supp. 1978); MONT. REV. CODES ANN. § 94-8-114(1)(c) (1977); N.M. STAT. ANN. § 40A-12: 1 (Supp. 1978); N.Y. PENAL LAW §§ 250.00 *et seq.* (McKinney 1975); N.C. GEN. STAT. §§ 14-227.1 *et seq.* (Supp. 1977); N.D. CENT. CODE § 12.1-15-02 (1976); OHIO REV. CODE ANN. §§ 2933.58 & 4931.28 (1976); OKLA. STAT. ANN. tit. 21, § 1757 (Supp. 1978); OR. REV. STAT. § 165.540 (1975); S.C. CODE § 16-17-470 (1976); TENN. CODE ANN. § 39-4533 (Supp. 1978); TEX. CRIM. PROC. CODE ANN. art. 38.23 (Vernon 1979).

Other jurisdictions have not enacted surveillance statutes, and rely totally on Title III. *See, e.g., In re* Marriage of Lopp, 378 N.E.2d 414, 416 (Ind. 1978), *cert. denied*, 99 S. Ct. 1023 (1979). *See* note 14 *supra*.

Statutory Interpretation: Conflict in the Circuits

The leading case scrutinizing Title III in an interspousal civil suit for damages was *Simpson v. Simpson*,[61] which denied a post-divorce cause of action to a woman whose husband had covertly attached a recording device to the marital home telephone. The Fifth Circuit initially noted that "[t]he naked language of Title III, by virtue of its inclusiveness, reaches this case,"[62] but qualified this by holding that "Congress did not intend such a far reaching result, one extending into areas normally left to the states, those of the marital home and domestic conflicts."[63] To buttress their conclusion, the court embarked upon an exhaustive and admittedly inconclusive search of the legislative history of Title III. It found no direct indication that Congress intended to create an interspousal eavesdropping cause of action, and discovered only scattered suggestions that it was aware that the statute's inclusiveness could reach such a case.[64] This statutory interpretation was also supported by warning that criminal punishment would be possible. Noting that criminal statutes must be construed to avoid ensnaring behavior not clearly proscribed, the court utilized its aforementioned statutory conclusion to state that interspousal eavesdropping was not clearly proscribed, and was therefore neither criminally punishable nor civilly remediable.[65] The *Simpson* opinion was carefully limited, however, to interceptions between cohabiting spouses perfected within the marital home.[66]

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61. 490 F.2d 803 (5th Cir.), *cert. denied*, 419 U.S. 897 (1974). In *Simpson*, the defendant obtained a device for recording telephone conversations from the family phone. While the parties had been divorced prior to the filing of the eavesdropping suit, plaintiff's communications with men other than the defendant, had been intercepted while the parties had been married and living together. The defendant played the tape recordings for various neighbors and friends, and for an attorney, on whose advice plaintiff agreed to an uncontested divorce. *Id.* at 804.

62. *Id.* at 805.

63. *Id.* 18 U.S.C. § 2520 (1970) commences "[*a*]*ny person* whose wire or oral communication is intercepted . . . shall (1) have a civil cause of action against *any person* who intercepts . . . such communication and (2) be entitled to recover from *any* such person. . . ." (emphasis added).

64. 490 F.2d at 806. Four reasons were given to support this conclusion: (1) the major purpose of Title III had been to combat crime, especially organized crime, S. REP. NO. 1097, *supra* note 37, at 2157, (2) the real concern of Title III was strengthening the position of law enforcement officers, *id.* at 2112, (3) the equivalent of only one page of legislative commentary concerned private interceptions, 490 F.2d at 806-07, and (4) there were statements made before Congressional hearings that there was no intention of making it a crime for a father to listen in on his teenage daughter's telephone conversations. *Hearings on the Anti-Crime Program Before Subcomm. No. 5 of the House Jud. Comm.*, 90th Cong., 1st Sess. 901 (1967).

65. *Id.* at 809.

66. *Id.* at 810.

Acknowledging *Simpson*'s distinction between interspousal taps in the marital home and third party intrusions therein, a Third Circuit district court in *Remington v. Remington*,[67] agreed that Congress did not intend to provide a federal remedy for purely domestic interceptions, but allowed a man's suit against his former wife who, during their marriage, had acted in concert with others in tapping the marital home telephone.[68] This anomalous distinction, based upon the presence or absence of third party assistance, has been criticized.[69] The most obvious criticism of this line of demarcation has never been mentioned; namely, the unfairness of providing a defense to one who is skilled in electronics, while punishing one who must seek third party aid in accomplishing an equivalent interception.

The Sixth Circuit refused to be bound by these precedents and third party distinctions. In *United States v. Jones*,[70] the dismissal of an interspousal eavesdropper's indictment was reversed despite the absence of third party wiretapping assistance. *Simpson* was distinguished because the interception had not taken place in the marital home between cohabiting spouses.[71] The *Jones* defendant had been living apart from his wife, and perfected the interception on the telephone in her abode. The *Jones* opinion was not content with distinguishing *Simpson*, however, and employed the identical legislative matter in concluding that Congress had not intended an interspousal exception to Title III.[72] This elucidation brought the circuits into conflict on the existence of an implied interspousal

67. 393 F. Supp. 898 (E.D. Pa. 1975). In *Remington*, the defendant was assisted in her eavesdropping by private detectives and attorneys, who were also made parties to the suit. Where a plaintiff recovers against multiple eavesdropping defendants, the liability is not individual, but joint and several. *E.g.*, Jacobson v. Rose, 592 F.2d 515, 520 (9th Cir. 1978). For a discussion of third party's attempts to create an implied derivative spousal immunity to Title III, *see* text accompanying notes 105-115 *infra*.

68. 393 F. Supp. at 901.

69. One anomaly noted is that while if a spouse had third party aid in the surveillance, he can be sued, a spouse who intercepts a telephone communication on his own and then discloses the preserved information to various persons, has a valid defense for his actions. *See Interspousal Surveillance Immunity, supra* note 7, at 208. *Cf.* 18 U.S.C. § 2520 (1970) (disclosures and other uses of intercepted communications are as civilly remediable as the interceptions themselves).

Another argument that has been raised is that when the courts focus on third party assistance to the defendant, they lack a proper perspective and should concern themselves more with the invasions of privacy of parties to the conversations with the spouse who is eavesdropped upon. *Interspousal Surveillance Immunity, supra* note 7, at 201, 209.

70. 542 F.2d 661 (6th Cir. 1976).

71. *Id.* at 672.

72. *Id.* at 667-68. Alternative premises were used in *Jones*. First, the court espoused the well-established principle of construction that legislative histories should not be referred to when a statute is clear on its face.

Title III immunity. The task of exploring the weaknesses of the decisions and their supporting rationale was left to the commentators.

Despite arguments that *Simpson* was wrongly decided, would and should never be followed, and that *Jones* rendered its statutory interpretation valueless,[73] the Fifth Circuit opinion remains a precedential bar to civil recovery under Title III.[74] Furthermore, notwithstanding its denouncement of *Simpson*, the *Jones* opinion ended apologetically with, "[w]e reach this conclusion reluctantly because we share the concern of other courts which have grappled with this problem, that application of *federal law* to essentially *domestic conflicts* may lead to harsh results."[75] Hence, what was considered a matter of statutory

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The court believed the "any person" language of section 2520 was as unambiguous as any that could have been chosen. *Id.*

Secondly, the *Jones* opinion disputed *Simpson*'s legislative history conclusion, finding a number of Congressional references to private interceptions, some dealing with domestic relations. *E.g.,* (1) "[T]itle III prohibits all wiretapping and electronic surveillance by persons other than duly authorized law enforcement officers." S. REP. NO. 1097, *supra* note 37, at 2153. (2) "A broad prohibition is imposed on private use of electronic surveillance, particularly in *domestic relations* and industrial espionage situations." *Id.* at 2272 (emphasis added).

Congress passed Title III pursuant to its commerce powers to reach industrial espionage cases. There is no interstate character in many domestic relations interceptions, hence Congress' alternative basis, section five of the fourteenth amendment, shows that a principal area of the legislators' concern was the use of surveillance for marital litigation. 542 F.2d at 669. The Sixth Circuit also rejected the frivolous contention that the single page of references to private interceptions somehow justified judicial creation of an interspousal Title III immunity. It believed that the ban on all forms of private surveillance was so universally recognized that Congress concentrated on law enforcement problems. *Id.*

73. *See* THE LAW OF ELECTRONIC SURVEILLANCE, *supra* note 1, at 100 (author rejects *Simpson* as wrongly decided); *Interspousal Surveillance Immunity, supra* note 7, at 201 (author quoted from private correspondence with G. Robert Blakely, the primary author of Title III, "[t]he Fifth Circuit decision *Simpson* is the one that was incorrectly decided. Title III was intended to mean what it says—no surveillance by third parties without a warrant—by police, spouses . . . or [in] any other relevant relation."); 11 GA. L. REV. 427, 434 (1977) (*Simpson* should not be followed); 11 SUFFOLK L. REV. 1367, 1373 (1977) (*Jones* renders *Simpson*'s interspousal immunity construction without merit).

74. *See* United States v. Rizzo, 583 F.2d 907, 909 (7th Cir. 1978), *cert. denied*, 99 S. Ct. 1216 (1979) (refusing to decide between the Fifth and Sixth Circuit approaches, deciding the case on other grounds). In its only chance to overrule *Simpson*, the Fifth Circuit in United States v. Schrimsher, 493 F.2d 848 (5th Cir. 1975), distinguished the fact that the parties in the latter case were not legally married, and that there was no "marital home" eavesdropping locus in quo. *Id.* at 851. *But see* Kratz v. Kratz, 48 U.S.L.W. 2173 (E.D. Pa. Aug. 23, 1979) (*Simpson* expressly rejected in holding that wife whose private telephone conversations were intercepted and recorded by her husband had Title III civil cause of action for damages).

75. 542 F.2d at 673 (emphasis added). For the results of *Jones* on remand, *see* note 39 *supra*.

interpretation in *Simpson* was transformed by Jones' dictum into a problem of judicial restraint and "eavesdropping federalism."

Judicial Restraint: Intrafamily Eavesdropping Federalism

In *Anonymous v. Anonymous*,[76] the intrafamily interception issue was framed in terms of the point at which wiretapping leaves the province of mere marital disputes, a matter left to the states, and rises to the level of criminal conduct justifying application of federal law.[77] This federalism test was applied to a situation where a post-divorce Title III civil suit was commenced by a woman against her former husband, who, while in temporary custody of the parties' children, electronically eavesdropped upon her conversations with them. The abandonment of *Simpson*'s statutory interpretation test is evidenced by the court's holding. While the court suggested that under certain circumstances a plaintiff could recover from a spouse under Title III, the present plaintiff was denied federal relief because the facts presented a purely domestic child custody conflict.[78]

This "eavesdropping federalism" concept arises from the historical reluctance of federal courts to entertain suits involving divorce and child custody disputes.[79] With so deep-rooted a basis, judicial restraint from hearing a domestic interception

76. 558 F.2d 677 (2d Cir. 1977), *aff'g* London v. London, 420 F. Supp. 944 (S.D.N.Y. 1976). In *London*, pursuant to a separation agreement, the defendant-husband retained temporary custody. He attached a device which enabled him to listen to conversations made on the living room telephone, without either lifting an extension phone receiver or being present in the room. The defendant also instructed his children, ages five and seven, to push a record button whenever they spoke with their mother. This action preserved messages received while the father was not at home.

The district court opinion spoke in statutory interpretation terms, and expanded the *Simpson* "interspousal eavesdropping in the marital home" exception to encompass intrafamily interceptions within the locus in quo of a family home. What was important was that the eavesdropping situs was in a family home, shared by a parent and another family member, whose conversations were recorded. In this discussion, the plaintiff-mother was relegated to the status of the third party to the conversation, with the central focus being placed on the father's interceptions of the children's messages. 420 F. Supp. at 945-46.

77. 558 F.2d at 677.

78. *Id.* at 679. *Cf.* Nouse v. Nouse, 450 F. Supp. 97 (D. Md. 1978) (incarcerated father's suit against ex-wife for interceptions of his letters to parties' children dismissed pursuant to domestic relations exception to federal court jurisdiction because it concerned custody and parental communication rights).

79. *See, e.g.,* Ohio *ex rel.* Popovici v. Agler, 280 U.S. 379 (1930); *In re* Burrus, 136 U.S. 586 (1890); Solomon v. Solomon, 516 F.2d 1018 (3d Cir. 1975). This implict exception to federal court jurisdiction is thought to date to the oft-quoted dictum in Barber v. Barber, 62 U.S. (21 How.) 582, 584 (1859) (disclaiming any federal court jurisdiction on the subjects of divorce and alimony).

case is much easier to support than the affirmative creation of an intrafamily immunity by judicial fiat. This is especially true where, as in *Simpson*, the immunity develops under the guise of interpretation of a statute whose unambiguous language makes such a construction ludicrous.[80]

The relegation of a Title III plaintiff from federal to state remedial devices is a definite bar to intrafamily eavesdropping suits where a court concludes that the heart of the matter is a marital or other domestic dispute. *Anonymous'* holding spoke of federal law as well as federal court, and could be extended to bar utilization of Title III in state court. Pleading a federal cause of action in state court may not be within the purview of the *Anonymous* rationale, however, if this caveat is merely jurisdictional. Nevertheless, other exceptions, expressly delineated by Congress, permeate the legislation. Some were used to justify the aforementioned statutory interpretation and federalism-based denials of recovery. In state or federal court, these exceptions appear employable as obstacles to Title III relief.

Employability of the Title III Consent Exception

Contrary to Illinois law,[81] and absent an injurious purpose, Title III neither punishes nor remedies interceptions made by or with the consent of a party to the conversation.[82] This rule has been justified in law enforcement cases on the ground that there is no constitutionally protected expectation that a party to whom a communication is made won't consent to its being overhead or recorded.[83] The consent exception is not limited to police surveillance, however, as the legislative history of Title III provides that "the use of surveillance techniques by private un-

80. *See* note 63 *supra* (any person has a civil cause of action against any person). *Cf.* note 41 *supra* (all wilful interceptions are punishable except those specifically exempted). Various courts have rejected the premise that they can imply Title III exceptions that Congress did not explicitly enunciate. *See, e.g.*, Campiti v. Walonis, 453 F. Supp. 819 (D. Mass. 1978) (prison inmates communications intercepted); Rickenbaker v. Rickenbaker, 290 N.C. 373, 226 S.E.2d 347 (1976) (admissibility of wiretapping evidence in divorce proceeding). *Cf.* Connin v. Connin, 89 Misc. 2d 548, 392 N.Y.S.2d 530 (Sup. Ct. 1976) (court would not imply exception to state statute covering suppression of eavesdropping evidence).

81. *See* text accompanying notes 27-28 *supra*.

82. United States v. Craig, 573 F.2d 455, 474 (7th Cir. 1977). 18 U.S.C. § 2511(2)(d) (1970) provides, "It shall not be unlawful . . . to intercept a . . . communication where such person is a party to the communication or where one of the parties to the communication has given prior consent . . . unless such communication is intercepted for the purpose of committing any criminal or tortious act . . . or . . . any other injurious act." This consent exception is not unconstitutionally vague. United States v. Edelson, 581 F.2d 1290, 1292 (7th Cir. 1978).

83. *E.g.*, United States v. Rathbun, 355 U.S. 107, 111 (1957).

authorized hands has little justification *where communications are intercepted without the consent of one of the participants.*"[84] Nevertheless, two requisites must be met[85] by the Title III civil defendant: the consent and the absence of a criminal, tortious, or injurious purpose.

The issue of whether there has been a consent depends on "capacity" to do so in a number of particulars. In *Anonymous*, the court refused to deal with the father's contentions that his seven year old child had consented to the interceptions of his estranged wife's messages, or, that if the child lacked capacity, he as lawful guardian impliedly consented for her. In *Berk v. Berk*,[86] the court was confronted with similar facts and the argument that the "consenting" seven year old was *sui juris*. It hinted that children of that age were incapable of giving effective consent.[87] Illinois' more lenient view of one-party consent, prior to its legislative modification, is evidenced by a case which adjudicated a woman incompetent, but held that she had been capable of acquiescing in the recording of her conversations.[88] The present Illinois statute requires two-party consent or one-party consent coupled with judicial authorization.[89] This rationale would be important, however, in adjudicating the consent issue in Title III suits in Illinois courts. If an incompetent can consent to interceptions, then assent by a minor child, with minimal parental persuasion, could legitimate eavesdropping between estranged or former spouses.

The problem of implied intrafamily consent, though ignored in *Anonymous*, was discussed in *Simpson*, and epitomizes the judicial struggle for standards in determining whether individual privacy rights are qualified by virtue of familial ties. While *Simpson* refused to grant the requested relief, the court was adamant in concluding that any effective consent must be by a party actually participating in the conversation.[90] This excludes any "consent" of an interceptor for his spouse. The contention that the wife's use of the marital home telephone amounted to her implied consent to her husband's eavesdropping was also

84. S. REP. No. 1097, *supra* note 37, at 2156.

85. Consent is an affirmative defense on which the defendant has the burden of proof in a civil action under Title III. Campiti v. Walonis, 453 F. Supp. 819, 823 (D. Mass. 1978); *accord*, United States v. McCann, 465 F.2d 147 (5th Cir. 1972).

86. 95 Misc. 2d 33, 406 N.Y.S.2d 247 (Fam. Ct. 1978). *See* note 185 and accompanying text *infra*.

87. *Id.* at 34, 406 N.Y.S.2d at 248.

88. *In re* Estate of Stevenson, 44 Ill. 2d 525, 532, 256 N.E.2d 766, 770 (1970).

89. *See id.*

90. 490 F.2d at 805 n.3.

rejected.[91] From the foregoing it appears that while an express consent by a participant is rare, it is required. This exception therefore would be most useful in cases dealing with the *Anonymous* child consent situation, or where, for example, a spouse is able to implore a friend to agree both to converse with the other spouse and to the recording of the conversation.

The requisite "absence of an illegal, tortious, or injurious purpose" language has met with conflicting interpretations. The *Simpson* court believed this proviso was intended to reach consensual recordings made for the purpose of blackmailing, threatening, or publicly embarrassing the non-consenting party.[92] Blackmail or a lesser threat was Mr. Simpson's apparent motive, as he used the tape recordings to procure an uncontested divorce. However, the *Simpson* rationale does not encompass situations where one's purpose is noble or merely the satisfaction of curiosity. All interceptions are in effect made for the illegal purpose of violating two-party consent state eavesdropping laws. Adoption of this interpretation would render the federal consent exception valueless, and it has been judicially rejected by an Illinois federal district court.[93]

Various courts have dealt with the claim that a tortious purpose exists where an interceptor tortiously invades the privacy of the non-consenting participant. Invasion of privacy as a tort, if employed as the "tortious purpose," would render the consent exception meaningless since all one-party consent interceptions necessarily involve invasions of the other person's privacy. The Seventh Circuit has taken cognizance of this anomaly, and concluded that a consent is saved if there is a valid underlying purpose other than the invasion of privacy.[94] Satisfaction of one's curiosity as to spousal fidelity or detrimental conversations between a non-custodial parent and the interceptor's child may be such a valid underlying purpose. In addition to barring an intrafamily Title III action for damages, the consent exception's importance also stems from its judicial application to another statutory caveat: the extension telephone exemption.

The Augmentation of the Extension Telephone Exception

The Title III extension telephone exception originates in

91. *Id.* at 805. *But cf.* Commonwealth v. Goldberg, 208 Pa. Super. Ct. 513, 224 A.2d 91 (1966) (implied condition that subscriber to phone line could intercept communications thereon).

92. 490 F.2d at 805 n.5; *accord*, Moore v. Telfon Communications Corp., 589 F.2d 959 (9th Cir. 1978); Meredith v. Gavin, 446 F.2d 794 (8th Cir. 1971).

93. Stamatiou v. United States Gypsum Co., 400 F. Supp. 431, 436 (N.D. Ill. 1975), *aff'd*, 534 F.2d 330 (7th Cir. 1976).

94. United States v. Edelson, 581 F.2d 1290 (7th Cir. 1978).

that instrument's exclusion from the definition of "electronic, mechanical, or other device," the use of which is a prerequisite for the "interception" on which a Title III violation depends.[95] One issue which has left the courts divided is whether a one-party consent requirement is implicit in the Congressionally created extension phone rationale. A line of cases headed by *United States v. Harpel*[96] has concluded that the "ordinary course" language of the extension exemption contemplates that authorization for listening in must be obtained before eavesdropping is excluded from the scope of Title III.[97]

Other viewpoints have found judicial support. In *Simpson*, the Fifth Circuit scrutinized the legislative history of this Title III exception. That court took a narrower approach to the "ordinary course" modifier, and believed it connoted no more than use by the phone line's subscriber rather than intruders to the subscriber's abode.[98] The Second Circuit's elucidation goes further. In *Anonymous, Harpel* was flatly rejected on the ground that its interpretation rendered the extension telephone exception meaningless, since interceptions which were acquiesced in were already exempted by the "consent" section.[99] This clarification merely supported the court's federalism holding. In an industrial espionage situation, however, *Anonymous'* reasoning

95. 18 U.S.C. § 2510(5) (1970) provides " 'electronic, mechanical, or other device' means any device or apparatus which can be used to intercept . . . a communication other than (a) any telephone . . . (i) . . . being used by the subscriber in the ordinary course of its business. . . ." The "ordinary course of its business" modifier was inserted to reduce fears that the police and others could enter and use someone's phone extension without penalty. Its inclusion substituted for the partially recommended deletion of the extension phone section. *See generally* Anonymous v. Anonymous, 558 F.2d 677, 679 (2d Cir. 1977).

96. 493 F.2d 346 (10th Cir. 1974).

97. *Id.* at 351. *Accord*, Gerrard v. Blackman, 401 F. Supp. 1189 (N.D. Ill. 1975) (use of extension to overhear patients' conversations was not in ordinary course of hospital's business); Rickenbaker v. Rickenbaker, 290 N.C. 373, 226 S.E.2d 347 (1976) (extension located in husband's office used not for company business, but solely to record calls made to family home). *Cf.* James v. Newspaper Agency Co., 591 F.2d 579 (10th Cir. 1979) (lower court finding of lawful business purpose in recording telephone calls and decision denying Title III civil relief were held to be consistent with *Harpel's* reasoning).

98. 490 F.2d at 809 n.17. The *Simpson* court had supported its statutory interpretation with this construction of the extension phone exception. It believed that this section was indicative of Congressional intent to abjure from deciding the intimate question of intrafamily privacy. *Id.* This contention is rebuttable, however, as business offices have extensions, and no one has ever claimed that industrial espionage is outside the purview of Title III.

99. 558 F.2d at 679 n.5. Great emphasis was placed on testimony before Congress stating, "I take it nobody wants to make it a crime for a father to listen in on his teenage daughter or some such related problem." *Hearings on the Anti-Crime Program Before Subcomm. No. 5 of the House Jud. Comm.*, 90th Cong., 1st Sess. 901 (1967).

was adopted in holding that "ordinary course" does not necessitate a finding of consent.[100] Since it must be presumed that Congress did not intend a construction which would render the extension phone caveat meaningless, Title III apparently does not provide a civil remedy to one whose conversations were overheard by a family member's use of an extension telephone.

Judicial augmentation of this sub-section, however, has extended its scope well beyond what could ever have been contemplated by Congress. The *Harpel* court had occasion to determine the point at which the Title III "interception" takes place when a recording device is attached to a telephone receiver. It believed the telephone receiver was the real acquiring mechanism, and that the recorder was a mere accessory. Holding that only the acquisition means are crucial, the recording was determined to have been immaterial where the consented to overhearing was lawful.[101]

The *Simpson* and *Anonymous* opinions used similar reasoning in expanding the extension phone exemption from mere "listening in" to encompass the utilization of recording devices in conjunction with the phone.[102] This rationale may be justifiable if the interceptor records conversations while he is listening. That was not the case in those two fact situations, however, since the devices employed enabled the eavesdroppers to record phone conversations regardless of their absence. While these decisions have been severely criticized,[103] and are probably not within the contemplation of Congress,[104] they have not been overruled or qualified. Taken to a logical extreme, Title III recovery could be barred where any type of eavesdropping device is placed on an extension telephone. More important, should a

100. Briggs v. American Air Filter Co., 455 F. Supp. 179, 181 (N.D. Ga. 1978).

101. United States v. Harpel, 493 F.2d at 350. *But cf.* United States v. Turk, 526 F.2d 654 (5th Cir. 1976) (recording, rather than overhearing, was at center of Congress' concern).

102. Anonymous v. Anonymous, 558 F.2d 677, 679 (2d Cir. 1977) (fact that defendant taped conversations that he permissibly overheard was a distinction without a difference); Simpson v. Simpson, 490 F.2d 803, 809 (5th Cir. 1974) (failed to appreciate the difference between mere overhearing and the attachment of a recording device to a telephone).

103. *See Interspousal Surveillance Immunity, supra* note 7, at 205 (extension phone overhearing requires eavesdropper's presence and involves problems of human hunger and sleep, while wiretap needs minimal supervision; wiretap, because it is not selective in what it intercepts, has greater potential for violating privacy rights of third persons unrelated to the domestic squabble).

104. Title III was intended to protect individuals against invasions of privacy by sophisticated surveillance devices. S. REP. NO. 1097, *supra* note 37, at 2153. While the utilization of an extension phone can hardly be termed sophisticated surveillance, the covert attachment thereto of a recording device requires at least some degree of mechanical skill.

court adopt such a position, it would probably apply in suits by family members versus third party private investigators who assist in installing devices and in monitoring conversations. Contempt for third party intrusions, especially by private detectives, has prevented such a result from arising so far.

Implied Derivative Spousal Immunity

Requests for judicial creation of a derivative immunity for private investigators who provide assistance to eavesdropping spouses have been twice refused. In *White v. Weiss*,[105] a civil cause of action was brought by a man against a private detective who'd been employed by the plaintiff's ex-wife. The defendant had furnished eavesdropping equipment and assisted in its installation. As in *Simpson* the locus in quo of the interception was the home where the married couple had cohabited. The court ruled, however, that neither the language or legislative history of Title III nor *Simpson* insulated a private investigator from civil liability for personally instructing and supervising an individual in the installation of telephone wiretapping equipment.[106]

This result does not appear anomalous until the defendant's conduct is scrutinized against the Title III civil remedy section's grant of a cause of action against one who intercepts, discloses, or uses communications or procures another to do so. Weiss did not intercept any communications, he only assisted in setting up the surveillance equipment.[107] The "aural acquisition" needed for an "interception" means to come into possession through the sense of hearing.[108] No court has ever held that installation of a device, without more, constitutes an "aural acquisition." The defendant never disclosed or otherwise used the communications. Therefore, the private detective who was actually "procured" by the woman was held to have procured the woman for interception of her husband's conversations.[109] Thus the term "procure," which appears to have been included to deter a prin-

105. 535 F.2d 1067 (8th Cir. 1976).

106. *Id.* at 1069. *But cf.* Bodrey v. Cape, 120 Ga. App. 859, 172 S.E.2d 643 (1969) (third parties who assisted man in eavesdropping upon his ex-wife shared in man's defense of woman's implied waiver of right of privacy).

107. 535 F.2d at 1071.

108. Smith v. Wunker, 356 F. Supp. 44, 46 (S.D. Ohio 1972). *Cf.* United States v. Turk, 526 F.2d 654, 658-59 (5th Cir. 1976) (acquisition can be by a recording device as an agent of the ear).

109. 535 F.2d at 1070. The *Weiss* court emphasized that mere suppliers of wiretapping equipment are to be treated differently than those who, like Weiss, supervise its installation. *Id.* at 1072 n.5. *See also* White v. Longo, 190 Neb. 703, 212 N.W.2d 84 (1973) (reversing criminal conversation award for erroneous admission of tapes made during the eavesdropping involved in *Weiss*).

cipal from procuring an eavesdropping agent, is also employable to punish the agent whose only activity was the preparation for his principal's eavesdropping.

In its only opportunity to construe Title III in an intrafamily eavesdropping case, the Seventh Circuit in *United States v. Rizzo*,[110] without citation to *Weiss*, affirmed a private investigator's criminal conviction and rejected the contended existence of an "implied derivative spousal immunity" to Title III.[111] The court was confronted with the constructions given Title III in *Simpson* and *Jones*, but refused to choose between the two interpretations. Instead the case was decided by merely distinguishing *Simpson* as limited to interspousal, and thus differentiable from private investigatory, eavesdropping.[112]

The significance of *Rizzo* stems less from what the court did, than what it failed to do. In not performing its own search of the legislative history of Title III, or otherwise adopting the *Jones* approach, the *Rizzo* court refused to foreclose the possibility of employing *Simpson* as a bar to civil recovery for purely interspousal eavesdropping. *Rizzo* was decided by rejecting a derivative spousal immunity on statutory interpretation grounds. The court, therefore, left open the possibility that private detectives and other third parties could base defenses on the "consent" and "extension telephone" exemptions, and more importantly the *Simpson-Anonymous* augmentation of the latter. So while both suits involving private detectives in marital disputes have punished their interceptions, persuasive arguments remain employable by future third party eavesdropping defendants.

While *Weiss* and *Rizzo* dealt with non-family members as defendants in domestic eavesdropping situations, the importance of such persons as plaintiffs can not be minimized. Indeed, the bulk of critical commentary on *Simpson* has centered on the lack of consideration afforded the privacy rights of the other party to the conversation. Consequently, authors have construed *Simpson* as a bar to *interspousal suits* as distinct from a prohibition on all recovery by all parties where interspousal eavesdropping is alleged.[113] Nevertheless, the district

110. 583 F.2d 907 (7th Cir. 1978), *cert. denied*, 99 S. Ct. 1216 (1979). In *Rizzo*, the defendant was charged in a multiple count Title III indictment. The evidence at trial disclosed that the defendant had on a number of occasions either installed eavesdropping equipment or procured suspicious spouses to connect devices to family telephones. *Id.* at 908. On appeal, the detective contended that Title III did not apply to interceptions by spouses within the marital home, and that he shared the immunity of eavesdropping spouses who needed assistance to effectuate interceptions that skilled persons could have accomplished themselves. *Id.*

111. *Id.* at 910.

112. *Id.* at 909.

113. *See, e.g., Interspousal Surveillance Immunity, supra* note 7, at 211

court in *London v. London*[114] explained that "[h]aving read the statute as not extending to the interception of calls by family members within the family home, it would be anomalous to conclude that although section 2520 confers no cause of action in favor of the family member, it does confer a claim on the other party to the call."[115] So despite concern for the privacy interests of other parties to intercepted communications, precedent can be found which supports this second branch of derivative spousal immunity—a bar to third party suits against interceptors, where the aggrieved family member could not recover on his own.

To summarize Title III judicial holdings, the privacy interests of family members and those who converse with them seem to depend on the presence or absence of third party eavesdroppers. Family members and other parties to their conversations are allowed recovery against third parties, but are precluded by statutory interpretation and discretionary federalism notions from federal relief against family members in purely domestic disputes. In contrast to these federal limitations is Illinois' "unqualified" eavesdropping proscription. The relative ease with which Title III claims can be defended makes it likely that Illinois plaintiffs would rely heavily on state remedies.

CAVEATS TO THE ILLINOIS REMEDIAL TRILOGY

Should a plaintiff be left to Illinois remedies, the inability to claim an attorney's fee and liquidated damages is compensated for by Illinois' "express exception-less" ban on private eavesdropping. This statute is supplemented by possible tortious invasion of privacy and constitutional causes of action. This remedial trilogy appears impenetrable on its face. However, judicial interpretations and the Proceedings of the 1970 Illinois Constitutional Convention create arguments that could render a plaintiff family member completely remediless.

The Eavesdropping Statutes

The Illinois eavesdropping statutes contain no express "family interception" exception, and none can be implied from the language or the committee comments. In three instances, however, court ascertainment of legislative intent has narrowed the scope of this "absolute" eavesdropping ban.

(author has no doubt that innocent parties to intercepted conversations can avail themselves of Title III remedies versus eavesdropping spouses).

114. 420 F. Supp. 944 (S.D.N.Y. 1976), *aff'd sub nom.* Anonymous v. Anonymous, 558 F.2d 677 (2d Cir. 1977). *See* note 76 *supra.*

115. *Id.* at 947.

"Unaided Ear" and "Intent to Keep Private" Restrictions

Unlike Title III, Illinois does not completely exempt extension telephones from the definition of "eavesdropping devices," and all improper telephone usage seems to fall under the bar of the state statutes.[116] A number of Illinois appellate opinions have concluded, however, that listening to the telephone on which a conversation is being conducted constitutes only the use of an "unaided ear" rather than an eavesdropping device on which the statutory sanctions depend.[117] This exception does not contemplate a person's overhearing via an extension phone. But included within its realm are situations where either the alleged eavesdropper places his ear to the receiver on which a party is receiving a communication or an assistant holds out the receiver in such a manner as to project the amplified communications to one within listening distance. While the use of surveillance equipment precludes defending with the "unaided ear" rationale, other judicially discovered exceptions apply even when eavesdropping devices are employed.

In *People v. Klingenberg*,[118] the court substituted its view of the Illinois statutes for that of the legislature, and in concluding the General Assembly had not intended an over-inclusive ban, restricted the scope of illegal eavesdropping to the listening or recording of statements intended to be of a private nature.[119] *Klingenberg* did not deal with a telephone "wire communication," but rather with "oral communications" which were intercepted with a "room bug" rather than a telephone tap. The importance of this judicial creation is that the Illinois scheme is equated with Title III, which expressly defines an interceptable "oral communication" in terms of an expectation of privacy.[120] Under Title III, and now *Klingenberg*, one whose oral communications are overheard must prove not only the wilful intercep-

116. *Electronic Surveillance In Illinois, supra* note 19, at 45. This all-inclusive ban has been judicially criticized as contrary to common sense. *See* People v. Kurth, 34 Ill. 2d 387, 397, 216 N.E.2d 154, 162 (1966) (Schaefer, J., concurring) (realizing that a businessman who records an order over the phone to insure accuracy is technically guilty of eavesdropping despite absence of injurious motive).

117. People v. Szymanski, 22 Ill. App. 3d 720, 318 N.E.2d 80 (1974); People v. Giannopoulos, 20 Ill. App. 3d 338, 314 N.E.2d 237 (1974); People v. Brown, 131 Ill. App. 2d 244, 266 N.E.2d 131 (1970); People v. 5948 W. Diversey Ave. Second Floor Apt., Chicago, 95 Ill. App. 2d 479, 238 N.E.2d 229 (1968). An "unaided ear" exception is also implicit in Title III. United States v. McLeoad, 493 F.2d 1186, 1188 (7th Cir. 1974).

118. 34 Ill. App. 3d 705, 339 N.E.2d 456 (1975).

119. *Id.* at 708, 339 N.E.2d at 459. The audio-visual recording of a defendant's movements while in police custody for drunken driving was found to be outside the scope of the eavesdropping ban, because the defendant did not intend to keep his statements private.

120. *See* note 40 *supra.*

tion, but also that the communication was uttered while exhibiting an expectation that such communication was to be private, *under circumstances justifying such an expectation.*[121] This justification requirement has been developed into an argument that the courts have the option of balancing the countervailing interests in intrafamily eavesdropping cases.[122] For example, in a domestic relations case, one's expectation of privacy may be outweighed by his spouse's reasonable suspicions of marital infidelity or child abuse.

While both the "unaided ear" and "privacy intent" caveats arose in law enforcement contexts, the First District Appellate Court in *Cassidy v. American Broadcasting Companies*[123] recently recognized both defenses in a private non-family civil suit for damages under section 14-6.[124] *Cassidy* could be extended to

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121. *See, e.g.*, Bianco v. American Broadcasting Cos., 470 F. Supp. 182 (N.D. Ill. 1979) (emphasis added). *But cf.* State v. Forrester, 21 Wash. App. 855, 587 P.2d 179 (1978) (one does not use telephone with intent to keep his conversations confidential where criminal extortion is involved).

122. 11 GA. L. REV. 427, 435 (1977) (since *Jones* was a wire communication case, it does not precedentially prevent judicial balancing of privacy interests and the countervailing considerations which prompted the eavesdropping).

123. 60 Ill. App. 3d 831, 377 N.E.2d 126 (1978).

124. 60 Ill. App. 3d at 835, 377 N.E.2d at 129. *See* note 159 *infra.*

On May 3, 1979, another approach to the "privacy expectation" caveats was formulated in Bianco v. American Broadcasting Cos., 470 F. Supp. 182 (N.D. Ill. 1979). In *Bianco*, plaintiffs were television station employees who regularly utilized electronic intercommunication equipment in conversing with technicians and performers. They brought suit against the station, its owner, and its general manager, alleging that the defendant manager and his agents intercepted plaintiffs' communications via mechanical eavesdropping devices. Defendants contended that since plaintiffs admitted that their job performance was subject to observation and supervision, they could not claim an expectation of privacy under Title III and *People v. Klingenberg*. The court recognized that an interceptable oral communication is defined by 18 U.S.C. § 2510 (2) (1970) in terms of an expectation of and justification for privacy. 470 F. Supp. at 184. *See* note 40 *supra*. It noted, however, that an "interception" contemplates usage of an eavesdropping device. 470 F. Supp. at 185. *See* note 38 *supra*. The court realized, therefore, that one who knows his communications may be non-mechanically overheard, may still have an expectation that they would not be intercepted with sophisticated devices. 470 F. Supp. at 185.

Similar reasoning impliedly narrowed *Klingenberg*'s "intent to be private" eavesdropping defense. *Klingenberg* was explained as protecting only those communications intended to be of a private nature. *Id.* at 186. But an Illinois eavesdropping violation also necessitates employment of a device capable of hearing or recording. *See* notes 20 & 22 *supra*. Hence, a plaintiff, who has no general expectation of privacy, is not precluded from relief if he intended that his statements were not subject to interception through eavesdropping equipment. Whether the *Klingenberg* rationale survives *Bianco* remains to be seen. *Klingenberg*'s own facts would be decided differently under *Bianco*. Defendants who converse with police, while in custody, obviously do not intend to keep their declarations to themselves. However, such persons may still have expectations that their statements are not being covertly recorded. Notwithstanding *Bianco*'s apparent

encompass intrafamily eavesdropping. Should this occur, various factual situations would be excluded from Illinois' "absolute" eavesdropping ban. It is not difficult to envision a variation in the *Anonymous* facts whereby a custodial parent could implore his child to hold out the telephone to him or let him hold his ear to the receiver so to overhear the statements of an estranged or former spouse. The "unaided ear" rationale could also be utilized should one spouse's friend agree to converse with the other spouse and allow an overhearing.

Regarding the "intent to be of a private nature" requirement for oral communications, the placing of a device which records one spouse's end of a telephone conversation as projected into the room could require the weighing of privacy interests versus the justification for the eavesdropping. Since this restriction of the scope of interceptable oral communciations was the product of judicial fiat, the next logical step is to require this "privacy intent" for telephonic communications. Indeed, the argument that one can not complain of telephone interceptions unless he had a reasonable right to expect privacy has been adopted in the judicial opinions of other jurisdictions.[125]

Once this conclusion has been reached, arguments based on morality and human nature can be injected into the process of weighing the competing privacy and justification interests involved in intrafamily eavesdropping cases. One argument is that legislators could not have intended to grant a right of privacy to an adulterous spouse which could further a conspiracy to break the "moral code relating to human conduct."[126] One's reasonable belief in a spouse's infidelity could then be used as an affirmative defense to a statutory civil cause of action. Concern for the health and welfare of one's child could also justify

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approval of *Klingenberg*, by pointing out that federal and state eavesdropping offenses are predicated on the use of devices, the court may have judicially foreclosed employment of an expressly enunciated Title III exception and created an argument for overruling *Klingenberg*.

125. *See, e.g.*, Beaber v. Beaber, 41 Ohio Misc. 95, 322 N.E.2d 910 (1974), *aff'd*, No. 4187, Ohio App., 5th Dist., Aug. 4, 1975 (unpublished opinion); *accord*, United States v. McGuire, 381 F.2d 306 (4th Cir. 1967); Markham v. Markham, 272 So. 2d 813, 814 (Fla. 1973) (Melvin, J., dissenting); Commonwealth v. Goldberg, 208 Pa. Super. Ct. 513, 224 A.2d 91 (1966).

126. Markham v. Markham, 272 So. 2d 813, 815 (Fla. 1973) (Melvin, J., dissenting). *But cf.* Katz v. United States, 389 U.S. 347 (1967) (wrongdoer still had a reasonable expectation of privacy). Other courts have decided that a telephone subscriber has a paramount right to intercept communications on his own telephone so to safeguard his marital status or family relationship. Family members using the phone line are subject to this implied condition, and it is presumed that they understand their own privacy rights may be invaded by the subscriber's surveillance. *See* Commonwealth v. Goldberg, 208 Pa. Super. Ct. 513, 224 A.2d 91 (1966); *accord*, United States v. McGuire, 381 F.2d 306 (4th Cir. 1967). *Contra*, People v. Snowdy, 237 Cal. App. 2d 677, 47 Cal. Rptr. 83 (1965).

eavesdropping upon a custodial parent by an ex-spouse with reasonable fears. Indeed, there is authority for the position that a parent deprived of custody of a child not only has a moral or human right, but a legal right to investigate and ascertain the conditions under which the child is being cared for.[127] Under *Klingenberg* and *Cassidy*, the foregoing arguments are employable in non-telephonic interception cases. For wire communication interceptions, these contentions depend on court creation of a "privacy expectation" requirement for telephone conversations. However, this justification rationale is also utilizable in conjunction with the defense of necessity, which unlike the aforementioned exceptions, deals with both the use of eavesdropping equipment and telephonic communications.

The Defense of Necessity

Illinois' criminal defense of necessity,[128] while best known for its application to cases of prison escapes to avoid homosexual attacks and threats of grave bodily harm,[129] also has potential as a civil defense to eavesdropping. In *Stamatiou v. United States Gypsum Company*,[130] the necessity defense was affirmatively pleaded in a civil action for damages under the Illinois eavesdropping statute. *Stamatiou*'s facts disclosed a situation where the defendant company, faced with the prospect of being victimized by plaintiff's extortion, tape recorded his conversations. The court decided that proof of a violation of the eavesdropping prohibition was a prerequisite to civil recovery, and therefore held that the criminal defense was usable in a civil action.[131] Since the defendants had stated and supported a valid necessity defense in that they reasonably believed the recordings were necessary to protect the financial well-being of the company, summary judgment was entered for the company.[132]

127. Bodrey v. Cape, 120 Ga. App. 859, 867, 172 S.E.2d 643, 648 (1969).

128. ILL. REV. STAT. ch. 38, § 7-13 (1977) provides: "Conduct which would otherwise be an offense is justifiable by reason of necessity if the accused was without blame in . . . developing the situation and reasonably believed such conduct was necessary to avoid a[n] . . . injury greater than the injury which might reasonably result from his own conduct."

"Under the necessity approach, the defendant is faced with committing the act which normally constitutes a crime. . . . The theory is not that his free will was overcome by an outside force, as with duress, but rather that it was properly exercised to achieve a greater good." United States v. Micklus, 581 F.2d 612, 615 (7th Cir. 1978).

129. *See* People v. Unger, 66 Ill. 2d 323, 362 N.E.2d 319 (1977); People v. Waters, 53 Ill. App. 3d 517, 368 N.E.2d 800 (1977). *See generally* Gardner, *The Defense of Necessity and the Right To Escape From Prison*, 49 S. CAL. L. REV. 110 (1975).

130. 400 F. Supp. 431 (N.D. Ill. 1975), *aff'd*, 534 F.2d 330 (7th Cir. 1976).

131. *Id.* at 436.

132. *Id.*

Stamatiou might be persuasively expanded to encompass a case of intrafamily surveillance. While the committee comments on the necessity defense do not expressly envision such a family eavesdropping usage, the *Stamatiou* facts are not included either.[133] One's marital status or the welfare of a child is at least as viable a reason for adopting this defense as the corporate profits in *Stamatiou*. The defendant family member, however, must have a provable[134] reasonable belief that his conduct was necessary to avoid an injury greater than the one that would result from his own conduct. The necessity defense must be viewed in light of the factual situation of the particular case.[135] Under certain circumstances, a court might be convinced that the potential injury to one's marriage or to the welfare of one's child outweighed the "injury" to the privacy of the person who is reasonably suspected of unfaithfulness or neglect or cruelty to the parties' child. Should the defense of necessity be successfully employed to bar recovery under the eavesdropping statutes, the plaintiff's constitutional and common law tort counts would take on much greater significance.

The Constitutional Mandate

At least one commentator has recognized that the plain language of Article I, sections 6 and 12 of the Illinois Constitution,[136] creates a specific guarantee of a remedy for unlawful invasions of privacy, including those based on interceptions of communications.[137] In intrafamily eavesdropping cases within the scope of the statutory "unaided ear" exception, a constitutional cause of action would apparently save a plaintiff's right of recovery. The mandate of the constitution was intended to

133. Statutory examples include: (1) the destruction of property to prevent the spread of fire, (2) the jetison of cargo to save a ship, and (3) lost mountain climbers taking refuge in a dwelling and using provisions. *See* ILL. ANN. STAT. ch. 38, § 7-13 (Smith-Hurd 1964 & Supp. 1978). *Cf.* City of Chicago v. Mayer, 56 Ill. 2d 366, 308 N.E.2d 601 (1974) (disorderly conduct defendant, a third year medical student, was entitled to jury instruction that his refusal to allow police to remove man with back injury was based on reasonable belief that moving him would bring about greater injury than his own misconduct). *See generally* Huxley, *Proposals and Counterproposals on the Defense of Necessity*, 1978 CRIM. L. REP. 141; Williams, *Defenses of General Application: Necessity*, 1978 CRIM. L. REP. 122.

134. The necessity defense would be an affirmative defense that the defendant would be obliged to plead and prove by a preponderance of the evidence. *See* ILL. REV. STAT. ch. 38, § 7-14 (1977).

135. City of Chicago v. Mayer, 56 Ill. 2d 366, 370, 308 N.E.2d 601, 604 (1974). The doctrine of necessity does not require an emergency to save life, limb, or health, but applies where the apparent danger is less serious in nature. Frasher v. State, 8 Md. App. 439, 260 A.2d 656 (1970).

136. ILL. CONST. art I, §§ 6, 12 (1970). *See* text accompanying notes 31-34 *supra*.

137. *See Illinois and the Right of Privacy, supra* note 32, at 101.

reach non-mechanical eavesdropping, such as listening with an unaided ear.[138] Two Illinois courts, however, which used the "unaided ear" as an exception to the eavesdropping statutes, fully ignored this mandate and justified an unaided overhearing for lack of a constitutional "interception."[139] This doctrine effectively restricts the constitution's scope, and equates it with that of the eavesdropping statutory scheme.

Two problems with the constitutional cause of action raise doubts as to its applicability to an intrafamily eavesdropping case. One difficulty centers upon the remedial base for invasions of privacy. Section 12, the remedy provision for basing a suit for violations of section 6, made one change in its 1870 predecessor. The earlier provision had stated that every person ought to find a remedy.[140] The 1970 version imperatively provides that every person shall find a remedy. Despite this change in verb strength, it has had no substantive effect on Illinois law.[141] Moreover, this section has been consistently held to express only a jurisprudential philosophy, rather than mandating that a remedy be provided to redress all wrongs.[142] Section 12 does not mandate recognition of new recovery methods where some other remedy is already available.[143] Possible recovery under the eavesdropping statutes should be sufficient to stymie efforts at developing a cause of action based solely on the constitution.

Even if section 12 is allowed to form the basis for a suit or if a plaintiff can directly state a cause of action for interference with his constitutional privacy rights, an intrafamily eavesdrop-

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138. *Constitutional Commentary*, ILL. ANN. CONST. art I, § 6 (Smith-Hurd).

139. *See* People v. Szymanski, 22 Ill. App. 3d 720, 318 N.E.2d 80 (1974); People v. Giannopoulos, 20 Ill. App. 3d 338, 314 N.E.2d 237 (1974). The requisite "interception" was lacking because the courts interpreted "interception" as that occurring before the communication had been completed. A communication is completed the moment it springs from the receiver, even before it reaches the human ear. *Id.* at 343, 314 N.E.2d at 239. *Cf.* 3 RECORD OF PROCEEDINGS, SIXTH ILL. CONSTITUTIONAL CONVENTION, at 1530 (1969-70) [hereinafter cited as PROCEEDINGS] (if one invites others into a room where there's a speaker-phone and they all listen to a conversation that the party on the other end does not know is being overheard, there is no interception).

140. ILL. CONST. art. I, § 19 (1870).

141. People v. Dowrey, 62 Ill. 2d 200, 340 N.E.2d 529 (1975).

142. People *ex rel.* Tucker v. Kotsos, 68 Ill. 2d 88, 368 N.E.2d 903 (1977); Sullivan v. Midlothian Park Dist., 51 Ill. 2d 274, 281 N.E.2d 659 (1972); Tyrken v. Tyrken, 63 Ill. App. 3d 199, 379 N.E.2d 804 (1978); DiSanto v. City of Warrenville, 59 Ill. App. 3d 931, 376 N.E.2d 288 (1978); Panton v. Demos, 59 Ill. App. 3d 328, 375 N.E.2d 480 (1978); Angelini v. Snow, 58 Ill. App. 3d 116, 374 N.E.2d 215 (1978); Steffla v. Stanley, 39 Ill. App. 3d 915, 350 N.E.2d 886 (1976). *See generally* Gertz, *Hortatory Language in the Preamble and Bill of Rights of the 1970 Illinois Constitution*, 6 J. MAR. J. 217 (1973).

143. *See, e.g.*, Steffla v. Stanley, 39 Ill. App. 3d 915, 350 N.E.2d 886 (1976).

ping defense is inherent in the definition of a "bill of rights" wherein the Illinois prohibition is found. The traditional concept of a bill of rights is its concern for the rights of persons against their government.[144] Indeed, the convention delegates, in creating actions against non-governmental defendants, were forced to expressly and deliberately depart from this tradition.[145]

The question of who was to be prohibited from invading personal privacy rights through interceptions of communications appears to have been settled pursuant to this traditional view. The Bill of Rights committee proposal restricted the scope of section 6 to include only governmental invasions of privacy.[146] Not all the convention delegates concurred, and counterproposals were offered to extend the purview of the section to invasions of privacy by any person, group, firm, or company.[147] Since those advocating this change failed in both of their attempts,[148] albeit by narrow margins, this rejection supports the claim that the constitutional eavesdropping ban does not reach beyond governmental surveillance into the realm of purely domestic interceptions.[149] Even if the sentiments of the conven-

144. Leahy, *Individual Legal Remedies Against Pollution in Illinois*, 3 LOY. CHI. L.J. 1, 6 (1972).

145. *Id. See* ILL. CONST. art. XI, § 2 (1970) (enforcing healthful environment provision). *Cf. id.* art. I, §§ 17, 19 (discrimination in employment and sale or rental of property; discrimination against handicapped in employment and sale and rental of property).

146. "The new provision creates a direct right to freedom from such invasions of privacy by government or public officials." 6 PROCEEDINGS, *supra* note 139, at 32; Gertz, *The Unrealized Expectations of Article I, Section 17,* 11 J. MAR. J. 283, 315 (1978) (author, Bill of Rights Committee Chairman for the 1970 Constitution, believes that federal and Illinois constitutional privacy rights deal exclusively with governmental invasions).

147. *See* 3 PROCEEDINGS, *supra* note 139, at 1733. *Compare* note 182 *with* Markham v. Markham, 272 So. 2d 813 (Fla. 1973) (construing state constitution as extending to intrafamily eavesdropping).

148. *See* 3 PROCEEDINGS, *supra* note 139, at 1524-43, 1733-39. One explanation for these defeats was the fact that some delegates had interpreted the developing Illinois case law as already recognizing the right to sue for all tortious invasions of privacy in the private sector. *Id.* at 1735. Dissenting delegates believed that the judicial development of the tort had been too slow, and thought that a constitutional mandate would provide impetus for more rapid development of this novel cause of action. *Id.* at 1738-40.

149. *But cf.* Cassidy v. American Broadcasting Cos., 60 Ill. App. 3d 831, 377 N.E.2d 126 (1978) (dictum indicating that a constitutional privacy cause of action could have been stated for interceptions between private individuals or entities).

A recent decision, Bianco v. American Broadcasting Cos., 470 F. Supp. 182 (N.D. Ill. 1979), should reinforce the position of intrafamily and other non-governmental eavesdroppers. Article I, section 6 was determined to be a restriction solely on governmental activity. *Id.* at 187. This holding was supported by analogy to the fourth amendment to the federal constitution, which is not a constraint on private action. Scrutiny was also directed to the remarks of convention delegates, especially Mr. John E. Dvorak of the

tion dissenters are adopted in the future, the constitutional modifier "unreasonable" stands ready for the implementation of the same "privacy expectation" and "necessity" arguments that barred the statutory cause of action. In such situations, plaintiffs may be forced to resort to a cause of action for tortious invasion of privacy.

Tortious Invasion of Privacy

Where a cause of action for eavesdropping-based privacy invasions is recognized,[150] standards for recovery are not stringent. Damages for mental suffering are awardable, absent physical injury, because the intrusion is essentiallly into one's subjective mental solitude.[151] Communication of garnered information to third parties is not required for recovery, though this factor is important in the assessment of damages.[152] There is a division of authority on the prima facie elements of this tort. One view is that eavesdropping itself, the actual aural acquisition, is needed, and the mere placing of a tap or other recording device is a non-actionable preparation for the interception.[153] The contrary position advocates that the lack of human hearing should not be fatal and that recovery may be had for the trespas-

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Bill of Rights Committee, who had stated that section 6 "doesn't apply to private circumstances between private individuals." 3 PROCEEDINGS, *supra* note 139, at 1524.

Plaintiffs argued that the adoption of the Article I, section 12 "every person shall find a remedy for all wrongs to his privacy" language meant that section 6 reached private eavesdropping. The court believed that section 12 covered interceptions not included within section 6, namely private surveillance. 470 F. Supp. at 187. Conceivably, a suit based solely on section 12 could be stated. However, this provision has consistently been held by the Illinois appellate judiciary not to create a cause of action. *See* cases cited in note 142 *supra*. *See also* Kelly v. Franco, 72 Ill. App. 3d 642, 391 N.E.2d 54 (1979) (sections 6 and 12 do not grant causes of action for invasions of privacy by non-governmental defendants).

150. A number of courts support the general conclusion that an action for invasion of privacy can be based on eavesdropping activities. Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971); Fowler v. Southern Bell Tel. Co., 343 F.2d 150 (5th Cir. 1965); McDaniel v. Atlantic Coca-Cola Bottling Co., 60 Ga. App. 92, 2 S.E.2d 810 (1939); Rhodes v. Graham, 238 Ky. 225, 37 S.W.2d 46 (1931); Hamberger v. Eastman, 106 N.H. 107, 206 A.2d 239 (1964); Nader v. General Motors Co., 25 N.Y.2d 560, 255 N.E.2d 765, 307 N.Y.S.2d 647 (1970); LeCrone v. Ohio Bell Tel. Co., 120 Ohio App. 129, 201 N.E.2d 533 (1963); Marks v. Bell Tel. Co. of Pa., 460 Pa. 73, 331 A.2d 424 (1975); Billings v. Atkinson, 489 S.W.2d 858 (Tex. 1973); Roach v. Harper, 143 W. Va. 869, 105 S.E.2d 564 (1958). *Contra*, State *ex rel.* North Pac. Lumber Co. v. Unis, 282 Or. 457, 579 P.2d 1291 (1978).

151. *E.g.*, Hamberger v. Eastman, 106 N.H. 107, 111, 206 A.2d 239, 241 (1964); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 117 (4th ed. 1971).

152. *E.g.*, Dietemann v. Time, Inc., 449 F.2d 245, 249-50 (9th Cir. 1971).

153. LeCrone v. Ohio Bell Tel. Co., 120 Ohio App. 129, 134, 201 N.E.2d 533, 538 (1963); *accord*, Marks v. Bell Tel. Co. of Pa., 460 Pa. 73, 331 A.2d 424 (1975).

sory intrusion in placing the device.[154] The latter, more liberal, rationale could be employed in a case where a spouse actually enters the separate abode of his estranged spouse in order to effectuate the interception. Absent a trespass into a separate dwelling, adoption of the viewpoint requiring proof of an aural acquisition may be necessary to state a cause of action for intrafamily eavesdropping within the family home.

Should a plaintiff be relegated to a suit in tort, his request for recognition of a heretofore unknown Illinois cause of action for tortious intrafamily invasion of telecommunications privacy[155] is susceptible to attack. A primary factor which could retard its development is the almost total absence of sister state precedent. The single reported appellate opinion dealing with such an invasion is *LeCrone v. Ohio Bell Telephone Company*,[156] in which a woman's recovery against the defendant company was predicated on its assisting her estranged spouse in his telephonic eavesdropping. The court, though deciding in favor of the plaintiff, was careful to narrow its opinion to the instant facts, and noted that since the parties were separated, the woman had a right to communicate in private without interceptions by her estranged husband.[157] *Le Crone* did not deal with eavesdropping between cohabiting family members in the family home. Nevertheless, in dictum, the court did concede that "as to privacy rights, husband and wife are not on the same footing as strangers."[158] Hence, the sole judicial pronouncement on purely domestic interceptions leans against recovery of damages.

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154. *See* Hamberger v. Eastman, 106 N.H. 107, 111, 206 A.2d 239, 242 (1964).

155. While Illinois appellate courts have recognized the tort of invasion of privacy, it is really four separate torts: (1) intrusion into a plaintiff's solitude or seclusion, (2) public disclosure of embarrassing private facts about a plaintiff, (3) publicity which places a plaintiff in a false light in the public eye, and (4) appropriation of a plaintiff's name or likeness for advantage. *See* Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960). For a discussion of the judicial interpretation of these four torts in Illinois, reference should be made to *Illinois and the Right of Privacy, supra* note 32. Invasions of privacy through eavesdropping are most likely covered by the "intrusion into solitude" tort. Hamberger v. Eastman, 106 N.H. 107, 111, 206 A.2d 239, 241 (1964).

156. 120 Ohio App. 129, 201 N.E.2d 533 (1963). In *LeCrone*, at the request of the plaintiff's husband, the defendant company connected an extension to the phone in the woman's abode and placed it in the man's residence. Direct recovery against the company was denied when it was conceded that the company neither listened to her conversations nor trespassed into the woman's abode to effect the interception. The connection had been made by means of a "jumper" at the defendant's central office. Relief depended, therefore, on a showing that the defendant gave material aid to the husband in his invasion of privacy. Since there was evidence that the husband listened in, the central issue was whether the woman had a right of privacy against her husband.

157. *Id.* at 137, 201 N.E.2d at 539.

158. *Id.* at 136, 201 N.E.2d at 539.

In 1978, the contended existence of a common law cause of action for tortious invasion of telecommunications privacy was adjudicated in a non-family setting in *Cassidy v. American Broadcasting Companies*.[159] Should an Illinois court be confronted with a purely domestic interception between cohabitants, competing theories on individual versus family privacy would clash. Supporting the individual privacy rationale would be the policy, which, as evidenced by the eavesdropping statutes, disfavors private interceptions without excluding intrafamily surveillance. The opposing policy argument centers on the theme that courts should not invade the family social order and thereby disrupt domestic tranquility.[160] From this basis stem contentions that rights of privacy may be qualified by the familial ties,[161] or even completely waived.[162]

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159. 60 Ill. App. 3d 831, 377 N.E.2d 126 (1978). In *Cassidy*, during a police investigation of a massage parlor, television crewmen made visual recordings of officers and non-mechanically overheard their conversations with alleged prostitutes. Plaintiff officers failed to state a possible constitutional privacy count. *Id.* at 837, 377 N.E.2d at 130. Suit was brought under the eavesdropping statute's civil provision and in tort for invasion of privacy. After ruling for the defendants on the eavesdropping defenses of "unaided ear" and "intent to keep private," the basis for tortious invasion of privacy recovery was scrutinized.

The court cited and explained Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971), which held that there is a cause of action for invasion of telecommunications privacy. *See* 60 Ill. App. 3d at 838, 377 N.E.2d at 132. Plaintiffs were denied relief, however, because they were public as distinct from private individuals. *Id.* Eavesdropping was not excluded from the realm of actionable privacy invasions. Hence, interceptions of private person's communications by a private individual may give rise to a cause of action. If the Illinois Supreme Court has occasion to adopt this rationale, it will be confronted with the case of Bureau of Credit Control v. Scott, 36 Ill. App. 3d 1006, 345 N.E.2d 37 (1976), which employed language limiting actions for invasions of privacy to those where a plaintiff's name or likeness has been commercially exploited. *See Illinois and the Right of Privacy, supra* note 32, at 100. *Compare* Bank of Ind. v. Tremunde, 50 Ill. App. 3d 480, 365 N.E.2d 295 (1977) (assumed Illinois Supreme Court would recognize cause of action for unreasonable intrusion upon seclusion) *with* Kelly v. Franco, 72 Ill. App. 3d 642, 391 N.E.2d 54 (1979) (refusing to recognize tort of unreasonable intrusion).

160. *See* Comment, *Domestic Tranquility and the Right of Privacy*, 18 S.W. TEX. L. REV. 121, 129-33 (1977) (notes that the family is itself a quasi-judicial institution and often must be the sole arbiter in intrafamily disputes).

161. *See Interspousal Surveillance Immunity, supra* note 7, at 211 (author fears stretching a consent by imputation could bar interspousal privacy invasion suits); Markham v. Markham, 272 So. 2d 813, 814 (Fla. 1973) (Melvin, J., dissenting) (no privacy right in adulterous spouse); *accord*, Beaber v. Beaber, 41 Ohio Misc. 95, 322 N.E.2d 910 (1974). *Compare* People v. Appelbaum, 277 A.D. 43, 97 N.Y.S.2d 807, *aff'd*, 301 N.Y. 738, 95 N.E.2d 401 (1950) (privacy rights are subordinated by an implied condition that a telephone will not be used to the detriment of the subscriber's marital status) *with* Plotkin v. Rabinowitz, 54 Misc. 2d 550, 283 N.Y.S.2d 156 (Sup. Ct. 1967) (statutory eavesdropping amendment overruled *Appelbaum* but left open issue of whether this reasoning could be employed in an invasion of privacy suit).

The individual privacy thesis is fortifiable, however, by attacking the basic premises of the contrary position. Countless courts have held that when family cases reach the courts, domestic tranquility has already been destroyed and therefore there is no reason for court reluctance in dealing with intrafamily disputes.[163] Further, the contention that a belief in a spouse's adulterous motives in some way justifies interception of communications is difficult to square with judicial holdings that wrongdoers retain privacy rights.[164] Since Illinois family members have reasonable expectations of privacy in search and seizure contexts,[165] they should have protectable privacy expectations in their communications. From the foregoing, arguments favor recognizing a right of suit for intrafamily eavesdropping, though what little precedent or dictum there is is to the contrary.

If this cause of action is recognized, defenses of privilege and immunity may limit its efficacy. The arguments employed in defending a statutory suit with the criminal defense of necessity[166] could also be utilized under the tort privileges of necessity[167] and justification.[168] A greater barrier is Illinois' codification of common law interspousal tort immunity, which prevents a spouse from recovering against the other for torts to the person committed during coverture.[169] The statute does not

162. *See, e.g.*, Bodrey v. Cape, 120 Ga. App. 859, 172 S.E.2d 643 (1969) (implied waiver of privacy right in interspousal eavesdropping child custody dispute); Commonwealth v. Goldberg, 208 Pa. Super. Ct. 513, 224 A.2d 91 (1966) (subscriber can eavesdrop because of paramount right outweighing waived privacy rights).

163. *See* Danforth v. Planned Parenthood of Mo., 428 U.S. 52, 75 (1976); Remington v. Remington, 393 F. Supp. 898, 901 (E.D. Pa. 1975) (interspousal eavesdropping case).

164. *See, e.g.*, Katz v. United States, 389 U.S. 347 (1967) (wrongdoer had reasonable expectation of privacy in telephone booth). Indeed, what would be the purpose of Title III's restrictions on law enforcement, if suspected criminals had waived their privacy rights because of evil deeds or motives?

165. *See, e.g.*, People v. Nunn, 55 Ill. 2d 344, 304 N.E.2d 81 (1973), *cert. denied*, 416 U.S. 904 (1974) (mother's third-party consent to search of son's room held insufficient).

166. *See* text accompanying notes 128-35 *supra*.

167. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 36 (4th ed. 1971); Bohlen, *Incomplete Privilege to Inflict Intentional Invasions of Interests*, 39 HARV. L. REV. 307 (1926).

168. *See, e.g.*, Sindle v. New York City Transit Auth., 33 N.Y.2d 293, 307 N.E.2d 245, 352 N.Y.S.2d 183 (1973).

169. ILL. REV. STAT. ch. 40, § 1001 (1977); Comment, *Wife Abuse: The Failure of Legal Remedies*, 11 J. MAR. J. 549, 569-73 (1978). *See also* Polelle, *Illinois Family Immunity*, 55 CHI. B. REC. 219 (1974); 19 DE PAUL L. REV. 590 (1970). In a parent-child suit, a family immunity defense would present minimal problems as the eavesdropping-based privacy invasion is an intentional tort. Any remaining vestige of parental tort immunity does not encompass wilful, wanton, or intentional conduct. Nudd v. Matsoukas, 7 Ill. 2d 608, 131 N.E.2d 525 (1956). *See also* Casey, *Trend of Interspousal and Paren-*

distinguish between intent and negligence, but applies to all torts to the person. "Person" has not been definitively interpreted by Illinois courts in the context of the immunity statute. If "person" is restricted to the physical person of a plaintiff, then damage awards for mental suffering should survive. If "person" means mental as well as physical person, it is conceivable that interspousal immunity could completely bar recovery for technical invasions of privacy.

Wiretapped spouses, limited to a tort action, would be forced to depend on continuation of the restrictive view of immunity taken by the Illinois judiciary. Buttressing the argument for a narrow interpretation of "person" is the fact that prior to the legislature's present action, the Illinois Supreme Court had abolished the doctrine of interspousal tort immunity.[170] Recent cases have continued to chastize the legislature's support for this outmoded concept.[171] Taken in this light, it is probable that if a plaintiff's statutory and constitutional counts were stymied by the defendant, Illinois courts would not leave a spouse remediless solely by interpreting "person" as contemplating something more than physical injury.

A restrictive interpretation of "person" could be dangerous, however. The only real intentional tort to the physical person is battery, and many actionable touchings are offensive rather than physically harmful. They are offensive to the subjective mental solitude in the same manner as an invasion of telecommunications privacy. It is doubtful that the General Assembly could have statutorily removed an effective remedy for severely physical wife abuse, while allowing litigation of petty interspousal claims of assaults in the form of threats of abuse, inflictions of mental distress, and invasions of privacy. Yet that would result if "person" is restricted to invasions of physical well-being.

Batteries which result from offensive touchings appear to be torts to the person. They commence with body contact. The injury, however, is to the "mental person" in terms of embarrassment or hurt feelings. In invasions of privacy, the injury is to the same mental solitude, and should be included as a "tort to the person," like offensive-touching batteries. Should a court consider the "physical and mental person" standard plausible,

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tal Immunity, 45 INS. COUNSEL J. 321 (1978); Annot., 41 A.L.R.3d 891 (1970). Intrafamily immunities are not employable as defenses to civil causes of action based on eavesdropping statutes. Remington v. Remington, 393 F. Supp. 898, 902 (E.D. Pa. 1975).

170. Brandt v. Keller, 413 Ill. 503, 109 N.E.2d 729 (1952).

171. *See, e.g.*, Steffla v. Stanley, 39 Ill. App. 3d 915, 919, 350 N.E.2d 886, 889 (1976).

Illinois' statutory interspousal immunity could be the final defense needed to render a wiretapped spouse completely remediless.

ADMISSIBILITY OF EAVESDROPPING EVIDENCE

Distinct from civil suits for damages or injunctive relief is the problem of suppression of evidence derived from unlawful eavesdropping. The United States Supreme Court, in a non-family setting, has indicated that circumstances under which suppression is required are not necessarily coterminous with findings of criminal surveillance violations.[172] Courts confronted with the attempted introduction of eavesdropping evidence in domestic relations disputes have reasoned that the exclusionary rule is the least severe of the interception remedies, and hence suppression of tainted recordings or transcripts thereof should be liberally granted.[173] This approach has been followed more strictly in cases of dissolution of marriage, however, than in child custody disputes.

Dissolution of Marriage

Separating pure divorce cases from those involving child custody, the jurisdictions that have dealt with the former situation have refused to admit wiretap evidence offered to prove divorce grounds. In *Rickenbaker v. Rickenbaker*,[174] a man, though cohabiting with his wife, arranged for the placing of an extension to the family telephone in his business office. He obtained recordings of the woman's conversations with her paramour. On the issue of the admissibility of these recordings where adultery was pleaded in bar to a state law alimony claim, the North Carolina Supreme Court held the tapes were to be excluded pursuant to the Title III exclusionary rule.[175] Similarly, a New

172. *E.g.*, United States v. Giordana, 416 U.S. 505, 529 (1974). It must be noted at the outset that it would be the statutory exclusionary rules of Title III and the Illinois scheme which would be employed in requesting exclusion of evidence. The United States Constitution has never been construed to require exclusion of evidence seized by private individuals. Katz v. United States, 389 U.S. 347, 350 (1967); 26 FLA. L. REV. 166, 167 (1973).

173. *E.g., In re* Marriage of Lopp, 370 N.E.2d 977, 981 (Ind. App. 1977), *vacated*, 378 N.E.2d 414 (Ind. 1978), *cert. denied*, 99 S. Ct. 1023 (1979). In addition to the divorce and child custody areas, eavesdropping evidence problems could surface in criminal conversation suits. *See, e.g.*, White v. Longo, 190 Neb. 703, 212 N.W.2d 84 (1973).

174. 290 N.C. 373, 226 S.E.2d 347 (1976).

175. *Id.* at 381, 226 S.E.2d at 352 (construing 18 U.S.C. § 2515 (1970)). *Simpson* was distinguished on the ground that its eavesdropping took place within the marital residence, and involved a suit for damages rather than an evidentiary problem. 290 N.C. at 381, 226 S.E.2d at 352.

York court, in *Connin v. Connin*,[176] a *Simpson* situation where a husband tapped the marital home telephone without his wife's consent, refused to decide whether *Simpson*'s Title III statutory interpretation should be restricted to suits for civil damages or encompassed all Title III issues. Instead state eavesdropping law was utilized to suppress tape recordings of conversations between the wife and other men.[177]

There is no Illinois case law in this narrow area. This should not be perplexing in light of the state's stringent eavesdropping ban. On a national scale, however, Illinois should be at the forefront in requests for excluding evidence used to directly prove divorce grounds. Where no-fault divorce concepts have solidified, mere curiosity has replaced proof of marital misconduct as the compelling reason for interspousal surveillance. Eavesdropping might be employed to determine the reasons for obtaining a divorce. Nevertheless, in terms of the proof of grounds, where exclusionary principles take on importance, interceptions appear unnecessarily risky. They open the possibility of criminal penalties and civil redress for an operation that, because of ease of dissolution of marriages, gives no real legal benefit to the eavesdropper.

In Illinois, one of only three states that rely solely on proven marital fault for dissolutions,[178] this eavesdropping risk might have to be accepted if a spouse is without other means of developing the proof needed to dissolve his or her failing marriage. Indeed, it has been espoused in well-considered dictum that when a party violates the marriage contract within the marital home and is sufficiently secretive so as to avoid public knowledge, the other party is placed in an indefensible position. To deny admission of eavesdropping evidence would deny this person the only creditable matter that he could obtain.[179] So while no court has admitted such evidence in divorce proceedings, the rationale has been developed for future offers, and rests, like many of the other eavesdropping justifications, in necessity under the circumstances.

Child Custody

When child custody is at issue, uncertainties originate in the supposition that all available information should be considered

176. 89 Misc. 2d 548, 392 N.Y.S.2d 530 (Sup. Ct. 1976).

177. *Id.* at 549, 392 N.Y.S.2d at 531 (construing N.Y. PENAL LAW §§ 250.00 *et seq.* & N.Y. CIV. PRAC. LAW § 4506 (McKinney 1975)).

178. ILL. REV. STAT. ch. 40, §§ 401-02 (1977); Freed & Foster, *Divorce In The Fifty States: An Outline*, 11 FAM. L.Q. 297, 300 (1977).

179. Beaber v. Beaber, 41 Ohio Misc. 95, 101, 322 N.E.2d 910, 915 (1974), *aff'd*, No. 4187, Ohio App., 5th Dist., Aug. 4, 1975.

so to ascertain the "best interests of the child."[180] Two reported opinions conflict. The Title III-like Florida eavesdropping statutes[181] and constitutional exclusionary rule[182] were construed in *Markham v. Markham*[183] to not implicitly include a domestic relations exception which would allow admission of unlawfully taped recordings.[184] In reaching a contrary conclusion more consistent with domestic relations than criminal explications, a New York Family Court in *Berk v. Berk*,[185] proclaimed that where child custody is a paramount issue, the court should consider the best interests of the child and therefore demand all available information.[186] It recognized that Mr. Berk's telephonic interceptions and recordings contravened criminal sanctions. Resolving the problem with a family law approach, however, the court ignored state and federal eavesdropping exclusionary rules and concluded that while admitting the tapes it would also consider what effect the father's illegal conduct had on the children.[187]

On appeal, the Appellate Division did not pass on the precise point decided below—whether the need for information in child custody cases outweighs the criminality in its obtainment. Instead the court, without reversing, remanded on the issue of a possible acquiescence in the recordings.[188] "Consent" had been disputed by the parties but not decided below. The lower court had considered the issue immaterial in light of its expansive

180. *See, e.g.*, Marcus v. Marcus, 24 Ill. App. 3d 401, 406, 320 N.E.2d 581, 584 (1974); Johnson v. Johnson, 25 A.D.2d 672, 672, 268 N.Y.S.2d 403, 405 (1966); Brosky & Alford, *Sharpening Solomon's Sword: Current Considerations In Child Custody Cases*, 81 DICK. L. REV. 683 (1977); Foster & Freed, *Life With Father*, 11 FAM. L.Q. 321 (1977); Schiller, *Child Custody, Evolution of Current Criteria*, 26 DE PAUL L. REV. 241, 246-49 (1977); Taylor, *Child Custody Problems In Illinois*, 24 DE PAUL L. REV. 521 (1975). *But see* Comment, *Child Custody Best Interests of Children vs. Constitutional Rights of Parents*, 81 DICK. L. REV. 733 (1977).

181. FLA. STAT. ANN. § 934.06 (West 1976).

182. FLA. CONST. art. I, § 12 (1971) provides that the "right of the people to be secure . . . against . . . interception of private communications by any means, shall not be violated. . . . Information obtained in violation of this right shall not be admissible in evidence."

183. 272 So. 2d 813 (Fla. 1973).

184. *Id.* at 814.

185. 95 Misc. 2d 33, 406 N.Y.S.2d 247 (Fam. Ct. 1978). In *Berk*, a custodial father taped telephone conversations between his estranged spouse and children. As part of the divorce proceeding, permanent custody was at issue and the woman moved to suppress the tapes on the ground that the recordings had not been consented to. The father believed that the children had legally acquiesced in the interceptions.

186. *Id.* at 34, 406 N.Y.S.2d at 248.

187. *Id. But cf.* CAL. CIV. CODE § 4361 (West 1977) (evidence obtained through eavesdropping is inadmissible in domestic relations proceedings).

188. 67 A.D.2d 708, 412 N.Y.S.2d 581 (1979).

pro-admission conclusion.[189] Since the primary issue was temporarily left undecided, theories remain available for opposing as well as supporting the offer of eavesdropping evidence as direct proof in child custody adjudication.

In *Fears v. Fears*,[190] the single Illinois appellate opinion dealing with intrafamily eavesdropping, the court was confronted with a decree awarding custody to a father who had successfully offered a tape recording which his seventeen year old brother had made of a conversation between himself and his sister-in-law. No objection had been made by the woman's counsel at trial, and the trial judge considered the tapes, in which the woman admitted involvement with drugs.[191] The appellate court reversed stating that where the best interests of the child are concerned, strict rules of evidence need not be followed.[192] The application of this principle in *Fears*, however, did not comport with the contention that all available evidence should be considered. Instead the court held that while failure to object to improper evidence ordinarily waives admission error, the fact that custody was in dispute prevented this technicality from barring the reviewing court from determining the admissibility of the evidence.[193] The tapes were found to be within the purview of the Illinois eavesdropping exclusionary rule and therefore suppressable.[194]

With *Berk* at least temporarily supporting the admission of illegally obtained evidence, the question remains whether Illinois courts would abandon *Fears* for this novel approach. *Berk* makes reasonably good sense because while admitting the surveillance evidence, it also considers the eavesdropper's illegal conduct as it affects the child. Since the surveillance activity is to be weighed in the custody hearing, eavesdropping should be restricted to cases where an interceptor truly believes his conduct is necessary to protect his child's best interests. Otherwise the eavesdropper would not accept the risks of losing his custody claim because of his own illegal activity.

Recent modifications in Illinois custody law provide that custody should be determined in accordance with the best interests of the child.[195] A court may not consider conduct of a pro-

189. *Id.* at 708, 412 N.Y.S.2d at 581.

190. 5 Ill. App. 3d 610, 283 N.E.2d 709 (1972). In *Fears*, a custodial mother moved to modify and fix more definite child support obligations. Her former husband sought a custody change, which was granted by the lower court. *Id.* at 611, 283 N.E.2d at 710.

191. *Id.* at 613, 283 N.E.2d at 711.

192. *Id.*

193. *Id.* at 614, 283 N.E.2d at 711.

194. *Id.*

195. ILL. REV. STAT. ch. 40, § 602(a) (1977).

posed custodian which does not affect his relationship to the child.[196] Modifications are allowed only in situations where the child's present environment seriously endangers his physical, mental, moral, or emotional health.[197] Published comments to the Uniform Act that was adopted in Illinois explained these changes as removing fault notions from custody adjudications, and concluded that there is no reason to encourage parties to spy on one another in order to discover marital or sexual misconduct for use in a custody contest.[198] Since discovery of extramarital sexual activity has been the primary purpose of interspousal eavesdropping, the commentary's mandate would seem to exclude the major reason for wiretapping. In *De Franco v. De Franco*,[199] however, marital infidelity was resurrected as a factor in custody determinations and modifications.[200] This reinstated sexual suspicion as the most prevalent reason for intrafamily surveillance.

The *De Franco* court, in affirming a custody change to a father, concluded that an adulterous relationship by one divorced parent can negatively affect a child's moral health.[201] Not only can adultery be employed when modification is requested it may also be utilized as a relevant factor in the original determination.[202] While there now appear to be comparable reasons for interspousal eavesdropping in New York and Illinois, it is doubtful that an Illinois court could be persuaded to abandon the *Fears* rationale. It would be pointed out that *Berk* is an opinion of one family court judge which may well be reversed on its pending appeal. More important, New York's one-party consent exception[203] contravenes any thought of analogizing the two states' eavesdropping laws in light of Illinois' "unqualified" surveillance ban.

A third child custody position has been advanced. It supports the use of eavesdropping evidence in impeaching a spouse's testimony in a custody proceeding. In *Beaber v.*

196. *Id.* § 602(b).

197. *Id.* § 610.

198. DESK GUIDE TO THE UNIFORM MARRIAGE AND DIVORCE ACT 43 (1974).

199. 67 Ill. App. 3d 760, 384 N.E.2d 997 (1979).

200. *Id.* at 768, 384 N.E.2d at 1002. Illinois courts under prior marriage legislation had awarded and modified custody to avoid the effect on children of sexual relationships. *See* Gehn v. Gehn, 51 Ill. App. 3d 946, 367 N.E.2d 508 (1977); Anagnostopoulos v. Anagnostopoulos, 22 Ill. App. 3d 479, 317 N.E.2d 681 (1974).

201. 67 Ill. App. 3d at 767, 384 N.E.2d at 1001.

202. *Id.* Since the original custody determination had been by stipulation, the court decided the case on a modification theory and also as if the proceeding was one for an original determination. *Id.*

203. *See, e.g.*, People v. Smith, 415 N.Y.S.2d 68 (A.D. 1979).

Beaber,[204] tape recordings were admitted to impeach the testimony of a woman as to both parents' alleged misconduct, despite acknowledgments that federal and state eavesdropping laws had been violated.[205] While the Illinois exclusionary rule does not seem to contemplate an exception for impeachment, neither did the statutes involved in *Beaber*. The Illinois rule, though it appears steadfast, has never been challenged on impeachment grounds in a domestic relations case. *Beaber* is the sole custody impeachment precedent. It can be buttressed by observing the willingness of other courts to narrow their exclusionary holdings to direct evidence so as to not foreclose offers to impeach testimony.[206] Should *Berk* and *Beaber* not convince a court, eavesdroppers, as a last resort, would be forced to extend the civil damage defenses to admissibility controversies, and place themselves within the realm of one of the exceptions.

CONCLUSION

Perplexities permeating judicial review of intrafamily eavesdropping stem from the unwillingness of some courts to remedy invasions of privacy in what is considered to be the most private of our modern institutions, the marital union and the

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204. 41 Ohio Misc. 95, 322 N.E.2d 910 (1974), *aff'd*, No. 4187, Ohio App., 5th Dist., Aug. 4, 1975. In *Beaber*, a *Simpson* situation where the eavesdropping took place in the marital residence between cohabiting spouses, the lower court hinted that the tape recordings were employable as direct evidence. *See* 41 Ohio Misc. at 99, 322 N.E.2d at 913. This was modified on appeal to usage solely in contradicting the woman's statements under oath. Beaber v. Beaber, No. 4187, slip op. at 17 (Ohio App., 5th Dist., Aug. 4, 1975).

205. *Id. Cf. In re* Marriage of Lopp, 370 N.E.2d 977 (Ind. App. 1977), *vacated*, 378 N.E.2d 414 (Ind. 1978), *cert. denied*, 99 S. Ct. 1023 (1979). The intermediate appellate court held that eavesdropping evidence is always inadmissible, regardless of the circumstances. *See* 370 N.E.2d at 980. On appeal, the Indiana Supreme Court noted the distinction between using eavesdropping evidence directly and for impeachment purposes. *See* 378 N.E.2d at 421. The court allowed tapes of wiretapped telephone conversations to be used to dispel a non-custodial woman's contention that she had been coerced into signing a court approved temporary custody agreement.

It was alleged that the father had made these recordings and had threatened to expose the woman's sexual conduct to her first husband, who would then most likely seek custody of a child of this first marriage. The woman claimed that she was prejudiced by allowing the judge to grant permanent custody after considering the tapes for the coercion claim. A presumption against trial court bias was employed to conclude that the tapes had not been considered by the judge in the custody determination itself. Even if they had been so used, the evidence derived from the tapes was held to be merely cumulative to the great weight of other evidence, and therefore not prejudicial. *Id.* at 424. *See also* United States v. Quintana, 508 F.2d 867 (7th Cir. 1975) (use of harmless error doctrine in admitting evidence in an interception of communications situation).

206. *See, e.g.*, Rickenbaker v. Rickenbaker, 290 N.C. 373, 382, 226 S.E.2d 347, 353 (1976).

family.[207] While the application of criminal eavesdropping laws to private domestic disputes has been dominated by uncertainty of purpose and propriety,[208] contentions that these prohibitions should never attach to intrafamily surveillance form only a part of the problem. Even treating the family as a "single entity," thereby qualifying individual privacy rights, fails to resolve the crucial issue of whether the courts should review the expectations of privacy and the justifications for invading it by weighing the circumstances of the particular family involved.

By raising claims of "best interests of the child," "necessity," and "reasonableness of privacy expectations," an eavesdropper will force a court to delve into the heart of the family concept as it exists in the scrutinized family. There is no concensus on whether spouses have unlimited rights to know whether their partners are being unfaithful. Many families would disagree on the extent parental control rights should interfere with their children's expectations of telecommunications privacy. One eavesdropper may wiretap for vicious self-serving motives, possibly arising out of a hideous need for retribution. Another may do so for the noble purpose of protecting his child's welfare or rehabilitating a failing marital union or family structure. In cases of intrafamily controversy, courts should have dispositional powers so to effect rehabilitation rather than retribution.[209] When the judicial system realizes that families have differing values as to privacy and family unity, courts may be forced to legitimate eavesdropping activity in the context of the specific competing individual and family interests involved.

While the federal and Illinois remedial devices purport to provide ease of access to civil redress of interceptions of communications and to foreclose admission of eavesdropping evidence, various exceptions and interpretative restrictions may instill a degree of confidence in one contemplating intrafamily eavesdropping. It must be warned, however, that the array of rebuttal expostulations must withstand thorough examination by the Illinois judiciary[210] before the "dirty business" of eaves-

207. *See Interspousal Surveillance Immunity, supra* note 7, at 212.

208. *Id.* at 211 (author discussed anomaly of the sparsity of intrafamily interception criminal prosecutions in light of Justice Department determination that eighty per cent of eavesdropping complaints involved domestic disputes). In addition to those previously considered, the following authorities point out the uncertainty of applying criminal law to domestic eavesdropping situations: 27 BUFFALO L. REV. 139 (1977); 4 N. KY. L. REV. 389 (1977).

209. H. KRAUSE, FAMILY LAW 305 (1976); Ketcham, *The Juvenile Court*, 40 SOC. SERV. REV. 283, 284-85 (1966). *See also* Parnas, *Prosecutorial and Judicial Handling of Family Violence*, 9 CRIM. L. BULL. 733 (1973); Schwartz, *The Serious Marital Offender: Tort Law as a Solution*, 6 FAM. L.Q. 219 (1972).

210. The law of intrafamily eavesdropping is in conflict. Practitioners

dropping can be cleansed by its litigation in intrafamily scenarios.

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should avoid oversimplistic appraisals of both state and federal legislation and judicial decisions. *See* Kratz v. Kratz, 48 U.S.L.W. 2173 (E.D. Pa. Aug. 23, 1979). In *Kratz*, a husband, suspicious of his wife's extramarital activities, asked his attorney whether it would be legal to attach an eavesdropping device to the family telephone. The attorney discovered Simpson v. Simpson, 490 F.2d 803 (5th Cir.), *cert. denied*, 419 U.S. 897 (1974), and concluded that the man's proposed wiretapping would not violate federal law. The woman and her paramour brought a Title III civil action for damages against the man and his attorney. The district court denied both defendants' *Simpson*-based motions to dismiss. Hence, an attorney, though he never actually intercepts a communication, can by merely advising his client that interspousal surveillance is lawful and employing garnered information in divorce pleadings be held monetarily liable.

Uncertainties in the law of intrafamily eavesdropping may themselves be utilized as affirmative defenses. The plaintiffs in *Kratz* had moved for summary judgment as to liability. Title III civil recovery depended on proof of "wilful" violation of the wiretapping ban. The court expressly rejected the holding in *Simpson*, but denied plaintiffs' motion. A genuine issue of material fact existed as to the reasonableness of the husband's and the attorney's reliance upon *Simpson*. The court believed that at this time the *Simpson* opinion was the voice of the federal government advising the man and his attorney that their contemplated conduct would not render them liable under Title III. If the fact-finder finds the defendants' reliance on *Simpson* to have been reasonable, the court concluded that it would entitle them to the affirmative defense of reasonable reliance upon an official, but erroneous, statement of federal law.