

## The Federal Wiretap Act: the Permissible Scope of Eavesdropping in the Family Home

### I. INTRODUCTION

Few, if any, courts find a violation of the Federal Wiretap Act when a concerned parent eavesdrops or secretly records a minor child's telephone conversation in the family home.<sup>1</sup> This consensus emerged among the Federal circuits, notwithstanding the statutory language of the Federal Wiretap Act, which prohibits "any person" from intercepting oral, wire, or electronic communications.<sup>2</sup> While courts have agreed on the narrow proposition that wiretapping in the parent-child context generally falls outside of statutory prohibitions, the general applicability of the Wiretap Act in the domestic realm remains unclear.<sup>3</sup> The Supreme Court has provided little guidance on the issue and has repeatedly declined requests to squarely address the reach of the Act inside the family home.<sup>4</sup> As a result, the extent to which the Act exempts family members remains unsettled unclear.

This note addresses wiretapping in the family home and explores the myriad factual scenarios addressed by courts in order to determine when wiretapping in the domestic realm transgresses from lawful and benign to possible criminal or civil liability. Part II addresses the Federal Wiretap Act's general prohibitions, including both the statutory and common law exceptions relied upon by courts in applying the Act in the domestic context. Part II will also discuss the

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1. *Schieb v. Grant*, 22 F.3d 149, 154 (7th Cir. 1994) (acknowledging father's use of an extension phone to record minor son's conversations with mother permissible under the Wiretap Act); *Newcomb v. Ingle*, 944 F.2d 1534, 1536 (10th Cir. 1991) (holding interception by custodial parent of minor son's conversations with father outside the scope of the Wiretap Act); *Anonymous v. Anonymous*, 558 F.2d 677, 679 (2d Cir. 1977) (stating husband's recording of wife's conversations with minor child excepted under Wiretap Act).

2. 18 U.S.C. § 2511(1) (2000).

3. *See Simpson v. Simpson*, 490 F.2d 803, 805-06 (5th Cir. 1974) (contending Congress did not intend for the Wiretap Act to reach domestic conflicts in the marital home). *But see United States v. Jones*, 542 F.2d 661, 673 (6th Cir. 1976) (stating Congress intended Title III to prohibit electronic surveillance in marital litigation).

4. *See, e.g., United States v. Ojeda Rios*, 495 U.S. 257 (1990) (addressing Title III requirement of a seal on recordings of intercepted communications); *Dalia v. United States*, 441 U.S. 238 (1979) (stating government agents entitled to enter private premise covertly pursuant to Title III order); *United States v. Giordano*, 416 U.S. 505 (1974) (addressing procedure for obtaining judicial authority to intercept wire communications in investigation of serious offense).

relevant legislative history. Part III addresses the scope of the Act in the family home and analyzes the proffered justifications for permitting or restricting domestic eavesdropping. In conclusion, Part IV discusses the effect of the development and proliferation of sophisticated surveillance technologies on wiretapping in the family home.

## II. HISTORY

### A. Title III General Statutory Prohibitions

Congress enacted the Federal Wiretap Act as part of the Omnibus Crime Control and Safe Streets Act of 1968 (Title III) in an effort to better articulate a balance between the privacy rights of individuals and the legitimate needs of law enforcement.<sup>5</sup> The Act seeks to safeguard privacy in oral and wire communications while simultaneously articulating when law enforcement officials may intercept such communications.<sup>6</sup> Title III prohibits the intentional interception of wire, oral or electronic communications, unless specifically provided for in the statute.<sup>7</sup> Under the Act, an interception occurs by the “aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device.”<sup>8</sup> Pursuant to the Act, a wire communication includes “any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable or other connection.”<sup>9</sup> Unlike wire communications, federal law protects oral communications only where there is a reasonable expectation of privacy.<sup>10</sup>

The original Wiretap Act prohibited only the intentional interception of wire or oral communications.<sup>11</sup> As other methods of communication became increasingly commonplace, such as cellular phones, cordless phones and electronic communications transmitted in digital form, Congress amended the Wiretap Act with the Electronic Communications and Privacy Act of 1986 (ECPA) to also prohibit the intentional interception of electronic communications.<sup>12</sup> Title I of the ECPA defines electronic communications as

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5. See *Dalia*, 441 U.S. at 250 n.9, 252.

6. See *Gelbard v. United States*, 408 U.S. 41, 48 (1972).

7. 18 U.S.C. § 2511(1) (2000) which states in relevant part: “Except as otherwise specifically provided in this chapter any person who – (a) Intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral or electronic communication . . . shall be punished . . .” A violation of the Act required that the interception occur contemporaneously during transmission. *United States v. Turk*, 526 F.2d 654, 658 (5th Cir. 1976).

8. 18 U.S.C. § 2510(4) (2000).

9. 18 U.S.C. § 2510(1) (2000).

10. 18 U.S.C. § 2510(2) (2000).

11. 18 U.S.C. § 2511(1)(a) (2000).

12. *Id.* (adding “electronic communication” to the definition of intercept). The definition of electronic communication includes the *transfer* of signals not the *storage*. *Id.* The 1986 Act amended the scienter

“any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system . . . .”<sup>13</sup> The ECPA not only prohibits the interception of electronic communications, but also the unauthorized access to these communications while in storage pursuant to the Stored Communications Act created under Title II of the ECPA.<sup>14</sup> The ECPA also bars the use and disclosure of an illegally obtained communication, although such liability requires more than proof of intentional conduct.<sup>15</sup>

States may also enact statutes regulating wiretapping.<sup>16</sup> All states, with the exception of Vermont, have enacted wiretap statutes.<sup>17</sup> To avoid preemption, states may adopt more stringent standards than required under Federal law, but not less restrictive.<sup>18</sup> Thus, States cannot admit evidence that would be suppressed in Federal Court, yet could exclude evidence admissible in Federal court.<sup>19</sup>

### B. Enumerated Statutory Exceptions

Title III expressly excludes certain classes of individuals from the operation of the statute, but contains no explicit exception for spouses or family members.<sup>20</sup> For example, switchboard operators, agents of communications service providers engaged in service related activities and certain government employees operating in the normal course of business are exempt from liability under Title III.<sup>21</sup>

Additionally, as provided in the Act, one party to the communication may consent to the interception, and in limited circumstances may lawfully authorize a third party interception.<sup>22</sup> The consent exception permits

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requirement from “willful” to “intentional,” acknowledging that an individual using a radio scanner might unintentionally tune into a cellular conversation. Carol M. Bast, *What’s Bugging You? Inconsistencies and Irrationalities of the Law of Eavesdropping*, 47 DEPAUL L. REV. 837, 842-43 (1998).

13. 18 U.S.C. § 2510(12) (2000).

14. 18 U.S.C. § 2701 (2000).

15. 18 U.S.C. § 2511(1)(b)–(d) (2000). The plaintiff must demonstrate that the defendant acted with knowledge that the information used or disclosed came from the intercepted communication and knew or could determine that such interception was prohibited. *Id.*

16. *Commonwealth v. Vitello*, 327 N.E.2d 819, 834 (1975).

17. See generally Stacy L. Mills, *He Wouldn’t Listen to Me Before, But Now . . . : Interspousal Wiretapping and an Analysis of State Wiretapping Statutes*, 37 BRANDEIS L.J. 415, 429 (1998) (discussing differences among state wiretapping statutes generally).

18. *Vitello*, 327 N.E.2d at 833-34. By adopting more stringent standards than required under Federal law, states may exclude evidence that would be admissible in Federal courts. *Id.*

19. *Id.*

20. *Gelbard v. United States*, 408 U.S. 41, 46 (1972).

21. See 18 U.S.C. § 2511(2)(b) (2000). See Allan H. Zerman & Cary J. Mogerman, *Wiretapping and Divorce: A Survey and Analysis of the Federal and State Laws Relating to Electronic Eavesdropping and Their Application in Matrimonial Cases*, 12 J. AM. ACAD. MATRIM. LAW. 227, 230-31 (1994) (discussing persons exempted from liability under Title III).

22. 18 U.S.C. § 2511(2)(d) (2000). Some states require that both parties to the communication consent or that a third party intercepting the communication obtain the consent of both parties. See Mills, *supra* note 17,

interception of “a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception”<sup>23</sup> Absent such consent, only a court of competent jurisdiction may authorize interception.”<sup>24</sup> Some courts rely on the one-party consent exception in the context of parent-child wiretapping suggesting that a parent may vicariously consent to the interception based on genuine concern for the child’s welfare.<sup>25</sup>

Moreover, the Wiretap Act carves out an exception for the use of extension telephones.<sup>26</sup> The exception applies to “standard” telephonic instruments furnished to a subscriber or user by a communication carrier and used by the subscriber in his or her “ordinary course of business.”<sup>27</sup> The statutory definition neglects to elaborate on what conduct falls within the ordinary course of business and the Supreme Court has yet to address the scope of the exception.<sup>28</sup> Federal and State courts have interpreted the phrase “in the ordinary course of business” differently depending on the context.<sup>29</sup> In the commercial context, courts interpret the phrase narrowly.<sup>30</sup> Businesses may avoid Title III liability if the interception is for a legitimate business purpose, routine and with notice.<sup>31</sup> In the domestic relations context, however, courts broadly interpret the phrase “in the ordinary course of business” permitting family members to intercept each other’s telephone conversations by listening on another phone extension in the family home.<sup>32</sup>

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at 429.

23. 18 U.S.C. § 2511(2)(d) (2000).

24. S. REP. NO. 1097, 90th Cong., 2d Sess., 89 (1968).

25. *Pollock v. Pollock*, 154 F.3d 601, 610 (6th Cir. 1998) (upholding parental vicarious consent on behalf of minor child where parent demonstrates “good faith, objectively reasonable basis” for believing consent was necessary for the child’s protection); *see also* *Commonwealth v. Barboza*, 763 N.E.2d 547 (Mass. App. Ct. 2002) (discussing Federal courts application of one party consent requirement where consent comes from parent vicariously).

26. 18 U.S.C. § 2510(5)(a) (2000).

27. The telephone extension exception applies to “(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business or furnished by such subscriber or user for connection to the facilities of such service and used in the ordinary course of its business . . . .” 18 U.S.C. § 2510(5)(a)(i) (2000).

28. *Vieux v. Pepe*, 184 F.3d 59, 65 (1st Cir. 1999) (stating Supreme Court declined to address the scope of the ordinary course of business exception).

29. *Id.* at 66 (acknowledging scope of ordinary course of business exception resulted in a “significant split in authority”).

30. *See Adams v. City of Battle Creek*, 250 F.3d 980, 984 (6th Cir. 2001).

31. The statute does not require actual consent on the part of the employee, but rather suggests implicit notice. *Id.*

32. *See Newcomb v. Ingle*, 944 F.2d 1534, 1536 (10th Cir. 1991). The *Newcomb* Court asserted “there is no persuasive reason why Congress would exempt a business exemption and not one in the home.” *Id.* *But see Kempf v. Kempf*, 868 F.2d 970, 973 (8th Cir. 1989) (holding husband’s taping of wife’s phone conversations in the marital home is not protected under Title III).

### C. Interspousal Wiretapping Common Law Exception

The Supreme Court has not yet addressed the split in the federal circuits on the issue of interspousal wiretapping.<sup>33</sup> The issue generally arises where one spouse conducts a wiretap of the conversations engaged in by the other spouse by attaching a recording device to an extension phone in the family home.<sup>34</sup> In *Simpson v. Simpson*,<sup>35</sup> the Fifth Circuit created an implied exception for interspousal wiretapping in order to promote tranquility in the home.<sup>36</sup> The *Simpson* court reasoned that issues relating to marital disputes and domestic conflicts are generally matters of state law and as such fall outside the purview of the federal wiretap statute.<sup>37</sup>

The majority of federal appellate courts have rejected *Simpson*, holding Title III applicable to interspousal wiretapping in the marital home.<sup>38</sup> Courts rejected the logic of *Simpson* arguing that Title III is a criminal statute with little justification for exempting spouses.<sup>39</sup> Moreover, even the few states retaining the doctrine of interspousal tort immunity would be unable to shield criminal prosecutions resulting under Title III.<sup>40</sup> Courts have criticized the *Simpson* court's statutory analysis and interpretation of legislative history.<sup>41</sup>

Title III prohibits "any person" from intercepting oral, wire, or electronic communications unless "specifically" authorized by statute.<sup>42</sup> Thus, because spouses are not specifically exempted, the statute unambiguously applies to wiretapping within the marital home.<sup>43</sup> Though Title III originated as a crime control statute, the legislative history reveals congressional awareness of electronic eavesdropping in the domestic realm.<sup>44</sup> At a congressional hearing on invasions of privacy held prior to the enactment of Title III, Senator Long noted that in the non-governmental arena "[t]he three large areas of snooping . . . are (1) industrial (2) divorce cases (3) [and] politics."<sup>45</sup> Additionally, Robert Blakey, a drafter of Title III, testified that "private

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33. See *Simpson v. Simpson*, 490 F.2d 803, 805 (5th Cir. 1974). But see, e.g., *Kempf*, 868 F.2d at 973 (holding Title III applicable to interspousal wiretapping); *Pritchard v. Pritchard*, 732 F.2d 372, 374 (4th Cir. 1984); *United States v. Jones*, 542 F.2d 661, 673 (6th Cir. 1976).

34. See *Simpson*, 490 F.2d at 804.

35. 490 F.2d 803 (5th Cir. 1974).

36. *Simpson*, 490 F.2d at 803; see also *Anonymous v. Anonymous*, 558 F.2d 677 (2d Cir. 1977) (holding Title III not applicable to interspousal wiretapping).

37. See *Simpson*, 490 F.2d at 805.

38. See, e.g., *Heggy v. Heggy*, 944 F.2d 1537, 1541 (10th Cir. 1991) (rejecting the *Simpson* view); *Kempf v. Kempf*, 868 F.2d 970 (8th Cir. 1989); *Pritchard*, 732 F.2d at 372; *Jones*, 542 F.2d at 661.

39. *United States v. Jones*, 542 F.2d 661, 672 (6th Cir. 1976).

40. *Id.*

41. *Id.*

42. 18 U.S.C. § 2511(1) (2000).

43. *Heggy v. Heggy*, 944 F.2d 1537, 1539 (10th Cir. 1991).

44. *United States v. Jones*, 542 F.2d 661, 668 (6th Cir. 1976).

45. *Id.* at n.12 (quoting remarks of Sen. Long Hearings on Invasions of Privacy Before the Subcommittee on Admin. Practice and Procedure of the Sen. Comm. on the Judiciary, 89th Cong. 1st Sess., pt. 5 at 2261 (1965-66)).

bugging . . . can be divided into two broad categories, commercial espionage and marital litigation.”<sup>46</sup> Most significantly, Congress could have codified the *Simpson* exception when it subsequently amended Title III.<sup>47</sup>

#### D. Remedies

Title III provides for both criminal and civil liability for a violation of the Federal Wiretap Act.<sup>48</sup> Title III states in pertinent part: “whoever violates subsection (1) of this section shall be fined under this title or imprisoned not more than five years, or both.”<sup>49</sup> A civil cause of action is available to “any person” whose wire or oral communication is intercepted, disclosed, or used, and may be brought against “any person” who “intercepts, discloses, or uses, or procures any other person to intercept, disclose or use such communication.”<sup>50</sup> The victim may recover compensatory and punitive damages, as well as any reasonable attorney’s fees and costs.<sup>51</sup> Moreover, Title III authorizes the suppression of information obtained by means of an illegal interception and its fruits.<sup>52</sup>

In the domestic context, the Federal circuits are split as to whether they must suppress illegal recordings made by private parties.<sup>53</sup> In *United States v. Murdock*,<sup>54</sup> the Sixth Circuit interpreted Title III to imply a “clean hands” exception that does not require suppression of an illegally obtained recording made by a private party.<sup>55</sup> The court reasoned that suppression is a remedy relied upon to deter law enforcement personnel.<sup>56</sup> Consequently, where law enforcement is not involved in the initial illegal interception, subsequent suppression fails to operate as a deterrent.<sup>57</sup> In contrast, the First Circuit ruled that allowing the government to use a recording illegally obtained by a private

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46. *Hearings on the Right to Privacy Act of 1967 Before the Subcomm. on Admin Practice and Procedure of the Sen. Comm. on the Judiciary*, 90th Cong., 1st Sess., pt. 2 at 413 (1967).

47. *See* *Heggy v. Heggy*, 944 F.2d 1537, 1541 (10th Cir. 1991) (highlighting Congressional awareness of the circuit split on interspousal wiretapping prior to subsequent Title III amendments).

48. 18 U.S.C. § 2511(2000).

49. 18 U.S.C. § 2511(4) (2000).

50. 18 U.S.C. § 2520 (2000).

51. *Id.*

52. 18 U.S.C. § 2518(10) (2000). Title III permits suppression as a result of an illegal interception, an interception pursuant to a facially invalid court order, or an interception obtained that failed to comply with the order of authorization. *See* *United States v. Ojeda Rios*, 495 U.S. 257, 260 n.1 (1990). The federal suppression statute states in relevant part: “Whenever any wire or oral communication has been intercepted, no part of the content of such communication and no evidence derived therefrom may be received in evidence in any trial . . . before any court . . . of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.” 18 U.S.C. § 2515 (2000).

53. *See* *Commonwealth v. Barboza*, 763 N.E.2d 547, 555 n.6 (Mass. App. Ct. 2002) (noting the split among Federal circuits as to whether suppression is required where recording is made absent state action).

54. *United States v. Murdock*, 63 F.3d 1391, 1404 (6th Cir. 1995).

55. *See id.* The Second and Fifth Circuits have also adopted the “clean hands” exception.

56. *Id.* at 1402.

57. *Id.*

party would undermine the privacy interests Title III aims to protect.<sup>58</sup>

### III. THE SCOPE OF THE FEDERAL WIRETAP ACT IN THE MARITAL HOME

#### A. Application of the Wiretap Act to Interspousal Wiretapping

Title III has no express exception for interspousal wiretapping.<sup>59</sup> Congressional awareness of wiretapping in domestic conflicts and divorce litigation suggests Congress intended wiretapping occurring in the marital home to fall within the purview of Title III.<sup>60</sup> In the past, the doctrine of interspousal tort immunity recognized by some states influenced courts to imply interspousal immunity under Title III.<sup>61</sup> In recent years support for the immunity doctrine in the tort context has declined.<sup>62</sup> Interspousal tort immunity would not bar criminal prosecutions because Title III is a criminal statute.<sup>63</sup> Title III aims at protecting individual privacy of communication, “the fact that one party to a taped conversation is a spouse should have no bearing whatsoever on the availability of criminal penalties.”<sup>64</sup>

The majority of Federal courts addressing the issue consistently reject an implied exception for electronic surveillance between spouses.<sup>65</sup> In *United States v. Jones*,<sup>66</sup> the court asserted that the legislative history of Title III “leaves no doubt” that the operation of Title III reaches private electronic surveillance and that Congress was cognizant of the use of such surveillance in divorce litigation.<sup>67</sup> Notwithstanding the express language of the statute and legislative intent, a small number of courts imply an interspousal exception on the theory that Congress did not intend to reach conflicts in the marital home.<sup>68</sup> Consequently, certain Federal circuits effectively deny spouses civil recovery under Title III in such circumstances.<sup>69</sup>

Courts generally agree with *Simpson’s* narrow proposition that state courts, rather than federal courts, are better suited to handle domestic conflicts. This assertion, however, does not necessarily imply Congressional intent to create an

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58. See *United States v. Vest* 813 F.2d 477, 481 (1st Cir. 1987).

59. See 18 U.S.C. § 2511(2)(d) (2000).

60. See *supra* notes 44 and 45 and accompanying text.

61. See *United States v. Jones*, 542 F.2d 661, 672 (6th Cir. 1976).

62. See *id.* (acknowledging states have abandoned antiquated doctrine of interspousal tort immunity). Title III is a criminal statute and even in states that support interspousal tort immunity, the doctrine is not applicable to criminal prosecutions. *Id.*

63. See *id.*

64. See *Jones*, 542 F.2d at 672.

65. See *supra* note 38 and accompanying text.

66. 542 F.2d 661 (6th Cir. 1976).

67. See *United States v. Jones*, 542 F.2d 661, 668 (6th Cir. 1976).

68. See *Simpson v. Simpson*, 490 F.2d 803, 805-06 (5th Cir. 1974) (noting Congress did not indicate a “positive intent” to bring domestic conflicts within the operation of Title III).

69. See *id.*

exception for interspousal wiretapping.<sup>70</sup> In the context of interspousal wiretapping, the proposition seems less relevant since permitting electronic surveillance between spouses does little, if anything, to promote domestic tranquility.<sup>71</sup> On the contrary, the very act of surreptitiously wiretapping a spouse in the family home frustrates domestic tranquility.<sup>72</sup> Accordingly, there is little logic in excepting from the operation of Title III “willful, unconsented to electronic surveillance between spouses.”<sup>73</sup>

Courts following *Simpson* draw erroneous distinctions between third-party surveillance that occurs in the marital home at the request of a spouse and unaided surveillance by a spouse.<sup>74</sup> These courts assert that the former is a more poignant invasion of privacy, while the latter is consistent with the parties’ expectations of privacy toward each other in the home.<sup>75</sup> Courts sharply criticize this distinction opining that the relevant inquiry is whether the privacy of the non-consenting party has been invaded in a manner unauthorized by Title III.<sup>76</sup> Whether a third party or a spouse installs the recording device is irrelevant.<sup>77</sup> Not only is the privacy of the non-consenting spouse violated, but also the privacy of third parties to the conversation.<sup>78</sup> While it may make little difference whether a spouse or a third party installs the recording device, a court may analyze the complexity of the unit and the sophistication and intrusiveness of the listening device in evaluating whether the activity violates Title III.<sup>79</sup>

Unlike in the parent-child context, courts have been reluctant to apply the telephone extension exemption to interspousal wiretapping in divorce litigation.<sup>80</sup> Listening on a telephone extension in the family home, while undoubtedly an invasion of privacy, is a less intrusive method of eavesdropping. Such use requires the listener to be physically present in the

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70. *Pritchard v. Pritchard*, 732 F.2d 372, 374 (4th Cir. 1984) (agreeing with *Simpson* court that domestic matters are best left to the states).

71. *Kratz v. Kratz*, 477 F.Supp. 463, 476 (E.D.Pa. 1979) (noting Title III regulates electronic eavesdropping not marital relations). Title III prohibits one method of obtaining evidence and “there is no more reason to permit husbands and wives to perpetuate these evils upon each other with impunity than there is to permit them legally to commit other crimes against each other.” *Id.*

72. *Id.*

73. *Pritchard*, 732 F.2d at 374.

74. *See Simpson v. Simpson*, 490 F.2d 803, 808-09 (5th Cir. 1974).

75. *See id.* The *Simpson* Court noted that “third-party intrusion into the marital home, even if instigated by one spouse, is an offense against a spouse’s privacy of a much greater magnitude that is personal surveillance by the other spouse.” *Id.* at 809.

76. *United States v. Jones*, 542 F.2d 661, 670 (6th Cir. 1976).

77. *Id.*

78. *See id.*

79. *See id.*

80. *See Commonwealth v. Vieux*, 671 N.E.2d 989, 992 (Mass. App. Ct. 1996); *see also Kempf v. Kempf*, 868 F.2d 970 (8th Cir. 1989) (holding no interspousal exception where husband attached tape recorder to extension phone in the family home). *Contra Scheib v. Grant*, 22 F.3d 149 (7th Cir. 1994) (holding no Title III violation where parent attached a recording device to extension phone in family home to obtain information concerning child’s welfare).



home, at the time of the conversation, and limits eavesdropping to the length of the single call.<sup>81</sup> On the contrary, a recording or wiretapping device invades the privacy at both ends of the telephone line. It is also unlimited in scope, recording all calls made to and from the residence on all subjects.<sup>82</sup> While in some contexts such a distinction might prove significant, courts hearing divorce litigation apply Title III to forbid the use of even a residential phone by one spouse to make recordings of the other spouse's private conversations.<sup>83</sup> Unlike the justification for wiretapping in the parent-child to protect a child's welfare, the motivation for interspousal wiretapping is rarely benign, but rather a calculated endeavor to gather incriminating evidence during divorce litigation.<sup>84</sup> It is likely the extension phone exemption is also applicable where a family member listens to a conversation to protect another family member against harm.<sup>85</sup>

### *B. Reluctance to Apply Title III to the Parent-Child Context*

The majority of courts that have addressed the issue acknowledge that wiretapping in the marital home is within the purview of Title III. Courts have been reluctant, however, to extend the reach of Title III to the parent-child context.<sup>86</sup> Courts excepting parental eavesdropping or wiretapping of minor children in the family home from the operation of Title III have focused on the legislative history and Congressional intent of Title III.<sup>87</sup> Courts have noted that Congressional concern about evidence from wiretaps being used in marital disputes is "qualitatively different" than electronic eavesdropping on minor children.<sup>88</sup> In exempting parental taping, courts have relied on the doctrine of vicarious consent or have been willing to interpret the telephone extension exception broadly.

#### *1. Vicarious Consent*

Some federal courts have applied Title III's one party consent requirement to situations involving a parent intercepting a minor child's conversation.<sup>89</sup> The courts have found the consent requirement satisfied where the parent

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81. See *Vieux*, 671 N.E.2d at 993 (asserting Title III aimed at deterring the use of sophisticated surveillance equipment to eavesdrop of telephone conversations). "A person who listens in on a residential phone simply does not pose the same threat to telecommunications security as a high-tech snooper." *Id.*

82. See *Jones*, 542 F.2d at 670.

83. See *Vieux*, 671 N.E.2d at 992.

84. See *id.*

85. See *id.* at 993 (holding no violation of Title III where daughter listened in on conversation between mother and defendant using an extension phone in family home out of concern for her sister).

86. See *Newcomb v. Ingle*, 944 F.2d 1534 (10th Cir. 1991).

87. See *supra* notes 44 and 45 and accompanying text.

88. The *Scheib* court acknowledged that Congress could not have intended to subject parents to criminal and civil penalties for recording their minor child's phone conversations. *Scheib v. Grant*, 22 F.3d 149, 154 (7th Cir. 1994).

89. See *Commonwealth v. Barboza*, 763 N.E.2d 547, 552 (Mass. App. Ct. 2002).

intercepting the communication vicariously consents on behalf of his or her minor child motivated by a genuine, good faith, concern for the child's welfare.<sup>90</sup> In *Pollock v. Pollock*,<sup>91</sup> the Court held that a custodial parent's taping of a minor child's conversations with a non-custodial parent was legitimate upon a showing of "a good faith objectively reasonable basis for believing such consent was necessary for the welfare of the child."<sup>92</sup> The doctrine not only applies to situations involving a parent intercepting a child's communication with another family member, but also to a child's communications with third parties.<sup>93</sup>

## 2. Extension Phone Exemption

Other courts, reluctant to find vicarious consent, have focused instead on Congress's "intention to abjure from deciding a very intimate question of familial relations."<sup>94</sup> In *Newcomb v. Ingles*,<sup>95</sup> upon reaching majority, a child brought an action alleging his mother and grandfather violated Title II by installing a wiretap device in order to record his conversations with his father.<sup>96</sup> The court applied the telephone extension exemption and found that "listening on an extension and tapping the line within the home in the context here is not material."<sup>97</sup> Likewise, courts extended this theory to the taping of a child's conversations with third parties.<sup>98</sup> In *Commonwealth v. Barboza*,<sup>99</sup> the Massachusetts Appeals Court held that parents who recorded the conversations of their minor son fearing he was sexually involved with a fifty-seven year old man did not violate Title III.<sup>100</sup> In the parent-child context, courts reason that wiretapping arising out of parental concern for a child is not "so close a question as one that fell within the scope of Congress's concern about evidence from wiretaps being used in marital disputes."<sup>101</sup>

While courts consistently recognize a parent's legitimate right to eavesdrop

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90. See *Pollock v. Pollock*, 154 F.3d 601, 610 (6th Cir. 1998).

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

92. See *id.*

93. See *New Jersey v. Diaz*, 706 A.2d 264, 270 (1998). The *Diaz* Court admitted, under the vicarious consent exception, the audio portion of a secretly made videotape of a nanny assaulting and verbally abusing an infant in her care. *Id.*; see also *Barboza*, 763 N.E.2d at 552 (recording by parents of minor son's phone conversations not violative of Title III where parents believed son was being sexually exploited).

94. *Newcomb v. Ingle*, 944 F.2d 1534, 1536 (10th Cir. 1991).

95. *Newcomb v. Ingle*, 944 F.2d 1534 (10th Cir. 1991).

96. *Id.* at 1536.

97. See *id.* While *Newcomb* involved a custodial parent, later decisions have downplayed the significance of the distinction between custodial and non-custodial parents. In *Grant*, the Court read *Newcomb* and *Anonymous* as not making the parent's custodial status a factor, much less outcome determinative. *Scheib v. Grant*, 22 F.3d 149, 153 (7th Cir. 1994).

98. *Pollock v. Pollock*, 154 F.3d 601, 610 (6th Cir. 1998).

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

100. *Barboza*, 763 N.E.2d at 552; see also *Pollock*, 154 F.3d at 610.

101. *Vieux v. Pepe*, 184 F.3d 59, 67 n.5 (1st Cir. 1999).

on a child in the family home the justification courts rely on is less clear.<sup>102</sup> Applying the theory of vicarious consent in the parent-child context produces the most consistent result while respecting Congressional intent.<sup>103</sup> This theory is applicable regardless of whether the intercepted communication is that of another family member or a third party. If courts require a finding of a good faith objectively reasonable basis for believing consent is necessary to protect a child, the concern that parties would intercept communications solely to gain an advantage in a divorce or custody proceeding diminishes.<sup>104</sup> Additionally, if the court satisfied the objectively reasonable standard and admitted the recorded conversation in a proceeding, concern for the child's welfare overrides any other detrimental effect resulting from admitting the evidence.<sup>105</sup>

The extension phone exception, on the other hand, is more difficult to reconcile with the parent-child cases. While it is arguably consistent with Title III to permit listening in on an extension phone in the family home, most courts considered cases involving conduct that exceeds the mere use of an extension phone or other standard equipment.<sup>106</sup> Courts have tried to avoid the plain language of the telephone extension exemption by asserting that listening in on a telephone extension, recording a call, or installing a wiretapping device is a "distinction without a difference."<sup>107</sup> Yet, courts have recognized precisely such differences in other contexts.<sup>108</sup> Listening in on a telephone extension requires a party's physical presence in the house and is limited to the length of the conversation. In contrast, recording or tapping device is virtually unlimited and considerably more intrusive.<sup>109</sup>

Thus, while the extension phone exemption theoretically exempts a parent from Title III liability, the exception, as expressly provided for in the statute, has not proven highly relevant or logically sound in this context.<sup>110</sup> Rather than expanding the extension phone exemption to include recording devices or advanced wiretapping equipment not contemplated by the statutory exception,

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102. See *Newcomb v. Ingle*, 944 F.2d 1534 (10th Cir. 1991) (applying telephone extension exception to parent taping line in marital home to record child's conversation).

103. See *Pollock*, 154 F.3d at 610.

104. But see *Scheib v. Grant*, 22 F.3d 149, 153 (7th Cir. 1994). The court found that the non-custodial father's use of an extension phone to record his minor son's phone conversation was permitted where "on more than one occasion" the son "became upset and emotional after speaking with his mother." *Id.* at 151.

105. *Pollock v. Pollock*, 154 F.3d 601, 610 (6th Cir. 1998).

106. See *Newcomb*, 944 F.2d at 1536 (stating that intercepting family member's phone conversation by use of extension phone in family home is "arguably permitted by a broad reading of 18 U.S.C. § 2510(5)(a)(i) (2000)").

107. *Anonymous v. Anonymous*, 558 F.2d 677, 679 (2d Cir. 1977).

108. See *supra* note 81 and accompanying text (noting in the context of interspousal wiretapping the degree of sophistication of listening device may be an appropriate inquiry in assessing whether there has been a Title III violation).

109. See *supra* notes 83 and 85 and accompanying text (acknowledging difference between listening on an extension phone and sophisticated recording devices).

110. See *supra* note 102, 104 and 106 and accompanying text.

the court should apply vicarious consent to provide consistency.<sup>111</sup>

### C. *Sophisticated Surveillance Technology in the Family Home*

Another problem presented in the context of domestic wiretapping is the use of sophisticated surveillance technology in the family home. Sophisticated surveillance equipment permits individuals to intrude, with greater ease, into protected communications.<sup>112</sup> The sophistication of the listening device will not likely affect wiretapping in the parent-child context, as courts have emphasized concern for the child's welfare and whether the intrusion was objectively reasonable conduct.<sup>113</sup> In other domestic contexts, the sophistication of the listening equipment and the degree of intrusiveness will arguably influence the court's determination of whether such wiretapping constitutes reasonable activity.<sup>114</sup>

#### 1. *Electronic Mail*

With respect to electronic mail, courts have held, by analogy to interspousal wiretapping, that there is no implied exception enabling one spouse to intercept the electronic communications or access a stored communication of the other spouse.<sup>115</sup> While this proposition makes sense logically, in practice it requires an understanding of how an electronic communication passes through cyberspace.<sup>116</sup> In *White v. White*,<sup>117</sup> the wife hired a private investigator to retrieve her husband's stored e-mail from the hard drive of the family computer. She intended to be use this information in a contested custody dispute.<sup>118</sup> The plaintiff mistakenly believed that his AOL password completely restricted access his e-mail.<sup>119</sup> The *White* court found that the wife did not violate the New Jersey Wiretap Act because the Act was not meant to extend to e-mail retrieved by the recipient and then stored.<sup>120</sup> Moreover, because it was a family computer the wife was authorized to access the computer and did not use the husband's password.<sup>121</sup> The husband had no reasonable expectation of

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111. See *supra* note 106 and accompanying text.

112. See *supra* note 81 and accompanying text (noting in the context of interspousal wiretapping the degree of sophistication of listening device may be an appropriate inquiry in assessing whether there has been a Title III violation).

113. See *supra* note 88 and accompanying text.

114. See *supra* note 81 and accompanying text.

115. *White v. White*, 781 A.2d 85 (N.J.Super. 2001).

116. *Id.* In the course of transmission, an electronic communication passes through intermediate and back up protection storage. Transmission is completed when the recipient retrieves the message from intermediate storage. The retrieved message passes to post-transmission storage where it may remain indefinitely. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *White v. White*, 781 A.2d 85 (N.J.Super. 2001).

privacy in the stored communications.<sup>122</sup> Consequently, there is an expectation of privacy in electronic communications while in transit, but that expectation diminishes once the transmission is complete and the communication is stored.<sup>123</sup>

## 2. Video Surveillance

Family members and spouses are also likely to use video surveillance with greater frequency. Video surveillance, however, is not within the purview of Title III.<sup>124</sup> The legislative history of Title III indicates that Congress intended to prevent only the interception of oral, wire or electronic communications.<sup>125</sup> Congress defined interception to include only aural interception.<sup>126</sup> Courts have generally exempted silent television and video surveillance is exempted from the operation of Title III but video surveillance containing an audio portion may be within the operation of Title III.<sup>127</sup>

## IV. CONCLUSION

Courts have grappled with the applicability of Title III, a crime control statute, in the domestic realm. It is imperative that courts provide clear guidelines with respect to wiretapping in the domestic context because, as one commentator noted, “nearly 80 percent of reported wiretapping matters involve wiretaps within the family context.”<sup>128</sup> In the context of interspousal wiretapping, courts have emphasized the clear and unambiguous language of the statute to bring interspousal wiretapping within the operation of Title III. In the parent-child context, however, courts have been willing to read the statute’s express language broadly to protect the welfare of minor children and to protect parents from potential liability for eavesdropping out of concern for their children.

The legislative history of Title III emphasizes that one of the primary concerns of the drafters was to protect privacy. By emphasizing when such an expectation of privacy is *reasonable* courts might be better equipped to apply the Wiretap Act in the family home. Title III aims to prohibit only unreasonable intrusions, not all intrusions. Courts will face considerable

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122. *Id.*

123. *Id.*

124. *United States v. Haimowitz*, 725 F.2d 1561, 1581 (11th Cir. 1984) (concluding when videotape includes audio portion, Title III applies).

125. *State v. Diaz*, 706 A.2d 264, 267-68 (N.J. Super. Ct. App. Div. 1998) (discussing legislative intent to exclude silent video surveillance from operation of Title III).

126. *See Haimowitz*, 725 F.2d at 1581.

127. *See Diaz*, 706 A.2d at 268 (asserting Title III not intended to apply to recorded silent video surveillance).

128. Allan H. Zerman & Cary J. Mogerman, *Wiretapping and Divorce: A Survey and Analysis of the Federal and State Laws Relating to Electronic Eavesdropping and Their Application in Matrimonial Cases*, 12 J. AM. ACAD. MATRIM. LAW 227, 228 (1994).

challenge in articulating an objectively reasonable standard as technologies develop and are used with greater frequency in the family home.

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