

Working Paper Series

Villanova University Charles Widger School of Law

Year 2003

Legal Protection for Conversational and
Communication Privacy in Family,
Marriage and Domestic Disputes: An
Examination Federal and State Wiretap
and Stored Communications Acts and
the Common Law Privacy Intrusion Tort

Richard C. Turkington
Villanova University School of Law, turk@law.villanova.edu

Legal Protection for Conversational and Communication Privacy in Family, Marriage and Domestic Disputes: An Examination Federal and State Wiretap and Stored Communications Acts and the Common Law Privacy Intrusion Tort.

Richard C. Turkington*
Professor of Law, Villanova University School of Law

INTRODUCTION

In domestic disputes family members and sexual partners may be motivated to record telephone conversations or access e-mail or voicemail communications to protect their perceived self-interest or out of spite and anger. The unauthorized access of the content of conversations or communications in domestic disputes is an invasion of any non-consenting person's privacy. In this article I examine whether such invasions of privacy are legally justified.

The full extent of intra-family eavesdropping is not determinable for obvious reasons. Persons generally have no way of knowing whether their conversations are surreptitiously listened to. A successful eavesdropper does so in secret. Even if the invasion of privacy is discovered the victim may be reluctant to come forward because of the potentially embarrassing content of the conversation. Currently there is no national commitment to study the extent of illegal eavesdropping in the United States. An important study of a national commission reviewing laws relating to electronic

* Copyright © 2003 Richard C. Turkington, Professor , Villanova University School Of Law. The impetus for this article was research done for a presentation at a meeting of the Family Law Section of the American Bar Association . I thank my colleague Lew Becker for inviting me to speak at the meeting and for his many helpful insights on the family law dimensions of the article. Richard Redding was helpful in discussions on minors' rights. A special thanks is owed to Andrew Hart , my research assistant, for his work on the article. Finally, as always, I am grateful for the tireless efforts of my Administrative Assistant, Terri LaVerghetta in preparation of the various drafts of this article.

surveillance published in 1976 suggested that illegal surveillance in marital and domestic disputes was a significant problem. The study indicated that 79% of the illegal wiretapping reported to the Federal Bureau of Investigation (FBI) for which a motive could be identified involved surveillance by spouses, parents or those in courtship.¹ Many of these illegal surveillances were instituted with the advice of an attorney and the assistance of a private detective.² Clearly electronic surveillance of conversations in marital and custody disputes is not uncommon. The increase in court adjudications of electronic eavesdropping arising from domestic disputes suggests that these activities may be on the rise. It is also clear that spouses are accessing e-mail and tracking computer use in connection with domestic disputes.

The legality of electronic surveillance of conversations and accessing of e-mail is complicated. Several legal institutions are implicated by these activities. Section I of this article identifies the values that are at stake when electronic surveillance is employed in marriage and custodial disputes. Section II examines the legality of electronic surveillance in domestic disputes under state and federal wiretap and stored communications acts and the common law privacy intrusion tort. Section III examines the extent to which the fruits of violations of wiretap and stored communications acts or the privacy intrusion tort are excluded from divorce and custody proceedings. Section IV examines the availability of protective orders and other legal tools which minimize the scope of legal electronic surveillance and provide some protection against invasions of

¹ *National Comm'n For The Review of Fed. & State Laws Relating to Wiretapping and Elec. Surveillance, Electronic Surveillance 161 (1976)*. (hereafter National Commission). The Commission was created pursuant to a mandate in Section 804 of the Omnibus Crime Control Act of 1968. Unfortunately there has been no subsequent commissions or other governmental bodies that have updated the data in the national Commission Report of 1976.

² *See id.*

privacy to innocent participants of conversations or communications that are acquired in legal intra-family surveillance.

I. VALUES AT STAKE IN MARITAL AND CUSTODIAL SURVEILLANCE

Important values are implicated when conversations, communications and images are surreptitiously tape recorded or videotaped. Conversational privacy is an important form of informational and physical privacy. By "informational privacy" I mean a condition, value, interest or right that embodies a concern about limiting access to one's personal affairs. Physical privacy is the right to decide who shall have access to a physical space or physical access to one's body. Informational privacy and physical privacy sometimes collapse into each other. Hiding a tape recorder in someone's bedroom invades both informational and physical privacy.³

Conversational privacy is valued on both intrinsic and instrumentalist grounds.⁴ Some commentators and jurists view privacy as a value that is essential to our status as persons with dignity rights. Limiting who has acquaintance with the content of one's conversation is a feature of the dignity that is essential to personhood. An influential voice in explicitly connecting privacy and respect for persons was the philosopher Stanley Benn⁵. Benn contends that the essence of the wrong that occurs through invasions of privacy from unlicensed observations of someone is lack of respect for the

³ For a more general account of my views on informational privacy see TURKINGTON AND ALLEN, *PRIVACY LAW, CASES AND MATERIALS* 77 (West Group 2002).

⁴ For a general account of the various views of privacy as a value that is an intrinsically good and as a value that is instrumentally good because of what privacy does for other important values see TURKINGTON & ALLEN, *supra* note 3, at 27, 29.

⁵ See Benn, *Freedom and Respect for Persons*, in *Nomos XIII: Privacy* (1971).

subject as a person. Under this view, surreptitious acquisition of the contents of a conversation is a “blow to human dignity.”⁶

In addition to being intrinsically valuable, conversational privacy is also important because it is an instrument for furthering other important values. Expecting that what one says to others is private is essential for entering into and altering personal, intimate and political associations.⁷ As some jurists have observed, “[n]o one talks to a recorder as he talks to a person.”⁸ Moreover, privacy in conversations promotes spontaneous expressions of thoughts and emotions that make it possible for others to know an individual and for that individual to know others. Conversational privacy is also viewed as essential to the formation of self identity and personality. The same arguments and values apply to the importance of privacy in communications like e-mail that do not involve the human voice.⁹

A. *Countervailing Values*

The countervailing values that are asserted to justify encroachments on conversational and communication privacy in marital and custodial electronic

⁶ See Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 974 (1964) (characterizing eavesdropping, wiretapping and the unwanted entry into one’s house as a “blow to human dignity.”); see also TURKINGTON AND ALLEN, *supra* note 3, at 50-52 (providing a general account of the dignity and respect for person foundations of privacy law).

⁷ See *United States v. United States Dist. Court*, 407 U.S. 297 (1972) (holding that the President did not have the inherent power to wiretap phones of United States citizens); *Commonwealth v. Blood*, 507 N.E.2d 1029 (Liacos, J.) (Mass. 1987) (noting Massachusetts law prohibits unreasonable searches and seizures violated by electronic surveillance of conversations in the home unless all of the parties have consented); see also, *Bartnicki v. Vopper*, 532 U.S. 514, 532 (2001) (recognizing the role of privacy in communications in “uninhibited exchange of ideas” amongst citizens).

⁸ See *Blood*, 507 N.E. 2d at 1036 (Liacos, J.) (quoting *Holmes v. Burr*, 486 F.2d 55, 72 (9th Cir. 1973) (Hufstedler, J., dissenting)).

⁹ See generally Michael Fromkin, *Flood Control on the Information Ocean: Living with Anonymity, Digital Cash, and Distributed Databases*, 15 J.L. & COM. 395 (1996); Donald J. Karl, *State Regulation of Anonymous Internet Use*, 30 ARIZ. ST. L.J. 513 (1998); TURKINGTON & ALLEN, *supra* note 3, at 450.

surveillance cases are parental autonomy in child rearing, the best interests of the child and the integrity of the fact finding process in divorce and custody proceedings.

Parental autonomy in decisions involving the rearing and upbringing of their children is a longstanding value in the United States.¹⁰ Until the age of majority parents have the authority to decide most decisions for their children. This parental autonomy may include deciding to invade the informational and physical privacy of their children. With minor children legally incapable of consent, parents have autonomy to access their children's health records and consent to physical invasions of privacy through beneficial medical procedures. However, parental autonomy in child rearing is not absolute. In some cases parental decisions are overridden where the decision is not in the physical or emotional best interests of the child.¹¹ The best interests of the child may also override the informational and physical privacy values of the parents. Where a question of physical or sexual abuse has been raised in psychiatric examination of a parent the privacy and confidentiality of health information gives way to the interest in the physical and psychological well being of the child.¹²

¹⁰ See *Meyer v. Nebraska*, 262 U.S. 390 (1923) (holding parents have right to control the content of their children's education); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding Wisconsin compulsory public school attendance law interfered with parent's rights to religious expression protected by First Amendment).

¹¹ One example not the focus of this article would be where the child's life would be saved with a blood transfusion and the parents religious beliefs forbid the procedure. See, e.g. *State v. Rogers*, 20 P.3d 166, 169 (Okla. Civ. App. 2001) (discussing compelling interest of state in preserving lives of children).

¹² Originally states adopted laws requiring physicians to report suspected physical and sexual abuse to authorities. Today, most states have greatly extended the scope of this duty to mental health professionals. The duty of both physicians and mental health professionals is triggered where there is a reasonable basis for suspicion of abuse. Moreover, some jurisdictions impose criminal liability for a failure to disclose such information to the proper authorities. For a more in depth analysis of the issues surrounding disclosure of confidential communications in psychotherapy see RICHARD C. TURKINGTON & ROBERT M. WETTSTEIN, *CONFIDENTIALITY LAW AND THE TESTIMONIAL PRIVILEGE IN PSYCHIATRY*, reprinted from *PSYCHIATRY* (Robert Michaels, et al., eds. Rev. ed 1996/1997)

B. Some of the Complexities in Accommodating Values in Spousal or Parental Electronic Surveillance Cases

There are several features of parental or spousal electronic surveillance that make the accommodation of values complicated and hard in some cases.

1. The Inherent Pervasiveness of Electronic Surveillance

Electronic surveillance through a wiretap or bug is inherently pervasive. A wiretap, bug, the downloading of a person's e-mail or voicemail breaches the conversational and communication privacy of all non-consenting persons that are talking on the telephone or are a part of the conversation or e-mail communication. Even if there are justifications for invading the privacy of a targeted person the privacy of non-targeted persons is invaded. Persons whose privacy is invaded without justification are innocent victims of the inherent pervasiveness of electronic surveillance technology. Electronic surveillance may provide access to and extra-judicial disclosure of highly personal and intimate information of innocent persons. In the sections that follow I contend that the pervasive nature of electronic surveillance is not adequately accounted for in much of the law on electronic surveillance. When adequately taken into account the pervasive nature of electronic surveillance may push the accommodation of values in favor of conversational and communication privacy.

2. Parental Autonomy, The Best Interests of the Child, and Minor Autonomy

Parental autonomy to electronically eavesdrop on the conversations or

communications of a minor child is limited when the surveillance is not in the best interest of the child or where the surveillance violates the minor's autonomy to converse or communicate. As observed above, the best interests of the child may override parental choices on childrearing and parental informational privacy values. Beyond this there is an emerging tradition in our legal system to grant minors self determination in respect to decisions that have traditionally been left exclusively to parents.¹³ Much of the discussion in commentary and law focuses on empirical studies that suggest that minors are competent to make important decisions at ages much earlier than traditional legal ages of majority.¹⁴ Statutes have been enacted in several states providing for "mature minors" to have the right to informed consent for medical treatment and psychotherapy.¹⁵ In psychotherapy the right of a minor's informed consent for treatment is thought by psychotherapist to facilitate mental health treatment.¹⁶ The importance of this recent development is that the rigid historic view that parents have autonomy over dependent children until they reach the age of eighteen or twenty-one is being replaced in some states by a flexible view that minors reaching a level of competency have right to decide certain matters for themselves. This changing landscape of minor autonomy and the

¹³ See Kellie Smidt, *Who Are You To Say What My Best Interest Is? Minors Due Process Rights When Admitted by Parents for Inpatient Mental Health Treatment*, 71 Wash. L. Rev. 1187 (1996) for a background on the changing landscape of minors' right to consent for treatment.

¹⁴ See Richard E. Redding, *Due Process Protections for Juveniles in Civil Commitment Proceedings* 24 (1991). For a source of state law that demonstrates the variable ages adopted by legislation for minors' consent, see National Survey of State Laws, 405-418 (2d Ed. 1997).

¹⁵ See Tania E. Wright *A Minor's Right to Consent to Medical Care*, 25 Howard L. Review 525, 528-538 (1982) (arguing for drastic legislative reform of minor consent law in view of inconsistent and inadequate common law and legislative rules).

¹⁶ See Redding, *supra*, note 14 at p.

limitations on parental autonomy where the best interests of the child are at stake need to be taken into account in parental electronic eavesdropping cases.

II. FEDERAL AND STATE WIRETAP AND STORED COMMUNICATIONS ACTS AND THE COMMON LAW PRIVACY INTRUSION TORT

The importance of conversational and communication privacy values is reflected in several legal institutions that are brought to bear in parental and spousal electronic surveillances cases. Three of these are federal and state wiretap and stored communications acts and the common law privacy intrusion tort.

A. Background on Federal Wiretap Law

Recording telephone and face-to-face conversations, accessing e-mail and voicemail are primarily regulated by federal and state wiretap and stored communications statutes. The wiretap statute is notorious for its lack of clarity.¹⁷ I think it is helpful to begin by laying foundations about the basic concepts and structure of federal law and identifying areas where there is some clarity.

In 1928 the Supreme Court held that a government wiretap was not a search under the Fourth Amendment in *Olmstead v. United States*.¹⁸ Chief Justice Taft writing for the majority concluded there was no search because the electronic device attached to the wire

¹⁷ See *United States v. Smith*, 155 F.3d 1051, 1055 (9th Cir. 1998) (noting that this characterization by the Fifth Circuit of the federal wiretap statute may have been too generous).

¹⁸ 277 U.S. 438 (1928).

outside of Olmstead's home did not amount to a physical trespass.¹⁹ The Court did note, however, that the privacy of telephone conversations could be protected by direct legislation.²⁰ Congress responded in 1934 by enacting the Federal Communications Act (FCA). Section 604²¹ of the FCA's prohibition on intercepting conversations was limited in several ways. Evidence obtained in violation of the FCA could be admitted in state court. In addition, the Justice Department and FBI interpreted section 605 to only prohibit wiretaps that were "divulged."²² Finally, the Supreme Court severely limited application of section 605 in transmission monitoring or "bugging" cases that did not involve wiretapping by imposing a trespass requirement on these forms of electronic eavesdropping.²³

In 1967 the Supreme Court junked the trespass concept of a Fourth Amendment search and reversed *Olmstead v. United States*²⁴. In *Katz v. United States*²⁵ the Court

¹⁹ *Id.* at 464-65 (noting that because the evidence was obtained only through hearing, there was no illegal seizure). The physical trespass notion of a Fourth Amendment search was junked by the Supreme Court almost forty years later in *Katz v. United States*, 389 U.S. 347 (1967).

²⁰ *Id.* at 465 (noting that Congress could protect wire communications by making them inadmissible in judicial proceedings).

²¹ Federal Communications Act of 1934, ch. 652, § 605, 48 Stat. 1103 (1934) (amended by 47 U.S.C. § 605 (1968)).

²² *See, e.g.* Herbert Brownell, Jr. *The Public Secrecy and Wiretapping*, 39 *Corn. L. Rev.* 195, 197-99 (1954); John Decker & Joel Handler, *Electronic Surveillance Standards, Restrictions, and Remedies*, 12 *Cal. W. L. Rev.* 60, 163 (1975).

²³ *Compare* *On Lee v. United States*, 343 U.S. 747 (1952) (no violation of section 605 where a conversation is recorded by someone who is "wired for sound") *with* *Silverman v. United States*, 365 U.S. 505 (1961) (section 605 not applicable where the government used a foot-long spike microphone to record a conversation).

²⁴ 277 U.S. 438 (1928).

²⁵ *Katz v. United States*, 389 U.S. 347 (1967). *Katz* involved the attachment of an electronic transmitter to telephone booth that Katz was conversing from and is a transmission monitoring case. Earlier during the same term the Court had assumed that a government wiretap was a Fourth Amendment search in *Berger v. New York*, 388 U.S. 41 (1967) (construing portions of the New York wiretap statute as unconstitutional under the Fourth Amendment).

held that electronic surveillance of a conversation by the government constituted a search if the person had a reasonable expectation of privacy in the conversation. This shift from a trespass based notion of a Fourth Amendment search to one based on an individual's expectation of privacy was paradigmatic. *Katz* ushered in the modern era of informational privacy law. As discussed later in this article, the expectation of privacy principle as employed by courts since *Katz* is fraught with problems. But the idea that a legally recognized expectation of privacy is the *sina qua non* for prima facie privacy protection permeates informational privacy law in the private and public sector.²⁶

Partially in response to the limited protection provided within section 605 and the emergence of constitutional protection for conversational privacy after *Katz*, Congress enacted the first comprehensive federal statute regulating virtually all forms of electronic surveillance of conversations. Title III of the Omnibus Crime Control and Safe Street Acts of 1968 nationalized the law of federal, state and private electronic surveillance of conversations.²⁷ This statute was commonly referred to as the “Wiretap Act” or “Title III.”

Congress enacted Title III with several objectives in mind. Clearly Title III was designed to establish the authority and standards for government wiretaps for criminal law investigations. There is a particular concern expressed in the legislative history over the need to clarify government electronic eavesdropping authority to respond to the perceived growing threat of organized crime. In addition, Title III was enacted for the

²⁶ See *Shulman v. Group W Productions, Inc.*, 955 P. 2d 469, (Cal. 1998).

²⁷ See generally Jeremiah Courtney, *Electronic Eavesdropping, Wiretapping and Your Right to Privacy*, 26 FED. COMM. B.J. 1 (1973); James G. Carr, *The Law of Electronic Surveillance* (2001).

purpose of protecting private individuals against wiretapping in domestic disputes and to protect against various forms of wiretapping in the business sector. The concern over protecting conversational privacy in the private sphere was reflected by the extension of Title III's prohibition against intercepting conversations to “any person,”²⁸ by providing for minimal liquidated damages,²⁹ a strong exclusionary rule³⁰ and the right to recover attorneys’ fees and court costs for all violations.³¹

Title III only protected conversational privacy. This limitation was contained in the prohibition against interception of “wire or oral” communications. Wire communications were those involving the human voice that were transmitted from the point of origin to the point of reception through the use of wire.³² Conversing on the telephone is the paradigm of a “wire communication.” Face-to-face conversations are the paradigm of an “oral communication.” A wiretap is the paradigm of an interception of a wire communication; bugging a conversation through a tape recorder or transmitter is the paradigm of interception of an oral communication. Title III generally prohibited the interception of a wire or oral communication without a court order³³ unless one of the parties has consented.³⁴

²⁸ See 18 U.S.C.A. § 2511(1) (West 2000).

²⁹ 18 U.S.C. § 2520 (West 2000).

³⁰ 18 U.S.C. § 2515 (West 2000).

³¹ 18 U.S.C. § 2520 (West 2000).

³² The 1968 version of the Wiretap Act restricted wire communications to those transmitted by telephone companies licensed by the FCC.

³³ Court ordered surveillance is limited to law enforcement bugs or wiretaps. Section 2518 establishes strict requirements for court authorized interceptions of wire communications.

³⁴ The consent defenses are found in 18 U.S.C. §§ 2511(2)(c) and (d).

B. *Enter the 1986 Electronic Communications Act: The ECPA*

In 1986 the federal statute was amended by The Electronics Communications Privacy Act (ECPA)³⁵ Congress enacted Title III to deal with the current communications of conversations over wire (by telephone) and face-to-face in 1968. During the decades following the passage of Title III, communication technology changed dramatically. By 1986 many communications were transmitted by means other than the telephone or face-to-face conversations and by systems owned and managed entities that were not licensed common carriers. Today many conversations are transmitted by radio signals through cellular systems or cordless phones. Many companies have private phone systems which they tie into the systems of common carriers. There is increasing use of digital technology to electronically communicate through electronic mail and facsimile machines

The amendments to the Wiretap Act which resulted from the 1986 passage of the ECPA responded to the technological advances that had developed since 1968. The response to the new technology is embodied in the addition of the concept of “electronic communication” to the statute.³⁶ The ECPA generally prohibits the interception of, and unauthorized access to, stored electronic communications. This addition brings the surveillance of digitally transmitted conversations, electronic mail, cellular phones and pen registers within the regulatory reach of the statute. While the ECPA restructured and

³⁵ The ECPA is found in 18 U.S.C. §§ 2510-3127 (1994).

³⁶ See Committee on the Judiciary, The Electronic Communications Privacy Act of 1986 H.R. Rep. No. 99-647, at 2 (1986).

extended federal law in important ways³⁷, the 1986 amendments also added to the confusion surrounding the Wiretap Act. Out of habit some courts and commentators continue to speak of the federal statute as “Title III.” That is not technically correct. The ECPA Amendments now divide the Wiretap Act into Title I, II and III. The former Title III is now Title I of the ECPA. Title I³⁸ of the ECPA (or the Wiretap Act) now regulates the interception of conversations. Title II³⁹ of the ECPA (or the Stored Communications Act) regulates access to e-mail, fax communications and voicemail. Title III⁴⁰ of the ECPA regulates call-tracing devices such as caller ID. The two titles most relevant to this discussion are Title I and Title II. I will refer to Title I as the “Wiretap Act” or “Title I” and Title II as the “Stored Communications Act” or “Title II.”⁴¹

C. ECPA’s Scope and Remedies

The Wiretap and Stored Communications Acts apply to both government and private action. The Wiretap Act imposes criminal and civil liability for intentional interceptions of all types of conversations by an electronic or mechanical device.⁴²

The Wiretap Act provides for recovery of both actual and punitive damages.⁴³ In

³⁷ For a general analysis of restructuring of the Wiretap Act by the ECPA, *see* TURKINGTON & ALLEN, *supra* note 3, at 294.

³⁸ 18 U.S.C.A. §§ 2510-2522 (West 2000).

³⁹ 18 U.S.C. §§ 2701-2711 (West 2000).

⁴⁰ 18 U.S.C. §§ 3121-3127 (West 2000).

⁴¹ *See generally*, Turkington and Allen, *supra* note 3, at 294-397.

⁴² 18 U.S.C. § 2511 (West 2000).

⁴³ State statutes have similar damage rules. *See, e.g.* M.G. v. J.C., 603 A.2d 990 (N.J. Super. Ct. Ch. Div. 1992) (upholding \$50,000 punitive damage award against husband for violation of the New Jersey Wiretapping Act).

addition, minimal liquidated damages of \$10,000 may be imposed for violations of the Wiretap Act.⁴⁴ Moreover, the Wiretap Act also contains a strong exclusionary rule prohibiting courts and administrative agencies from admitting into evidence the content of taped conversations that are acquired in violation of the statute.⁴⁵

Attorneys' fees and court costs are also available to the prevailing party.

Similarly to the Title I, the Stored Communications Act applies to both government and private action as well as providing actual and punitive damages. But the liquidated damages are less – only \$1,000,⁴⁶ and most importantly, there is no exclusionary rule for violations of Title II.⁴⁷ Both Title I and Title II of the ECPA preempt state laws that provide less security for conversations and electronic communications. But state laws can provide for greater security. For example, if one party consents to the recording of a conversation there is no violation of Title I of the ECPA. But in states like Florida,⁴⁸ Pennsylvania,⁴⁹ Maryland,⁵⁰ and California⁵¹ both

⁴⁴ 18 U.S.C. § 2520. The minimum liquidated damage amount was changed in 1986 (with the ECPA amendments) from \$1,000 to \$10,000. Language in section 2520 was changed from “shall be entitled to damages” to a court “may” assess damages. Most courts have viewed the change to mean that awarding damages is discretionary and do not award damages for *de minimis* violations of Title I. *See Goodspeed v. Harman*, 39 F. Supp. 2d 787, 791 (N.D. Tex. 1999).

⁴⁵ 18 U.S.C. § 2515.

⁴⁶ 18 U.S.C. § 2707(c).

⁴⁷ No exclusionary rule is specifically found in Title II and section 2708 states that “remedies and sanctions described in this chapter are the only judicial remedies and sanctions for non-constitutional violations of this chapter.” *See* 18 U.S.C. § 2708 (West 2000).

⁴⁸ Fla. Stat. Ann. § 934.03(3)(d) (West 2000).

⁴⁹ 18 Pa. Cons. Stat. Ann. § 5704(4) (West 1983 & Supp. 1998).

⁵⁰ Md. Code Ann., Cts. & Jud. Proc. § 10-402(C)(3) (1998).

⁵¹ Cal. Penal Code § 631(a) (West 1998 & Supp. 1998).

parties must consent for the recording of a conversation by private parties to be legal under the applicable state wiretap law.

D. *Interspousal Recording of Conversations in the Marital Home*

As noted above, telephone conversations (including those communicated over cell phones) are “wire communications” under the Wiretap Act. Title I specifically prohibits “any person” from intercepting a wire communication without a court order or the consent of one of the parties to the conversation.⁵² Despite the absence of any express exception in the Wiretap Act for the nonconsensual tape recording by one spouse of another spouse’s conversation, some courts have carved out a limited exception for interspousal taping of telephone conversations in the marital home. This exception is sometimes referred to by commentators as the “interspousal” or “marital/domestic” conflict exception to Title I.

In 1974 the Fifth Circuit Court of Appeals exempted some interspousal electronic surveillance from the Federal Wiretap Act. In *Simpson v. Simpson*⁵³, the court held that the recording of telephone conversations in the marital home by a husband who suspected his wife of infidelity did not violate Title I. The plain language of Title I does not provide for an interspousal/marital conflict exception. Section 2511 imposes criminal or civil responsibility on “any person” who willfully intercepts a telephone conversation. The *Simpson* court, however, found an implied exception for interspousal wiretapping on the basis that Congress did not intend for the Wiretap Act to be thrust into marital

⁵² 18 U.S.C.A. §§ 2511, 2511(2)(d).

⁵³ 490 F.2d 803 (5th Cir. 1974).

controversies or to override state interspousal tort immunity. The court also found that the exception in the statute for ordinary use of an extension phone by the subscriber supported excluding spousal eavesdropping from coverage of the Wiretap Act. [The ordinary use of an extension phone exemption is examined more fully in the section on parental eavesdropping that follows.] *Simpson* has been followed in only one other federal circuit.⁵⁴ Most of the federal circuits follow the plain language of the ECPA and have not recognized an interspousal exception for wiretapping in the marital home.⁵⁵ The majority of courts have also interpreted state wiretap acts to not include an interspousal exception for wiretapping in the marital home.⁵⁶

1. Limited to Spousal Eavesdropping in the Marital Home

In those jurisdictions where an interspousal exception has been recognized the exception has been limited to eavesdropping by the **spouse in the marital home**.⁵⁷ Persons who assist the spouse in eavesdropping in the marital home (such as a private detective) are liable under Title I even though the spouse is not.⁵⁸

2. “Bugging Conversations” in the Marital Home

⁵⁴ See *Anonymous v. Anonymous*, 558 F.2d 677 (2d Cir. 1977).

⁵⁵ See *United States v. Jones*, 542 F.2d 661 (6th Cir. 1976); *Heggy v. Heggy*, 944 F.2d 1537 (10th Cir. 1991); *Kempf v. Kempf*, 868 F.2d 970 (8th Cir. 1989); *Pritchard v. Pritchard*, 732 F.2d 372 (4th Cir. 1984).

⁵⁶ See James G. Carr, *The Law of Electronic Surveillance* § 3.6, at 3-163 (Release # ? 3/2002); at least one state wiretap act has been interpreted to contain an interspousal wiretap exception; *Wright v. Stanley*, 700 So. 2d 274 (Miss. 1997).

⁵⁷ See *Anonymous*, 558 F.2d at 679 (distinguishing Sixth Circuit case where spouse no longer resided in marital home); *Simpson*, 490 F.2d at 809 (noting Title I reflects "Congress's intention to abjure from deciding a very intimate question of familial relations, that of the extent of privacy family members may expect within the home vis-a-vis each other.").

⁵⁸ See *Simpson*, 490 F.2d at 809 (noting others may still be liable even if spouse is not).

Face-to-face conversations are “oral communications” under the Wiretap Act. Therefore, the placing of a recording device, commonly referred to as a "bug", in a room or on a person for the purpose of recording face-to-face conversations is subject to regulation under Title I as an interception of an oral communication. Where the recording device is used to record the face-to-face conversations of a spouse and another adult in the marital home the result would be identical to the recording of a telephone conversation. If the jurisdiction recognizes an interspousal exception it would apply to the “bugging” as well. If there was no recognized exception the “bugging” would be illegal. As explained in the section that follows, the wiretapping and bugging of a conversation of a parent/child conversation is subject to a somewhat different analysis.

E. *Parental Tape Recording of Conversations of Children*

The parental tape recording of conversations between a child and a third party (generally the other parent) is not uncommon where there is a custody dispute.⁵⁹ In such cases the taping is regarded as more permissible under federal and state wiretap laws. This is due to courts' propensity to treat the recording as within the ordinary extension use exception to the wiretap statute or view the parent as having authority to vicariously consent for the child.

i. The Extension Phone Exception

Title I contains a narrow exception for electronic eavesdropping over an extension phone that is done for the ordinary use of the subscriber (the extension phone or ordinary

⁵⁹ See Jonathan E. Niemeyer, Note, *All in the Family: Interspousal and Parental Wiretapping Under Title III of the Omnibus Crime Control Act*, 81 KY. L.J. 237, 247 (1993).

use exception). The ordinary use exception has arisen mostly in cases where an employer records the conversations of employees on an extension phone.⁶⁰ However, because of testimony in the legislative history of the Wiretap Act, some courts have applied the doctrine in cases involving custodial parents recording the conversations of their children. In hearings before the House Judiciary Committee on the scope of the ordinary use exception to the wiretap Act, Professor Herman Schwartz, speaking on behalf of the ACLU stated, "I take it nobody wants to make it a crime for a father to listen in on his teenage daughter"⁶¹ This language has been invoked by courts to support a parental eavesdropping exception under federal and state statutes for recording conversations on the extension phone of a child in the family home.⁶²

Recognition of a marital conflict and parental extension phone exception for electronic surveillance under the Wiretap Act has been limited and subject to considerable critical commentary.⁶³ The marital conflict exception is distinctly a minority rule and has been roundly criticized as unwarranted in view of the plain language and legislative history of the Wiretap Act.⁶⁴ Most state courts have not

⁶⁰ See, e.g., *Deal v. Spears*, 980 F.2d 1153 (8th Cir. 1992) (holding employer liable for recording employee's telephone conversations on an extension phone because recording exceeded narrow scope of ordinary business use of extension phone exception). The ordinary course of business exception is found in section 2510(5)(a)(i) which exempts electronic surveillance "by the subscriber or user in the ordinary course of its business" from regulation under Title I of the ECPA. See *id.* at 1157 (noting source of extension phone exception).

⁶¹ Hearings on the Anti-Crime Program Before Subcomm. No. 5 of the House Judiciary Comm. 90th Cong. 1st Sess. 901 (1967).

⁶² See *Scheib v. Grant*, 22 F.3d 149, 154 (7th Cir. 1994); *Newcomb v. Ingle*, 944 F.2d 1534, 1536 n.5 (10th Cir. 1991); *Anonymous v. Anonymous*, 558 F.2d 677, 679 (2d Cir. 1977).

⁶³ For the general criticism of the marital and parental exception, see, James Carr, *The Law of Electronic Surveillance*, § 3.6 (Release # 30 3/2002).

⁶⁴ *Id.* A thorough trashing of the arguments of the *Simpson* court is found in Judge Celebrezze's opinion in *United States v. Jones*, 542 F.2d 661 (6th Cir. 1976), discussed *supra*. See also the arguments of the court in *Kratz v. Kratz*, 477 F. Supp. 463 (E.D. Pa. 1979). Both decisions find the analysis of Judge Bell in

recognized a marital conflict exception.⁶⁵ Many courts have also rejected the telephone extension exception as applied to the tape recording of conversations.⁶⁶ But a potentially much broader exception has recently been recognized by courts that reject both the marital and telephone extension phone exception.⁶⁷ This new exception would authorize parental electronic eavesdropping by granting a parent the authority to vicariously consent for a minor child and thereby provide a defense to the Federal Wiretap Act and those state wiretap acts that allow for electronic surveillance of conversations if one party has consented.

ii. Vicarious Consent

The Wiretap Act is not violated if a party to the intercepted conversation has consented. This one party consent rule is mirrored in most state wiretap statutes. Parents/guardians of minors have the authority to vicariously consent for the minor when it is perceived by the parent to be in the best interests of the child. Does the parental authority to consent for the child under state law include consenting to the surreptitious recording of a conversation between the child and a third person? If state law allows a parent to vicariously consent for their child in respect to decisions such as whether to be subject to a particular medical procedure, does that authority provide a consent defense under Title I? Does the authority for a parent to consent for the child under state law include consenting to the surreptitious recording of a conversation between a child and

Simpson v. Simpson to be without support in the language, legislative history or purposes of the Wiretap Act.

⁶⁵ See footnotes 94, 95 and accompanying text.

⁶⁶ See *Thompson v. Dulaney*, 970 F.2d (10th Cir. 1992), *Pollock v. Pollock*, 154 F.3d 603 (6th Cir. 1998).

⁶⁷ *Id.*

the other parent? Courts have generally answered both of these questions affirmatively and have been increasingly willing to apply a vicarious consent defense to parental eavesdropping.

The Tenth Circuit was the first federal court of appeals to suggest vicarious consent was a defense under the Wiretap Act in *Thompson v. Dulaney*.⁶⁸ During the pendency of a divorce, Denise Dulaney taped several conversations between the father and their minor children while she and her children were living in her parents' home.⁶⁹ Dulaney had the tapes transcribed and distributed them to her family, attorney and expert witnesses.⁷⁰ Two of the transcripts were admitted in the deposition of an expert witness during the custody litigation.⁷¹ Thompson, the father, brought a damage action under Title I against his wife, her parents, experts and attorney for taping and divulging the contents of recorded conversations between himself and his children.⁷²

The district court exempted the recordings under the interspousal exception.⁷³ The Tenth Circuit, in an earlier case, had rejected the view that there was an interspousal exception to Title I and reversed the district court on this issue.⁷⁴ However, the court remanded the case to the district court to determine whether consent was a defense to the Title I action on the basis that the custodial parent had the authority to vicariously

⁶⁸ 970 F.2d 744 (10th Cir. 1992).

⁶⁹ *See id.* at 746.

⁷⁰ *See id.*

⁷¹ *See id.*

⁷² *See id.*

⁷³ *See id.*

⁷⁴ *See id.* at 747.

consent for the child under state law.⁷⁵ On remand, the district court found that the mother, as guardian of the child, had the right under state law to act on behalf of the child, where to do so was in the child's best interest.⁷⁶ Therefore, in order to fulfill her responsibilities as guardian the mother could consent for the child under Title I if she had "a good faith basis that is objectively reasonable for believing that it is necessary to consent on behalf of her minor children to the taping of the phone conversations...."⁷⁷

Most federal and state courts that have considered the issue have applied a version of the vicarious consent doctrine in parental eavesdropping cases.⁷⁸ The doctrine has been applied beyond parental eavesdropping on conversations between the other parent and their minor children.⁷⁹

a. Limitations on the Vicarious Consent Defense

The availability of the vicarious consent defense is fact specific. The age of the minor and the purpose of the surveillance are factors that are taken into account by courts. A leading case illustrating this is *Pollock v. Pollock*.⁸⁰ Samuel Pollock (Samuel)

⁷⁵ See *id.* at 749

⁷⁶ See *Thompson v. Dulaney*, 838 F. Supp. 1535 (D. Utah 1993).

⁷⁷ See *id.* at 1543.

⁷⁸ See *id.*; *Pollock v. Pollock*, 154 F. 3d 601 (6th Cir. 1998); *Campbell v. Price*, 2 F. Supp. 2d 1186 (E.D. Ark. 1998); *Silas v. Silas*, 680 So. 2d 368 (Ala. Civ. App. 1996) (adopting the vicarious consent doctrine in interpreting state wiretap acts); *State v. Diaz*, 706 A.2d 264 (N.J. Super. App. Div. 1998) (adopting the vicarious consent doctrine in interpreting state wiretap acts); *West Virginia Dep't of Health and Human Res. v. David L.*, 453 S.E.2d 646 (W. Va. 1994) (interpreting both the state and federal wiretap acts to include the vicarious consent doctrine). As of the writing of this article the only court to reject the vicarious consent doctrine was *Williams v. Williams*, 581 N.W.2d 1777 (Mich. 1998) (interpreting both the Michigan and federal wiretap acts to not recognize vicarious consent in parental eavesdropping cases).

⁷⁹ See *Diaz*, 706 A.2d at 516 (upholding the admissibility of the audio portion of a video tape in a criminal trial of babysitter for abuse of the child).

⁸⁰ 154 F.3d 601(6th Cir. 1998).

and his current wife Laura Pollock (Laura) brought a damage action under the Wiretap Act against Samuel's former wife, Sandra Pollock (Sandra) and her two attorneys for tape recording and disclosing the contents of conversations between fourteen year old Courtney Pollock (Courtney) and Samuel and Laura.⁸¹ The recordings occurred on an extension phone in Sandra's home while Courtney was residing with her.⁸² The district court entered summary judgment for the defendants.⁸³ On appeal the Sixth Circuit affirmed the district court's adoption of the vicarious consent defense under Title I but remanded the case to determine whether Sandra's purpose in taping the conversations was sufficient to preserve the consent defense.⁸⁴ The record contained conflicting evidence as to whether her motive in taping was out of genuine concern for the best interest of the child.⁸⁵ If Laura's motivation in taping was to "gain access to Courtney's attorney-client communications" or if in some other sense was not motivated by the best interest of the child, the defense of vicarious consent would not be available.⁸⁶ Where evidence is disputed, motive presents a question of fact that is sufficient to overcome a motion for summary judgment.⁸⁷

⁸¹ *See id.* at 603. (noting facts surrounding the appeal). Sandra's attorneys named as defendants were Oliver Barber and Luann Glidewell. *Id.*

⁸² *See id.* at 604 (noting Sandra's admission to recording phone calls on an extension phone in her home).

⁸³ *See id.* at 605 (noting entry of summary judgment by district court).

⁸⁴ *See id.* at 610, 613 (affirming adoption of exception and remanding case).

⁸⁵ *See id.* at 612 (noting conflicting evidence surrounding Sandra's motivation).

⁸⁶ *See id.* at 611 (noting presentation of evidence suggesting possibility of ulterior motives).

⁸⁷ *See Kroh v. Kroh*, 567 S.E. 2d 760, 764 (N.C. App. 2002).

b. The Test for Parental Motive

As suggested by the Sixth Circuit Court of Appeals in *Pollock*, the parent's motive in wiretapping or bugging a child's conversation is crucial to the vicarious consent defense. The test adopted by *Pollock* and other courts⁸⁸ is whether the parent had a "good faith, objectively reasonable basis for believing such consent was necessary for the welfare of the child."⁸⁹ Alabama has adopted a stricter test. Under this standard the parent must demonstrate a good faith, objectively reasonable belief "that the minor child is being abused, threatened, or intimidated by the other parent."⁹⁰

c. Critique of the Vicarious Consent Rule

Given the reluctance of courts to sanction spousal eavesdropping under the Wiretap Act for the reasons stated above, it is surprising that the vicarious consent notion has been received favorably by court without critical examination. Some of the problems created by recognition of a parent's right to consent to eavesdropping on a child's conversations with the other parent and third parties are: (1) the joint custody problem; (2) the non-identity of interests problem; and (3) the minimization problem.

The Joint Custody Problem

One of the assumptions of the vicarious consent principle is that there is authority to consent for the minor child under state law that is incorporated into the one party

⁸⁸ *Pollock* adopts the test first articulated in *Thompson*.

⁸⁹ *Pollock*, 154 F. 3d at 610 (noting adoption of *Thompson* standard of vicarious consent).

⁹⁰ See *Silas v. Silas*, 680 So. 2d 368, 371 (Ala. Civ. App. 1996) (stating standard adopted by Alabama).

consent defense under state and federal wiretap acts. But this assumption ignores the rudimentary features of the important development of joint custody that is recognized in most states.⁹¹ The traditional model of custody was to grant one parent, usually the mother, both legal custody and physical custody. Legal custody entails the authority to make important decisions involving the upbringing of the child such as where to go to school and whether to be treated medically. Physical custody entails decisions about where the child shall reside and physical care. The traditional model of sole custody grants the custodial parent both legal (decisional) and physical custody. Non-custodial parents were given visitation rights. Joint custody was recognized initially by California in 1980.⁹² Joint custody changes the division of responsibility under the traditional sole custody rule. With joint custody one parent generally has physical custody but both parents share the responsibility for legal custody – making important decisions involving the upbringing of the child. One commentator suggests that in joint custody arrangements, “the child’s care, education, religion, medical treatment and general welfare”⁹³ be shared by both parents. If this form of joint custody under state law applies to the parents in a vicarious consent eavesdropping case than the notion that the state law gives one parent the sole authority to consent to the invasion of privacy of the minor child and the other parent makes no sense. If vicarious consent is shared by both parents under state law then that state law is no warrant for the authority of one party to consent for the child under state or federal wiretap acts. If the authority to wiretap is

⁹¹ See D. Kelly Weisberg, Susan Frelich Appleton, *Modern Family Law*, note 1,844 (Aspen 2002).

⁹² Some commentators suggest that the father’s rights movement was an important influence in the development of joint custody.

⁹³ See, Homer H. Clark, Jr., *The Law of Domestic Relations in the United States*, Sec. 19.5, p. 816, note 18.

shared, then vicarious consent to wiretap the conversation of a non physical custodial parent would only be warranted in the unlikely case where that parent agrees to it.

There is virtually no discussion of the impact of the multiple kinds of joint custody arrangements under state law on vicarious consent to wiretapping under wiretap acts. In *Wright v. David L.*⁹⁴ a court of appeals court in West Virginia suggests that the vicarious consent doctrine is limited to the physical custodial parent. David was separated from his wife, Lisa, who was given temporary custody of their twin daughters, Chelsea and Ashley, ages 6, and their son, Joshua, age 5. Lisa lived with the children in the marital home. Prior to their divorce David asked his mother to place a voice activated tape recorder in the children's bedroom while she babysat for them.

After listening to these taped conversations, David gave the tapes to his lawyer. The tapes were played to a therapist for Family Services for the West Virginia HHS and thereafter David was given physical custody of the children. In reviewing whether the tape recordings were legal West Virginia law, the court assumed that the vicarious consent principle applied to the state eavesdropping statute but held that vicarious consent could not be exercised by a parent in respect to conversations taking place in the home of the parent with physical custody over the child. Therefore, the recording violated the Wiretap Act and were not admissible in the custody proceedings.

It seems odd to vest exclusive authority to the physical custodial parent to decide whether to invade the privacy of the minor child and the non-physical custodial parent when the non-physical parent has joint decisional authority to consent for the minor. In *Wright* the physical custodial parent had consented to physical access to the children by the paternal grandparent and her exclusive authority to decide physical access is

⁹⁴ 453 S.E. 2d 646 (W. Va. 1994)

preserved. Perhaps the *Wright* decision is palatable if the conversation with the child is viewed as a form of physical custody - access to the child. But that is not a sensible interpretation of physical custody in a case like *Wright*. The non physical custodial parent had the right to converse over the telephone in *Wright* and therefore Lisa Wright's physical custody authority did not extend to physical access to the children through conversing over the telephone with the other parent. There might be a good argument for viewing taping of a child's conversation with a parent as part of the authority of a physical custodial parent in the rare and exceptional cases where the non physical custodial parent has been restrained by a court order from conversing over the telephone with a child. But in that case the authority to wiretap ought to be pursuant to a court authorization to determine whether the order not to converse with the minor has been violated. The conceptual incomprehensibility of the vicarious consent principle in cases where the parents have joint decisional custody ought to by itself be enough for courts to reject the vicarious consent principle. But there are additional problems that also ought to move courts in that direction.

The Non-Identity of Interest Problem

Even in a perfect family world and life the substituted judgment by a parent for the decision of a child may not be identical to the best interests of the child. As Gerald P. Koocher has noted:

The concept of substituted judgment [in which an adult provides a kind of proxy consent] presumes a great deal. Most notably, it assumes that the person making the decision is willing and able to act in this capacity on

the child's best interest (i.e., without a conflict of interest). Even within the loving, intact, two-parent family, no all parental decisions regarding children are without conflicts of interest. Parents often subordinate their needs and preferences to the best interest of their children (or to what they believe to be their children's best interests), but this is not always the case.⁹⁵

David J. Anderman further observed in a 1993 article:

In the majority of parental wiretap cases reported, however, the family unit has fallen apart or seems to be deteriorating. Indeed, in only one of the cases involving parental wiretapping were the parents of the child not divorced or seeking a divorce. The interceptions were not effected for the interests of the child, but to give the parent leverage in the settlement of custody battles.⁹⁶

The risk of a parent's substituted judgment for a child is not in the best interest of the child is exacerbated in cases where the family is conflicted by a separation, divorce and custody fight. In such cases there is a greater likelihood of a non-identity of interest between the parent's choice and the child's best interest. A decision of a parent in a marital or custodial dispute to wiretap or bug the conversations of a child with the other parent is rife with the risk of non-identity of interest – that the eavesdropping parent is

⁹⁵ See Gerald O. Koocher, *Children Under Law: The Paradigm of Consent in Reforming the Law*, 3, 14 (Gary B. Melton ed. (1987).

⁹⁶ David J. Anderson, *Title III At A Crossroads: The Ordinary Course of Business in the Home, The Consent of Children, and Parental Wiretapping* 141 U. Penn. L. Rev. 2261, 2290 (1993).

motivated by personal interest or hostile motive against the other parent and not the best interests of the child.

Is the increased risk of non-identity of interests in parental electronic surveillance cases adequately accounted for, or protected against, in courts adoption of the substituted consent doctrine? Given the limitations of the self minimization rule of vicarious consent I do not think the increased risks of non-identity of interests are accounted for.

d. The Minimization Problem

A wiretap on a telephone line records the conversations of all of the parties that are talking. Even if there is justification for recording conversations between targeted parties, the pervasive nature of a wiretap is such that the privacy of parties for whom there is no justification is invaded. Recording portions of some of the conversation between targeted parties may not be justified because they are not relevant to the legitimate purposes of the eavesdropping. The privacy invasiveness of a wiretap led Justice Douglas to describe a wiretap as:

[A] dragnet, sweeping in all conversations within its scope – without regard to the participants or the nature of the conversations. It intrudes upon the privacy of those not even suspected of crime and intercepts the most intimate conversations.⁹⁷

Court ordered wiretaps under Title I impose an obligation on the government to minimize the interception of conversations that are not evidence of criminal conduct.⁹⁸ One of the problems with exceptions to Title I in private surveillance cases is the absence of any court reviewed efforts to minimize the overreach of the wiretap or bugging.

⁹⁷ *Berger v. New York*, 388 U.S. 41, 64-65 (1967) (Douglas, J., concurring).

⁹⁸ *See* 18 U.S.C.A. § 2518(5) (West 2000).

Self-Minimization Under the Vicarious Consent Doctrine

The courts that recognize a vicarious consent defense to Title I in parental eavesdropping cases contemplate self-minimization by the parents and/or their lawyer if the lawyer has advised them of the legality of wiretapping or bugging a child's conversations. The self-minimization obligation is implicit in the limitation of the vicarious consent authority to eavesdropping where the parent is properly motivated. Under either the strict or looser sense of proper motivation that is discussed above, it would not be legal for a parent to wiretap or bug conversations between their child and a third person if the purpose was simply to gather evidence for prospective or pending custody or divorce litigation. The proper motive requirement constitutes a threshold minimization obligation: to demonstrate some reasonable belief that the surveillance is in the best interest of the child. A parent is not authorized to wiretap or bug conversations to gather evidence that would justify the surveillance. For the surveillance to be legal under the vicarious consent doctrine evidence that would justify the surveillance must be acquired before the surveillance itself.⁹⁹

Whether additional self-minimization requirements are imposed under the vicarious consent doctrine is not as clear. Are lawyers or parents required to delete conversations that are clearly not relevant conversations?

One problem is with the use of voice activated recording devices. If such a device is placed on a phone or placed in a bug in the room all of the conversations in the room or over the telephone are recorded. A less inherently pervasive use of technology would be for the eavesdropping parent to only trigger the recording when he or she knows the

⁹⁹ See *Pollock v. Pollock*, 154 F.3d 601, 611 (6th Cir. 1998).

minor is talking to the other parent on the telephone. This might be unacceptable because it would limit the recording to only when the parent is at home. One might suggest a minimization requirement analogous to the Wiretap Act which would require the recording parent to delete conversations that are not relevant to the best interests of the child. But the obvious problem with this requirement is the credibility of the resulting tape in the face that it has been tampered with.

I have been doing two things in this discussion of the various consent principal – providing my best interpretation of the scope and requirements of the rule and offering a critique of the rule. As for the critique, it is my view that problems I have discussed above are too considerable to support the vicarious consent principle. I think it ought to be junked in those jurisdictions that have adopted it and not recognized by adoption by courts that in the future are faced with the question.

F. *Silent Video Surveillance*

Video surveillance without an accompanying audio component is not a violation of Title I of the ECPA.¹⁰⁰ The acquisition of an image is not an interception of a wire or oral communication because the contents of a conversation are not acquired. Video surveillance is not the interception of an electronic communication under Title I of the ECPA because there has been no interception of the image while it is being transmitted. The audio portion of a videotape is an oral communication and would be subject to the

¹⁰⁰ This is the view of all of the federal circuits that have considered the question. *See, e.g.*, *United States v. Torres*, 751 F.2d 875, 885-86 (7th Cir. 1984); *United States v. Falls*, 34 F.3d 674, 679 (8th Cir. 1994).

rules discussed above for interspousal or parental bugging.¹⁰¹ This is also the emerging view in cases arising under state wiretap statutes.¹⁰²

G. The Role of State Law

The question of whether it is legal for a spouse to record the conversations of another spouse in the family home under state wiretap statutes is more complicated. First, the Wiretap and Stored Communications Acts adopt a floor preemption rule allowing state wiretap and stored communications acts to provide for greater security for conversational privacy and for access to e-mail and voicemail (stored electronic communications).¹⁰³ Therefore, state law may be written or construed to not provide for a marital conflict exception without violating the Federal Wiretap Act. Second, in civil actions brought for violations of the state statute the tort interspousal immunity defense may be available to the wiretapper.

1. Interspousal Exceptions Under State Law

There are only a few state courts that have examined the question of whether the applicable state wiretap statute contains an exception for interspousal wiretapping. Most of the courts that have addressed the question have construed states laws not to contain an

¹⁰¹ See *supra* notes 47-87 and accompanying text.

¹⁰² See *State v. Diaz*, 706 A.2d 264, 268 (N.J. Super. App. Div. 1998); *Ricks v. Maryland*, 537 A.2d 612, 616 (Md. 1988); *People v. Teicher*, 422 N.E. 2d 506, 513 (N.Y. 1981).

¹⁰³ See *State v. Ayres*, 383 A. 2d 87 (N.H. 1978) where the New Hampshire Supreme Court discusses the stricter consent rule under the state of New Hampshire's wiretap act, New Hampshire RSA ch. 570-A.

interspousal wiretapping exception.¹⁰⁴ It should be noted that state courts within the two federal circuits that recognize the interspousal wiretapping exception under federal law are not bound by interpretations of federal law in interpreting state wiretap acts even if the state statute tracks the language of the Wiretap Act. In *Ranson v. Ranson*,¹⁰⁵ the Supreme Court of Georgia rejected the intercepting spouse's contention that the state wiretap statute should be construed to recognize an interspousal wiretap exception as the Fifth Circuit had done in *Simpson*.¹⁰⁶ In rejecting this contention the court relied on the state statute's purpose to protect every citizen's privacy and on the fact that the language of the statute did not contain an exception for interspousal wiretapping.¹⁰⁷ New York also does not recognize an interspousal exception under the New York Wiretap Act.¹⁰⁸

2. The State Interspousal Tort Immunity Defense

Interspousal tort immunity could provide a defense to civil suits for violation of state wiretap acts in cases where the state statute was not construed to contain an interspousal exception. The statute would be violated but the general common law defense of interspousal immunity might be a defense in the damage action under the statute.

¹⁰⁴ See generally, Stacey L. Mills, Note, *He Wouldn't Listen to Me Before, But Now...: Interspousal Wiretapping and An Analysis of State Wiretapping Statutes*, 37 BRANDEIS L.J. 415, 421 (Spring, 1998).

¹⁰⁵ 324 S.E. 2d 437 (Ga. 1985).

¹⁰⁶ See *id.* at 438 (disagreeing with Fifth Circuits holding).

¹⁰⁷ See *id.* at 439 (noting state legislatures intention behind enactment of wiretap statute).

¹⁰⁸ See *Pica v. Pica*, 417 N.Y.S.2d 528 (1979).

Courts in states that still recognize interspousal tort immunity have generally not applied the doctrine to actions brought by spouses for violation of the state wiretap act. In *Burgess v. Burgess*,¹⁰⁹ the Supreme Court of Florida reversed the court below and held that the legislature created an exception to the interspousal tort immunity defense in wiretap cases because the result of the defense – to admit the tape into evidence – would be contrary to marital harmony, the often cited purpose of the immunity defense.¹¹⁰ The Delaware Superior Court came to the same conclusion in interpreting Delaware law in *State v. Jock*.¹¹¹

H. *Interspousal and Parental Access to E-Mail:*

Title I of the ECPA Off the Table

There are only a few appellate court decisions interpreting the legality of interspousal or parental access to e-mail and voicemail. E-mail and voicemail cases in other contexts, however, provide a useful basis for evaluation of domestic conflict cases. Access to e-mail and voicemail by private parties is primarily regulated under Title II of the ECPA.¹¹² Title II regulates access to “stored electronic communications.”¹¹³ Communications such as e-mail that consist of purely electronic data are electronic

¹⁰⁹ 447 So. 2d 220 (Fla. 1984).

¹¹⁰ *See id.* at 222-23 (noting that policy behind interspousal immunity is not furthered through its application to wiretap litigation).

¹¹¹ 404 A.2d 518 (Del. Sup. Ct. 1979).

¹¹² Regulations of government access to e-mail and voicemail, unlike access by a private party, may be subject to constitutional restraints under the Fourth Amendment. *See, e.g.,* Leventhal v. Knapek, 266 F.3d 64 (2d Cir. 2001); *United States v. Maxwell*, 45 M.J. 406 (1996).

¹¹³ *See* 18 U.S.C.A. §§ 2701-2711.

communications. Under the recently enacted USA PATRIOT ACT (Patriot Act) amendments to the ECPA, voicemail is now treated in the same manner as e-mail.¹¹⁴

It is pretty well established under federal court precedent that once e-mail is received and stored in a computer system it is regulated exclusively under Title II.¹¹⁵ Or to put it another way, these cases hold that accessing stored e mail is not an “interception” of an electronic communication under Title I. The amendment to the Patriot Act would apply the same rule to voicemail.

Although the Supreme Court has not decided this question, the decisions of the two federal circuit courts that have indicate that once e-mail is stored is exclusively regulated by Title II.¹¹⁶ The Fifth Circuit initially construed the ECPA to restrict interception under Title I to the contemporary acquisition of the contents of a conversation or communication in 1994 in *Steve Jackson Games v. United States Secret Service*.¹¹⁷ This construction of Title I was initially rejected by the Ninth Circuit in *Konop v. Hawaiian Airlines*¹¹⁸ in 2001. The *Konop* court held that e-mail could be intercepted after it was received.¹¹⁹ Furthermore, the court held that the accessing and downloading of an e-mail could constitute a violation of both Title I and Title II.¹²⁰ In a 2002 re-issue of it previous

¹¹⁴ See § 209 of the Patriot Act. For a general analysis of the implications of the Patriot Act voicemail amendment to the ECPA see TURKINGTON AND ALLEN, *supra* note 3, at 342-345.

¹¹⁵ The Supreme Court has not decided this question. But the two federal circuit courts that have hold that once e-mail is stored it is exclusively regulated by Title II. See *Steve Jackson Games v. United States Secret Serv.*, 36 F.3d 457 (5th Cir. 1994); *Konop v. Hawaiian Airlines*, 262 F.3d 972 (9th Cir. 2001).

¹¹⁶ See *Steve Jackson Games*, 36 F. 3d 457 (5th Cir. 1994); *Konop*, 262 F. 3d 972 (9th Cir. 2001).

¹¹⁷ 36 F. 3d 457 (5th Cir. 1994).

¹¹⁸ 262 F. 3d 972 (9th Cir. 2001).

¹¹⁹ See *id.*

¹²⁰ See *id.*

decision, the Ninth Circuit changed its view and concurred with the Fifth Circuit's *Jackson Games* view on the scope of the ECPA's protection for e-mail.¹²¹ The Fifth and Ninth Circuits' narrow construction of the scope of protection of e-mail has been severely criticized in commentary and is by no means a compelling or rational interpretation of the ECPA. Nevertheless, the absence of a contrary federal circuit court construction of the federal statute has resulted in the creation of e-mail policies in the private sector that have relied upon this view of e-mail protection under federal law.¹²² In the absence of Supreme Court precedent, which is unlikely, the current high view adopted by the Fifth and Ninth Circuits that e-mail that has been received is exclusively subject to regulation under Title II of the ECPA is controlling. The net effect of this precedent is that spousal access to stored e-mail is regulated by federal and state stored communications acts.

I. *Title II, The Stored Communications Act : Downloading E-mail from Computers*

Located in the Home

In a case where a spouse or parent accesses e-mail from a computer in the home Title II may be violated. Section 2701(a) prohibits the intentional accessing and obtaining of e-mail or voicemail (electronic communications) without authorization while it is in electronic storage.¹²³

¹²¹ *See id.*

¹²² *See* TURKINGTON & ALLEN, *supra* note 3, at 335-39.

¹²³ 18 U.S.C.A. § 2701 (West 2000). Section 2701(a) also prohibits the alteration of e-mail or voicemail (electronic communications) and acts which prevent authorized access to e-mail or voicemail. For the e-mail or voicemail to come within section 2701 it must be in a facility through which an electronic communications service is provided. *See id.*

1. *Separate E-Mail Accounts and Separate Passwords*

Efforts by spouses to segregate e-mail accounts and maintain separate private passwords are important in evaluating whether access to e-mail stored on the hard drive of a family computer is “without authorization” within the meaning of Title II.

Do spouses with joint access to the hard drive of a mutually used computer located in the home have authority to access the password protected e-mail files of the other spouse?

The answer most certainly is no if they have not shared their passwords. Authorized access to the hard drive does not imply authority to access files that are password protected when the password has been withheld. By maintaining a separate password the spouse has affirmatively intended to exclude the other spouse from the personal e-mail file. As yet there have been no reported cases under federal or state stored communications acts, but a Fourth Circuit cases on analogous facts persuasively rejects the contention of implied authority because of mutual access to the hard drive of a computer in the home,

In *Trulock III v. J. Freeh*,¹²⁴ the court held that authority to generally access the computer hard drive did not include the authority to access password protected files of a joint computer user. Linda Conrad and Notra Trulock jointly used the same computer in an apartment they shared. They protected their personal files with passwords. Conrad consented to government access to Trulock’s protected password files. In rejecting the governments contention that Trulock could consent to the Fourth Amendment Search of Conrad’s files the court concluded:

By using a password, Trulock affirmatively intended to exclude Conrad and others from his personal files. Moreover, because he concealed his

¹²⁴ 275 F.3d 391 (4th Cir. 2001)(noting that password-protected computer files were accessed by an FBI computer specialist).

password from Conrad, it cannot be said that Trulock assumed the risk that Conrad would permit others to search his files. Thus Trulock had a reasonable expectation of privacy in the password-protected computer files and Conrad's authority to consent to search did not extend to them.¹²⁵

2. *The "In Electronic Storage" Requirement of Title II*

The requirement that the e-mail or voicemail be in electronic storage may eliminate Title II from applicability in many domestic conflict cases where the e-mail is in the hard drive of the computer in the family home. As noted above only e-mail that is in "electronic storage" is protected from unauthorized access under section 2701 of Title II. Electronic storage is defined in the ECPA as "temporary, immediate storage incidental to the electronic transmission" or "backup" storage of an electronic communication.¹²⁶ In *Fraser v. Nationwide Mutual Insurance Co.*,¹²⁷ Judge Brody took judicial notice of the technology of e-mail transmission that has been invoked favorably by other courts:

Transmission of e-mail from the sender to the recipient through an electronic communication ... is indirect. First an individual authorized to use the system logs on the system to send a message. After a message is sent, the system stores the message in temporary or intermediate storage. I will refer to this storage as "intermediate storage." After a message is sent, the system also stores a copy of the message in a separate storage for backup protection, in the event that the system crashes before transmission is completed. I will refer to this storage as "backup protection storage." In the course of transmission from the sender to the recipient, a message passes through both intermediate and backup protection storage. Transmission is completed when the recipient, logs on to the system and retrieves the message from intermediate storage. After the message is retrieved by the intended recipient, the message is copied to a third type of

¹²⁵ Trulock brought a *Bivens* action against former FBI Director Louis Freeh and others for violation of his Fourth Amendment rights. The Fourth Circuit held that Freeh enjoyed qualified immunity for the illegal search because the contours of Fourth Amendment computer consent law had not been established at the time of the illegal search of Trulock's files.

¹²⁶ See 18 U.S.C.A § 2510(17) (West 2000).

¹²⁷ 135 F. Supp. 2d 623 (E.D Pa. 2001).

storage, which I will call “post-transmission storage.” A message may remain in post-transmission storage for several years.¹²⁸

The court in *Fraser* went on to hold that access to e-mail was not subject to Title II regulation because “post-transmission storage” is not “in electronic storage.”¹²⁹

3. *White v. White*¹³⁰

Title II of the ECPA prohibits unauthorized access to an electronic communication (e-mail) while it is in “electronic storage.”¹³¹ Wiretap statutes in states like New Jersey contain language that tracks the Federal Stored Communications Act.¹³² In *White v. White*¹³³ the court evaluated the applicability of state and federal statutes to interspousal access to e-mail stored on a computer in the family home.¹³⁴ The case illustrates issues that face lawyers in such cases. In *White*, although separated, the husband and wife lived in the same house.¹³⁵ The husband occupied the “sun room” of the home where the family computer, television and stereo were located.¹³⁶ The sun room was also the only way to get to the grill on the deck of the house.¹³⁷ As a result, all

¹²⁸ *Id.* at 633-34 (citations omitted).

¹²⁹ *See id.* at 636 (noting inapplicability of Title II).

¹³⁰ 781 A.2d 85 (N.J. Super Ct. Ch. Div. 2001).

¹³¹ *See* 18 U.S.C.A. § 2701(a)(2) (West 2000).

¹³² *See N.J.S.A. 2A: 156A-27(a)* (West 2000).

¹³³ *See White v. White*, 781 A. 2d 85 (2001).

¹³⁴ *See id.* at 214-15 (noting issue before the court).

¹³⁵ *See id.* at 215.

¹³⁶ *See id.*

¹³⁷ *See id.*

of the members of the family were in and out of the room.¹³⁸ After the wife discovered a letter from the husband to his girlfriend, allegedly in plain view, she hired a computer detective and without using the husband's password copied his e-mails that were stored on the hard drive.¹³⁹ The court held there was no violation of the New Jersey Wiretap Act for two reasons.¹⁴⁰ First, the e-mail was not in "electronic storage" when it was accessed.¹⁴¹ Second, access to the e-mail was not "without authorization" as meant by the Act.¹⁴²

a. E-Mail Was Not In "Electronic Storage"

In *White* the court adopted the accepted technical description of transmission of e-mail.¹⁴³ E-mail typically involves three stages of storage, intermediate, backup and protected storage and post transmission storage.¹⁴⁴ Once e-mail has been retrieved by the recipient and stored, it is in the "post transmission storage" stage.¹⁴⁵ Post-transmission

¹³⁸ *See id.* at 223.

¹³⁹ *See id.* at 215. When installing the America Online (AOL) software the program automatically created the Personal Filing Cabinet ("PTC") on the hard drive of the family computer. The PTC automatically saved e-mail but the e-mail was not automatically password protected and could be accessed by simply opening up the AOL files on the hard drive. The e-mail could have easily been protected by a password or by deletion. But the husband did not know the e-mail was saved on the hard drive and took no steps to protect them. *See id.* at 216.

¹⁴⁰ *See id.* at 220-21.

¹⁴¹ *See id.* at 221.

¹⁴² *See id.*

¹⁴³ *See id.* at 219.

¹⁴⁴ *See id.*

¹⁴⁵ *See id.*

storage was not “electronic storage” within the meaning of the Wiretap Act.¹⁴⁶ The Wiretap Act protected only electronic communications which are “in the course of transmission or are backup to that course of transmission.”¹⁴⁷ This construction of federal and state stored communications acts take wiretap statutes off the table in cases where spouses access e-mail stored on the hard drive of a computer in the family home.

b. Unauthorized Use

In *White* the court also concluded that access of the e-mail was not “without authorization” as that concept is meant under the Act.¹⁴⁸ Without authorization was limited to prohibited use of a computer or unauthorized use of someone’s password. Because the husband in *White* had consented to his wife’s access to the computer network, her “roaming in and out of different directories on the hard drive” was not “without authorization.”¹⁴⁹

J. The Interspousal Exception

New Jersey was one of a majority of states that had construed their state wiretap statute to not contain an exception for interspousal wiretapping. The court in *White* took the same position on the stored electronic communications portion of the Act.¹⁵⁰

¹⁴⁶ *See id.* at 220.

¹⁴⁷ *See id.* The court relied heavily on *Fraser v. Nationwide Mutual Ins. Co.*, 135 F. Supp. 2d 623 (E.D. Pa. 2001) (construing Title II of the ECPA).

¹⁴⁸ *See id.* at 221.

¹⁴⁹ *See id.*

¹⁵⁰ *See id.*

Although the court did not have to discuss the question it held that the New Jersey Wiretap Act did not impliedly exempt interspousal accessing of e-mail in the computer of the home.¹⁵¹

K. *The Privacy Intrusion Tort*

Most states have recognized a tort right to privacy under state common law. The seminal call for recognition of privacy rights was made in a famous article published in the *Harvard Law Review* in 1890 authored by Samuel D. Warren and Louis D. Brandeis.¹⁵² In the article the authors focused on tort liability for media publicity of the private lives of public figures.¹⁵³ The current formulation of the common law of privacy was greatly influenced by an article written by the late Dean William Prosser in the *California Law Review* in 1960.¹⁵⁴ In that article Prosser argued that four torts had emerged from the large body of common law precedent.¹⁵⁵ Prosser argued that although the torts were referred to as involving invasions of privacy they really involved different kinds of torts and different invasions.¹⁵⁶ The four-part interest analysis and disparate tort theory that Prosser advocated was adopted by the *Restatement (Second) of Torts (Restatement)* in section 652.¹⁵⁷ The *Restatement* has been influential and is generally

¹⁵¹ See *id.* at 217-18 (noting state legislature considered and then rejected interspousal immunity under the New Jersey Wiretap Act).

¹⁵² See Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890)

¹⁵³ See *id.*

¹⁵⁴ See William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

¹⁵⁵ See *id.*

¹⁵⁶ See *id.*

¹⁵⁷ See RESTATEMENT (SECOND) OF TORTS § 652 (1977).

embraced by courts as an initial premise in analysis of privacy tort claims.¹⁵⁸ The four torts recognized in the *Restatement* are: (1) Intrusion (652B); (2) Appropriation (652C); (3) Private Facts (652D); and (4) False Light (652E).¹⁵⁹ Of these, the privacy intrusion tort is the most relevant to electronic surveillance in domestic or custody disputes. This tort focuses on invasions of informational or physical privacy through the acquisition of personal information about a person or through physical invasions of a person's space or body.

The common law privacy intrusion tort is violated if someone intentionally intrudes upon the private affairs, seclusion or solitude of another person by means that would be highly offensive to a person of ordinary sensibilities.¹⁶⁰ Recently, the Supreme Court of California has articulated an important formulation of the intrusion element of the tort.¹⁶¹ The intrusion element is established if the plaintiff demonstrates that the defendant has penetrated some “zone of physical or sensory privacy surrounding, or obtained unwanted access to data about, the plaintiff...if the plaintiff had an objectively reasonable expectation of seclusion or solitude in the place, conversation or data source.”¹⁶² Core examples of privacy intrusions provided by the *Restatement* include: (1) forced entry into a hotel room or home; (2) looking into someone's bedroom with

¹⁵⁸ See Jay M. Feinman, *Doctrinal Classification and Economic Negligence*, 33 SAN DIEGO L. REV. 137, 141 (1996) (noting widespread adoption of *Restatement*).

¹⁵⁹ See RESTATEMENT (SECOND) OF TORTS § 652 (1977).

¹⁶⁰ Most states adopt the *Restatement (Second) of Torts* version of the Privacy Intrusion Tort. See RESTATEMENT (SECOND) OF TORTS § 652B (1977).

¹⁶¹ See *Shulman v. Group W Productions, Inc.*, 955 P. 2d 469, (Cal. 1998).

¹⁶² See *id.* at 490 (noting requirements for a cause of action for intrusion).

binoculars; (3) opening private personal mail; (4) searching a safe, wallet or private bank account and tapping telephone lines.¹⁶³

It is well established that an invasion of privacy for intrusion does not require that information or images that are the object of the intrusion be published or used in any way. The tort is established by the acquisition of information or the invasion of someone's physical space.¹⁶⁴ A leading case illustrating this last point is *Hamberger v. Eastman*.¹⁶⁵ The New Hampshire Supreme Court found a privacy intrusion violation when the defendant surreptitiously placed an audio tape recorder in the plaintiff's bedroom.¹⁶⁶ The court found the conduct actionable even though there was no allegation that anyone had listened to the tape:

If the peeping Tom, the big ear and the electronic eavesdropper (whether ingenious or ingenuous) have a place in the hierarchy of social values, it ought not to be at the expense of a married couple minding their own business in the seclusion of their bedroom who have never asked for or by their conduct deserved a potential projection of their private conversations and actions to their landlord or to others. Whether actual or potential such "publicity with respect to private matters of purely personal concern in an injury to personality. It impairs the mental peace and comfort of the individual and may produce suffering more acute than that produced by a mere bodily injury."¹⁶⁷

The view that the intrusion itself is a sufficient affront to personal dignity to be actionable is also reflected in the damage requirement for privacy intrusion tort actions.

¹⁶³ RESTATEMENT (SECOND) OF TORTS § 652B, cmt. 20(a) (1977).

¹⁶⁴ *See id.*

¹⁶⁵ 206 A.2d 239 (N.H. 1964).

¹⁶⁶ *See id.* at 242 (holding defendant liable for privacy intrusion).

¹⁶⁷ *Id.* (quoting POUND, JURISPRUDENCE 58 (1959)).

Credible evidence of emotional distress is sufficient in privacy tort actions.¹⁶⁸ Expert testimony is not required for the issue of damages to go to the jury.¹⁶⁹ Section 652H of the *Restatement* supports this view:

One who has established a cause of action for invasion of his privacy is entitled to recover damages for:

- (a) the harm to his interesting privacy resulting from the invasion;
- (b) his mental distress proved to have been suffered if it is of a kind that normally results from such an invasion; and
- (c) special damages of which the invasion is a legal cause.¹⁷⁰

Some defendants have argued that the privacy intrusion tort ought to require a showing of extreme or heightened emotional distress analogous to that required in an intentional infliction of emotional distress (tort of outrage) case. The best reading of the above authority and the *Restatement* is that the privacy intrusion tort does not require such a showing and differs from the tort of outrage in two important respects.¹⁷¹ First, the tort of outrage requires a threshold demonstration of conduct by the defendant that is extreme and outrageous in the sense that the conduct is beyond that which is tolerated in a civilized society.¹⁷² In a privacy intrusion tort action the intrusion must be substantial

¹⁶⁸ See *Monroe v. Darr*, 559 P.2d 322, 327 (Kan. 1977) (noting that scant amount of evidence was enough to send question to jury); D. ELDER, *THE LAW OF PRIVACY*, § 2:10 at 57-61 (1991). *Trevino v. Southwestern Bell Tel. Co.*, 582 S.W. 2d 582, 584 (Tex. App. 1979) (noting that because of the nature of the tort at issue, physical damages are unnecessary).

¹⁶⁹ See *Fischer v. Hooper*, 732 A. 2d 396, 401 (N.H. 1999) (citing *Monroe v. Darr*, 559 P.2d 322, 327 (Kan. 1977)).

¹⁷⁰ See *RESTATEMENT (SECOND) OF TORTS* § 652h (1977).

¹⁷¹ See *Miller v. Brooks*, 472 S.E.2d 350 (N.C. Ct. App. 1996) (distinguishing elements required for cause of action under tort of outrage and privacy intrusion tort).

¹⁷² See *RESTATEMENT (SECOND) OF TORTS* § 46. cmt. d (1976).

in the sense that the means are highly offensive to an ordinary person. The privacy invading conduct must violate community standards of decency in an intrusion action but it need not reach the level of social condemnation that is required for intentional infliction of emotional distress. Second, and most importantly, the quantum of evidence of emotional distress that is required for the case to go to the jury is much less in an intrusion action. Credible evidence of emotional distress resulting from the intrusion is sufficient for the jury to consider compensatory damages in an intrusion action. This may be demonstrated without expert testimony.¹⁷³ The threshold quantum of evidence in a tort of outrage action is greater and requires demonstration of a “severe and disabling emotional or mental condition” generally recognized by professionals trained to do so.¹⁷⁴

The interrelationship between the wiretap acts and the common law privacy intrusion tort in family and custodial dispute electronic surveillance cases is illustrated by a recent Supreme Court of New Hampshire case. In *Fischer v. Hooper*,¹⁷⁵ a divorced husband taped the conversations of his former wife and daughter without obtaining either party's consent.¹⁷⁶ Upon discovering this, the wife brought a cause of action under the state wiretap act and for invasion of privacy under the state common law.¹⁷⁷ The court remanded the case for further findings of fact on the state wiretap count but affirmed the

¹⁷³ See *Fischer*, 732 A. 2d at 401 (noting expert testimony not required).

¹⁷⁴ See *Waddle v. Sparks*, 414 S.E.2d 22, 27 (N.C. 1992) (quoting *Johnson v. Ruark Obstetrics & Gynecology Ass'n*, 395 S.E.2d 85, 97 (1990)). (Need more authority.)

¹⁷⁵ 732 A. 2d 396 (N.H. 1999).

¹⁷⁶ See *id.* at 398

¹⁷⁷ See *id.*

lower court's decision that the plaintiff's privacy intrusion tort action was properly submitted to the jury.¹⁷⁸

In *Fischer* the parties had joint custody of their daughter and a guardian *ad litem* and a therapist were appointed for their daughter.¹⁷⁹ The husband argued that the wife had no reasonable expectation of privacy of her conversations with her daughter because she should have expected that the daughter would divulge the content of their conversations to the therapist.¹⁸⁰ Even if this was the case, the court concluded that the jury might have concluded that the plaintiff had a reasonable expectation of privacy that her actual voice and words would not be "captured on tape."¹⁸¹

Fischer assumes as a basis of its intrusion tort holding that wiretap legislation and common law privacy tort claims exist as separate legal claims even though the misconduct that is the basis of the wiretap and privacy intrusion tort actions is the same. In the absence of a clear intention that the wiretap act was intended to preempt the state common law electronic surveillance that constitutes an intrusion ought to be actionable even though it might also be a violation of wiretap legislation. Given this view that state wiretap and privacy intrusion tort claims exist as separate claims, conduct that did not

¹⁷⁸ *See id.* at 398, 402 (noting holding of court with respect to privacy and state wiretap claims).

¹⁷⁹ *See id.* at 398 (noting status of custody).

¹⁸⁰ *See id.* 400 (noting contentions of defendant regarding plaintiff's alleged diminished expectation of privacy).

¹⁸¹ *See id.* at 401 (stating court's rationale).

violate the wiretap act might constitute a violation of the privacy intrusion tort. This is the view of the Supreme Court of California.¹⁸²

1. *Invasions of Privacy and Intentional Infliction of Emotional Distress*

As noted above, privacy intrusion and intentional infliction of emotional distress actions do not track each other. However, in some marital conflict cases electronic surveillance can be sufficiently outrageous to constitute both torts. A North Carolina appeals court in *Miller v. Brooks*¹⁸³ found this to be the case. In *Miller* the wife, Annette Miller, hired a private detective to install a hidden video camera in the bedroom ceiling of the home after she was separated and agreed not to return to her former marital home.¹⁸⁴ She also represented herself as a resident of the home and intercepted some of her estranged husband's mail.¹⁸⁵ Terry Miller, the husband, sued his estranged wife and the detectives she had hired for privacy intrusion, intentional infliction of emotional distress and trespass to real property.¹⁸⁶ The trial court granted summary judgment to the defendants in respect to all of plaintiff's claims.¹⁸⁷ The court of appeals reversed holding that plaintiff had presented evidence on all claims that was sufficient to go to a jury.¹⁸⁸

¹⁸² See *Shulman v. Group W Productions, Inc.* 955 P.2d 469 (Cal. 1998) (holding that recordings of conversations at the scene of an automobile accident did not violate the California Wiretap Act but did constitute privacy intrusion tort under state law.

¹⁸³ 472 S.E. 2d 350 (N.C. Ct. App. 1996).

¹⁸⁴ See *id.* at 352 (noting actions of defendants).

¹⁸⁵ See *id.* at 353 (noting actions of defendant).

¹⁸⁶ See *id.*

¹⁸⁷ See *id.*

¹⁸⁸ See *id.* at 357 (stating disposition of case).

Defendants contended that the husband had a reduced expectation of privacy because of his marriage to defendant Annette Miller.¹⁸⁹ In rejecting this argument the court noted:

Although a person's reasonable expectation of privacy might, in some cases, be less for married persons than for single persons, such is not the case here where the spouses were estranged and living separately. Further, the marital relationship has no bearing on the acts of [the private detectives]. Plaintiff's marriage to defendant Miller did nothing to reduce his expectations that his personal privacy would not be invaded by perfect strangers.¹⁹⁰

The video surveillance, opening of the mail and trespass into the plaintiff's property also constituted sufficiently extreme and outrageous conduct for the jury to consider emotional distress damages for intentional infliction of emotional distress.¹⁹¹ The court also ruled that the plaintiff had established sufficient evidence of aggravated conduct for the jury to award punitive damages for both the privacy intrusion and intentional infliction of emotional distress torts.¹⁹²

2. *Privacy Intrusion Tort and Silent Video Surveillance*

In cases where federal or state wiretap and stored communications acts are not violated the common law privacy intrusion tort may apply to wiretapping, bugging, silent video surveillance, or electronic downloading of e-mail that are employed in domestic or custodial conflicts. As noted in section F above silent video surveillance is not regulated under state and federal wiretap acts. The common law privacy intrusion tort may apply

¹⁸⁹ *See id.* at 354-355 (noting contention of defendants).

¹⁹⁰ *See id.* at 355.

¹⁹¹ *See id.* at 356 (noting sufficiency of evidence for submission to jury).

¹⁹² *See id.* at 357 (reversing summary judgment on issue of damages).

to silent video surveillance and other forms of electronic surveillance that are employed in domestic or custodial conflicts that do not violate federal or state wiretap and stored electronic communications acts. Nonetheless, as discussed below, while the the intrusion tort would provide a complimentary compensatory damage remedy, the invasion of privacy would not be a basis for excluding the fruits of the tortuous conduct in divorce or custody proceedings.¹⁹³

A privacy intrusion tort action might be available in silent video recordings cases if the video captured images of someone in a private place where he or she had a reasonable expectation of privacy.¹⁹⁴ As illustrated by the court in *White v. White*¹⁹⁵, the privacy intrusion tort gives courts flexibility through the “reasonable expectation of privacy” and “highly offensive means” elements.¹⁹⁶ This renders the particular circumstances of the wiretapping, bugging or silent video surveillance critical to the court's analysis. In *Alexander v. Pathfinder, Inc.*¹⁹⁷ for example, the court held that the audio taping of conversations between a mother and staff in a facility for the mentally retarded was not an intrusion upon the seclusion of the mother because she knew the conversations were being recorded and did not object.¹⁹⁸ Moreover, in *Deteresa v.*

¹⁹³ See *infra* Section D.

¹⁹⁴ See *McCray v. State*, 581 A. 2d 45, 48 (Md. Ct. Spec. App. 1990) (holding that government video taping was not a search because a person walking on a public sidewalk or street has no reasonable expectation of privacy in activities in public view).

¹⁹⁵ 781 A. 2d 85 (2001).

¹⁹⁶ See generally *id.*

¹⁹⁷ 189 F.3d 735 (8th Cir. 1999).

¹⁹⁸ See *id.* at 742-43 (noting fact that mother did not object to recording my institution's employees).

*American Broadcasting, Inc.*¹⁹⁹ the surreptitious audio and videotaping by a television producer of a woman who would not appear on his show was found not to be a violation of the privacy intrusion tort because the videotaping occurred in a public place.²⁰⁰ The audio taping was not sufficiently offensive to be actionable because she had spoken to a person she knew was a reporter.²⁰¹ Compare these decisions with the Supreme Court of California's view in *Sanders v. ABC*.²⁰² In *Sanders* the court held that a telepsychic had a reasonable expectation of privacy in conversations with an agent of ABC held in a large room with rows of cubicles (about 100) in which psychics took their calls.²⁰³

There is general legal recognition that a person has a reasonable expectation of privacy in their conversations or conduct at their home.²⁰⁴ Surreptitious wiretapping, bugging or video surveillance in a person's home clearly constitutes an intentional intrusion into the subject's seclusion or private affairs. Courts early on recognized surreptitious audio taping by a landlord in a tenant's bedroom as an invasion of privacy.²⁰⁵ Moreover, the *Restatement* considers surreptitious video and audio surveillance to be a paradigm of intrusion into seclusion and private affairs.²⁰⁶

Surreptitious wiretapping, bugging and videotaping in domestic and custodial conflicts have generally been found to be actionable intrusions. There is little inclination

¹⁹⁹ 121 F.3d 460 (9th Cir. 1997).

²⁰⁰ *See id.* at 466 (refusing to sustain cause of action where plaintiff was videotaped in public view).

²⁰¹ *See id.* (noting that plaintiff knew the person was a reporter).

²⁰² 978 P. 2d 67 (Cal. 1999).

²⁰³ *See id.*

²⁰⁴ *See* *Kyllo v. United States*, 533 U.S. 27 (2001); *Katz v. United States*, 389 U.S. 347 (1967).

²⁰⁵ *See* *Hamberger v. Eastman*, 206 A.2d 239 (N.H. 1964).

²⁰⁶ *See* RESTATEMENT (SECOND) OF TORTS § 652 (b) cmt. 2. (1977).

on the part of courts that have considered the question to track wiretap act construction and recognize a marital conflict or vicarious consent defense in privacy intrusion tort actions. The notion of vicarious consent is irrelevant in a privacy intrusion tort action. Consent is, of course, a defense to the tort action, but it is the consent of the party whose privacy is invaded that is relevant. Even if the custodial parent could consent for the child, there could be no vicarious consent for the invasion of privacy for the non-custodial parent or other third parties. Their consent would be governed by general tort principles of actual consent, express or implied.²⁰⁷

For example in *Fischer* the New Hampshire Supreme Court found that a custodial parent's taping of telephone conversations between his daughter and former wife to have constituted an intrusion.²⁰⁸ Although the court had appointed a therapist for the daughter and the mother should have expected that the daughter would discuss her conversations with the therapist the mother retained a reasonable expectation that the conversation would not be electronically recorded.²⁰⁹ The court treated consent to be governed by general tort principles.²¹⁰ Similarly the Court of Appeals of North Carolina found that the placement of a hidden video camera in the home and bedroom of an

²⁰⁷ See RESTATEMENT (SECOND) OF TORTS § 652; *Deitman v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971) (holding no express or implied consent for surreptitious video taping of office visit because Dietman invited reporter claiming to be patient into office in Dietman's home).

²⁰⁸ *Fischer v. Hooper*, 732 A. 2d 396, 398 (N.H. 1999).

²⁰⁹ See *id.*

²¹⁰ See *id.* The court held the trial court had properly instructed the jury that whether the mother had impliedly consented to the surveillance depended upon whether her conduct in fact constituted implied consent and that trial court did not error in failing to include the term "acquiescence" in the instructions to the jury on consent. See *id.*

estranged husband by his wife was a highly offensive intrusion into his private affairs and seclusion.²¹¹

3. *Interspousal Access to E-Mail and the Privacy Intrusion Tort*

Employees seeking damages for violation of the privacy intrusion tort against employers who accessed their e-mail have generally been unsuccessful. Courts have used the alternative grounds that the employee has no reasonable expectation of privacy in e-mail stored in an business computer network and that employer access is not an offensive means within the privacy intrusion tort. This has been the holding even if the employer published policy was that e-mail communications are confidential and not monitored. A leading and controversial case is *Smyth v. Pillsbury Company*.²¹² There, a federal district court held Smyth had no reasonable expectation of privacy in e-mail communications to a supervisor over an e-mail system that was “apparently utilized by the entire company.”²¹³ The court also found accessing the particular communications was not a “highly offensive” invasion of privacy.²¹⁴ A Texas court of appeals court took a similar view in *McClaren v. Microsoft Corporation*.²¹⁵ A Superior Court in

²¹¹ See *Miller v. Brook*, 472 S. E.2d 350, 354 (N.C. Ct. App. 1996). The defendant wife’s conduct also included opening the husband’s mail. But I read the case to hold the video surveillance by itself was sufficient to constitute a privacy intrusion tort invasion.

²¹² 914 F. Supp. 97 (E.D. Pa. 1996).

²¹³ See *id.* at 101 (holding Smyth did not have a reasonable expectation of privacy).

²¹⁴ See *id.* (holding access to Smyth’s e-mails was not “highly offensive”).

²¹⁵ No. 97-00095-F, 1999 WL 339015 (Tex. App. May 28, 1999) (holding access to employee e-mail by employee not highly offensive and employee did not have reasonable expectation of privacy).

Massachusetts, however, has taken a different view and would recognize a reasonable expectation of privacy in employee e-mail.²¹⁶

The correctness of decisions that fail to recognize that employees have reasonable expectations of privacy in privacy intrusion tort actions brought against employers for access to employee e-mail in company e-mail systems is beyond the scope of this article. But I think it is clear that these cases do not control the question of whether spousal access to e-mail stored in a computer in the family or marital home is a violation of the privacy intrusion tort. As proprietors of company e-mail systems employers have authority to access employee e-mail under the Stored Communications Act.²¹⁷ Even employees have reasonable expectations of privacy in e-mail stored outside of company e-mail systems. In a leading case, *United States v. Maxwell*²¹⁸ the court there held that a United States Air Force Colonel had a reasonable expectation of privacy in e-mail messages stored in his internet service provider's central computer under a contractual privacy policy not to disclose the e-mail to anyone other than an authorized user or pursuant to a court order.²¹⁹

The reasonableness of privacy expectations in e-mail stored in computers in the home will depend upon whether the spouse has consented or authorized access to the e-mail by the other spouse. If separate e-mail accounts and separate passwords are

²¹⁶ See *Restuccia vBurk Technology*,.1996 WL1329386 (Mass. Super. 1996) (NOT CORRECT)

²¹⁷ Section 2701(c) of Title II provides that it is not unlawful to access stored electronic communications if access is authorized “by the person or entity providing a wire or electronic service.”

²¹⁸ 45 M.J. 406 (C.A.A.F. 1996).

²¹⁹ See *id.* at 417-19 (holding Colonel had an expectation of privacy). The e-mail in question was generated by computer hardware, software and accessories that were purchased and maintained by Maxwell. Use of the computer and services by Maxwell was not in connection with his official Air Force duties.

maintained by spouses who jointly share a computer with joint access to the main drive each spouse would have a reasonable expectation of privacy in their separate e-mail accounts. As observed by the *Trulock* court in the discussion above, a spouse's affirmative act of maintaining a separate e-mail account and password demonstrates an intention to exclude others (including the other spouse) from the personal e-mail files. By this act the spouse has a reasonable expectation of privacy in the password-protected files.²²⁰

White v. White,²²¹ discussed above, illustrates the importance of password – protected e-mail files in privacy intrusion tort actions. The court in *White* rejected Mr. White's claim that accessing stored e-mail by Mrs. White constituted a violation of the privacy intrusion tort. As correctly observed by the court, the plaintiff must have a reasonable expectation of privacy in the area or information that is accessed and the means of access must be "highly offensive" for a tortious invasion of privacy to occur.²²² Both spouses and their children had authority to access the hard drive of the computer which was located in the sun room of the home. Under the e-mail service agreement with AOL, and unknown to Mr. White, he was saving e-mail he sent and received on the hard drive of the computer. Because he did not know he was doing this he did not delete or protect the e-mail with a password. In light of the authority given to both spouses to access the hard drive Mr. White had no reasonable expectation of privacy in e-mail on the hard drive of the computer. The court analogized the computer to an office file cabinet in

²²⁰ See *Trulock III v. J. Freeh*, 275 F.3d 391, 403 (4th Cir. 2001); see also text accompanying notes 114, 115.

²²¹ 781 A. 2d 85 (N.J. Super. Ct. Ch. Div. 2001)

²²² . *Id* at 91-92.

a room both spouses had complete access to.²²³ The privacy intrusion tort becomes important in spousal access to e-mail cases because as discussed in the section above several courts have construed the Stored Communications Act as not applying to e-mail stored in computers in the home²²⁴ But as noted in the section below violations of the privacy intrusion tort will provide a damage remedy for the spouse whose privacy is invaded but the tort violation is not an independent basis for excluding the illegally acquired e-mail from divorce or custody proceedings.²²⁵

III. EXCLUSION OF FRUITS OF ILLEGAL SURVEILLANCE

A. *The Fault Requirement for Violations of the ECPA*

Criminal responsibility, damage remedies and the exclusionary rule are only triggered if there is a willful or intentional violation of the ECPA. Section 2511 of the 1968 Wiretap Act limited criminal sanctions to “willful” violations of the statute.²²⁶ Although initially there was no reference to “willful” in the damage section of the statute – section 2520 – courts generally required a finding that the defendant had acted willfully for damages to be recoverable.²²⁷ “Willful” within the meaning of sections 2511 or 2520 was interpreted the way it is generally constructed in federal criminal statutes and

²²³ *Id* at 92. The analogy was based upon a New Jersey case where the husband unsuccessfully tried to suppress love letters that had been discovered by the wife in file cabinets she had full access to. *See DelPresto v. DelPresto*, 235 A. 2d 240 (App. Div. 1967).

²²⁴ *See* discussion *infra* of *White* and other courts not viewing e-mail stored in computers in the home or workplace as “ in electronic storage” under state and federal Stored Communications Acts.

²²⁵ *See* fn. 282 *supra* and accompanying text.

²²⁶ *See* 18 U.S.C.A. § 2511 (West 2000).

²²⁷ *See* *Citron v. Citron*, 722 F. 2d 14 (2d Cir. 1983); *Kratz v. Kratz*, 477 F. Supp. 463 (E.D. Pa. 1979).

was not limited to knowingly violating the statute; “willful” has the broader meaning of reckless disregard of a known legal duty.²²⁸ As elaborated by a leading case :

The word [willful] often denotes an act which is intentional or knowing or voluntary, as distinguished from accidental. But when used in a criminal statute, it generally means an act done with a bad purpose; without justifiable excuse; stubbornly, obstinately, perversely. The word is also employed to characterize a thing done without ground for believing it is lawful, or conduct marked by careless disregard whether or not one has the right so to act.²²⁹

Clearly, accidental or negligent violations of the statute will not satisfy the fault requirement in sections 2511 and 2520 of the ECPA. It is enough, however, that the interception was done without justifiable excuse, stubbornly, obstinately, perversely or without ground for believing it was lawful or with careless disregard whether or not one had the right to act²³⁰ “Willfully” may be treated as a factual question for the jury in many cases. Illustrative of this point is the court's decision in *Citron v. Citron*.²³¹ There, Fiona Citron taped conversations between her husband and their adopted children, Steven and Alisande.²³² She continued to tape the conversations after consulting her attorney.²³³ After discovering that some of his conversations with the children had been recorded Casper, Steven and Alisande brought a damage action under section 2520 of the

²²⁸ 290 U.S. 389, 394-95 (1993).

²²⁹ *See id.*

²³⁰ *See Citron*, 722 F. 2d 14; *see also Kratz*, 477 F. Supp. 463; *Heggy v. Heggy*, 944 F.2d 1537 (10th Cir. 1991).

²³¹ 722 F. 2d 14.

²³² *See id.* at 15.

²³³ *See id.*

Federal Wiretap Act.²³⁴ The Second Circuit Court of Appeals affirmed the dismissal of the complaint after the jury in a special verdict found that Fiona had not acted intentionally or recklessly in taping the conversations.²³⁵

Citron also reflects the general view taken by courts that the “willfulness” standard in the criminal law provision - section 2511 - has the same meanings as in the damage section - section 2520.²³⁶ The damage provision of Title I provides that a “good faith reliance on . . . a legislative authorization or a statutory authorization” constitutes a defense.²³⁷ This section tracks the general notion of “willfulness” required for negligence but is generally regarded as specifically addressing “good faith” on the part of law enforcement officials or their assistants.²³⁸ State courts have construed “willfully” under state wiretap acts similarly.²³⁹ Although there is ambiguity in the fault requirement since recklessness is sufficient, it is clear that a jury determination that the defendant acted with a good faith belief that her conduct was lawful²⁴⁰

The ECPA substituted “intentional” for “willfully” in section 2511 and added “intentional” to portions of section 2520.²⁴¹ Courts generally do not consider this change to alter the pre-ECPA view that reckless satisfied the fault requirement.²⁴²

²³⁴ *See id.*

²³⁵ *See id.* at 16.

²³⁶ *See id.*

²³⁷ *See* 18 U.S.C.A. § 2520 (d)(1) (West 2000).

²³⁸ *See Citron*, 722 F.2d at 16.

²³⁹ *See Fischer v. Hooper*, 732 A. 2d 396 (N.H. 1999).

²⁴⁰ *See id.*

²⁴¹ *See* 18 U.S.C.A §§ 2511, 2520 (West 2000).

B. *The Federal Wiretap's Strict Exclusionary Rule*

The Wiretap Act has a strict exclusionary rule.²⁴³ Section 2515 excludes any part of the contents of an illegally intercepted communication from being admitted into any legal proceedings before state or federal legislatures, courts or administrative agencies.²⁴⁴ Evidence is only excluded under Title I if it is the fruits of activities that constitute a violation of Title I. Therefore the fruits of electronic surveillance would be admissible in a state court divorce or custody proceeding if surveillance was exempt from Title I because of the spousal marital conflict exception.²⁴⁵ This would also be the case if the electronic surveillance was exempt because the parent had authority to vicariously consent for the child whose conversations were recorded.²⁴⁶ Evidence procured from an interception that was not willful or intentional could also be admitted in state court proceedings as those interceptions are not illegal under Title I.²⁴⁷

The exclusionary force of Title I federal wiretap violations in state divorce or custody proceedings has been acknowledged by state courts.²⁴⁸ In *In re Marriage of*

²⁴² need support

²⁴³ See 18 U.S.C.A. § 2515 (West 2000).

²⁴⁴ *Id.*

²⁴⁵ As noted earlier the Fifth Circuit and Second Circuit have recognized a limited marital conflict exception. See *supra* notes 47-51 and accompanying text.

²⁴⁶ See *supra* notes 58-87 and accompanying text.

²⁴⁷ See *supra* notes 203-219 and accompanying text

²⁴⁸ See *Markham v. Markham*, 265 So. 2d 59 (Fla. Dist. Ct. App. 1972) *aff'd*, 272 So. 2d 813 (Fla. 1973); *Rickenbaker v. Rickenbaker*, 222 S.E.2d 463 (N.C. Ct. App. 1976), *modified*, 226 S. E. 2d 347 (N.C. 1976).

Lopp,²⁴⁹ the Supreme Court of Indiana held that it was not reversible error for a trial judge to hear wiretaps procured in violation of Title I where the wiretap victim claimed that the wiretaps were used by her spouse to blackmail her into signing a provisional custody order.²⁵⁰ The court decided that even if section 2515 generally required exclusion of wiretaps introduced to establish the merits of the controversy, the exclusionary rule was not applicable to conversations introduced to challenge the credibility of witnesses or to conversations that were pertinent to allegations of testimony defrauding the court.²⁵¹ To apply the exclusionary rule of section 2515 to such cases would violate the due process clause and constitute an unconstitutional impairment of essential functions of state judges and state sovereignty.²⁵²

While the *Lopp* case represents an important exception to the exclusionary rule the courts reasoning is flawed. The state sovereignty case relied upon in *Lopp* was *National League of Cities v. Usery*.²⁵³ *National League of Cities* held that Federal Commerce Clause legislation imposing a minimum wage requirement on local government entities violated state sovereignty.²⁵⁴ The minimum wage holding of *National League of Cities* was overruled in *Garcia v. San Antonio Metropolitan Transit Authority*.²⁵⁵ In two subsequent cases, however, the Supreme Court has found federal

²⁴⁹ 378 N.E.2d 414 (Ind. 1978).

²⁵⁰ *See id.* at 422 (noting that circumstances rendered court's review of tapes obtained not reversible error).

²⁵¹ *See id.* at 423 (noting that it would be illogical to apply exclusionary rule under certain circumstances).

²⁵² *See id.* (noting potential issues of federalism).

²⁵³ 426 U.S. 833 (1976).

²⁵⁴ *See id.* (striking down mandatory minimum wage for state employees).

²⁵⁵ 469 U.S. 528 (1985).

legislation enacted under the Commerce Clause to violate state sovereignty.²⁵⁶ However, in *Testa v. Katt*²⁵⁷ the Court held that federal legislation requiring state courts to enforce federally created causes of action does not violate state sovereignty. *Lopp* is clearly inconsistent with *Testa v. Katt*.

C. *No Exclusionary Rule Under Title II*

As noted earlier there is no exclusionary rule explicitly in Title II. There is no basis for implying an exclusionary rule because Section 2708 specifically states that the remedies under Title II are limited to those that are enumerated.²⁵⁸ As a consequence even if access to e-mail or voicemail violates the Stored Communications Act, the e-mail or voicemail would be admissible in divorce or custody proceedings in state court.

D. *Exclusion of Evidence for Privacy Intrusion Tort Invasions*

The absence of an exclusionary rule under Title II means evidence from the fruits of invasions of privacy through illegal access to e-mail and voicemail is admissible in divorce and custody proceedings under the Federal Stored Communications Act. As suggested above conduct that violates Title II also may constitute an invasion of privacy under common law tort. Does the common law of torts provide an independent basis for excluding evidence? I think the best answer is that the fact that evidence is acquired in the commission of a tort is not by itself a sufficient reason for excluding the evidence if it is relevant or material in a subsequent civil or criminal court proceeding. As a general

²⁵⁶ See *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

²⁵⁷ 330 U.S. 336 (1947)

²⁵⁸ See 18 U.S.C.A. § 2708.

matter there is no common law exclusionary rule. In cases where the government violates constitutional provisions such as the Fourth Amendment, a rule excluding introduction of the fruits of the illegal search has been adopted by the Court as a deterrence to police and on the basis that the government as guardian of our rights should not benefit from acting illegally.²⁵⁹ In some instances (like Title I) the legislature has adopted an exclusionary rule to enforce standards in statutes. These exclusionary rules express the exception judgment that primacy over the integrity of fact finding and justice dispensing of courts should be given to enforcing the prohibited statutory conduct. In the case of constitutional or legislative exclusionary rules, exclusion of evidence is designed as a means for enforcing the constitutional or legislative standards and policies that are in place.

Remedies that are built into the remedies that are part of our longstanding common law tort traditions are viewed by courts as sufficient to further tort policies of compensation of tort victims and deterrence of tortious conduct. Compensatory tort damages include money for physical and emotional pain and suffering as well as out of pocket economic loss. Deterrence is promoted indirectly in granting compensatory damages awards through insurance rates.²⁶⁰ Direct deterrence is promoted through punitive damage awards.²⁶¹ Given this it is not surprising that there is little or no authority to exclude relevant and material evidence in custody or divorce proceedings on the basis that the evidence is the fruit of conduct that constitutes a common law tort

²⁵⁹ See Wayne R. LaFare, *Criminal Procedure* § 9.5 (3d Ed. West Group 2000).

²⁶⁰ For a general discussion of the role of compensatory and punitive damages and insurance on deterrence in tort law, see, Christie, *The Law of Torts* 735 (West Group 3d Ed. 1997).

²⁶¹ *Id.*

violation. There may be cases where a court might exclude evidence in a civil proceeding on the basis of improper conduct of parties or lawyers in those proceedings. In *Shoney's v. Lewis*,²⁶² for example, the Supreme Court of Kentucky excluded introduction of evidence that was procured by one of the lawyers before the court in violation of a code of professional conduct rule.²⁶³ In that case, however, the court was exercising its authority to sanction conduct that was unethical by a lawyer who is an officer of the court system.

IV. *Minimization of Privacy Invasions By Protective Orders In Discovery*

As suggested in sections II and III of this article Title I and Title II of the ECPA have been construed to allow for the electronic surveillance of communications or conversations without a filtering mechanism that would minimize invasions of privacy of innocent persons – those persons communicating or conversing about matters unrelated to the legitimate justification for the electronic surveillance. The absence of a filtering mechanism for minimization is a serious problem because significant invasions of privacy occur and are sanctioned by law even though there is no justification for the privacy invasions. The minimization problems arises in two related situations : (1) where the ECPA allows for the electronic surveillance of conversations or the unauthorized access to digital communications of innocent persons, and (2) where the content of the conversation or communication may be admitted in a judicial proceeding because of the absence of an exclusionary rule.

²⁶² . 875 S. W. ed 514 (Ky. 1994).

²⁶³ The rule was SCR 3.130 Rule 4.2 (prohibiting ex parte communications between lawyer party represented by another lawyer.

In this section I examine the extent to which privacy protection in discovery rules and under state and federal constitutions may be utilized to function as *de facto* exclusionary rules that minimize the introduction of innocent person's conversations or communications into records of judicial proceedings. Preventing introduction of innocent personal conversations or communications into court records is important for privacy protection because judicial records are probably the most public in our legal system.

The ECPA does not provide for exclusion of innocent person's conversations or communications in two instances. There is no exclusion under Title I in cases where courts recognize an exception to unauthorized interceptions of conversations in marital conflicts or for parents intercepting the conversations of their minor children. Although Title I has a strong exclusionary rule it does not apply because there has been no violation of the Wiretap Act. Perhaps more importantly there is no exclusion under Title II in any case where e-mail or voicemail is accessed even if the access violates Title II. However, privacy rights recognized in discovery rules and federal and state constitutions provide rules for preventing innocent persons communications or conversations from introduction into judicial proceedings.

F. *Constitutionally Based Privacy Rights*

There are two traditions of privacy rights under the United States constitution and the constitutions of several states.²⁶⁴ Decisional privacy rights protect independence of decisions for matters such as abortion. Informational privacy rights recognize a right of persons to decide whether the government shall have access to highly personal or

²⁶⁴ . *Whalen v. Roe*, 429 U.S. 589,599 (1977).

intimate information about them. Informational privacy rights are protected under unreasonable search and seizure provisions in the federal and state constitutions. These rights are also protected under the due process clauses of state and federal constitutions.²⁶⁵ Compelled disclosure of highly personal or intimate information in the discovery process triggers this right. This privacy right compels courts to balance privacy interests with the need to know.²⁶⁶ In divorce and custody cases where there are requests for disclosure of intercepted conversations or stored e-mail and voicemail in the discovery process this constitutionally based informational privacy right may be utilized to preclude innocent conversations or communications from access in discovery.

State and federal discovery rules also provide for privacy rights that would restrict discovery of innocent conversations or communications in divorce and custody cases. Under Rule 26 (c) of the Federal Rules of Civil Procedure courts are authorized to limit discovery and provide protective orders when data sought would cause “unreasonable annoyance, embarrassment, oppression or burden.”²⁶⁷ State discovery rules generally track Rule 26 (c).²⁶⁸ While the language in Rule 26 (c) and analogous state rules do not specifically mention privacy, it is clear that serious invasions of privacy are included.²⁶⁹ The availability of a protective order under discovery rules to protect privacy is

²⁶⁵ For a general discussion of constitutionally based privacy right theory and balancing of interest test see Richard Turkington, *Legacy of the Warren and Brandeis Article, The Emerging Unencumbered Constitutional Right to Informational Privacy*, 10 N. Ill. U. L. Rev. 479 (1990); Seth Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. Pa. L. Rev. 1, 145 (1991).

²⁶⁶ . Turkington *Id.* , Kreimer *Id.*

²⁶⁷ Federal Rules of Civil Procedure 26 (c).

²⁶⁸ . (See *Rasmussen v. South Florida Blood Service*, 500 So. 2d 533 (Fla. 1987), *Stenger v. Lehigh Valley Hospital Center*, 609 A.2d. 796 (Pa. 1992)

²⁶⁹ *Id.*

determined by balancing privacy interests with the need to know very much like the balancing test under the constitutional right to privacy discussed above.²⁷⁰

Conclusion

Use of electronic technology to capture conversations or images and to access e-mail or voicemail is not uncommon in marriage and custody disputes between married persons and parents. Surreptitious use of this technology invades the privacy of the non-consenting party. Accessing the legality of these activities is complicated because a variety of legal institutions are implicated. In this article I have primarily examined whether electronic surveillance in domestic disputes violates federal and state stored communications and wiretap acts and the common law privacy intrusion tort. Wiretap acts generally restrict surreptitious recording of conversations with two limited exceptions. A minority of courts allow spouses to record conversations of other spouses on the extension phone in the marital home. There is greater authority to record conversations of a minor child on the extension phone in the home. Recently, a potentially more expansive third exception has been adopted by almost all of the courts that have considered it. This exception would authorize parents to vicariously consent to a wiretap on behalf of their minor child if the parent believes it is in the child's best interest. If the vicarious consent rule is adopted, state and federal wiretap acts that provide a one party consent defense are not violated.

I argue that the vicarious consent doctrine ought to be rejected primarily for two reasons: (1) because the intercepting spouse is not sufficiently accountable for invasions

²⁷⁰ . Some courts view the constitutionally based privacy right to be incorporated into the limitations on privacy contained in Rule 26 (c) and analogous state discovery rules, *see Rasmussen, Stenger Id. See Farnsworth v. Procter & Gamble Co.*, 758 F. 2d 1545 (11th Cir. 1985).

of privacy to a non consenting third party who is conversing with the child and (2) because the vicarious consent doctrine is incomprehensible in view of state joint custody laws.

Access to e-mail and voicemail is primarily regulated by state and federal stored communications acts. This is a developing area of law and there are few appellate court decisions that construe the stored communications acts in domestic conflict cases. The clear trend is to find these statutes not applicable because e-mail stored in the home is not “in electronic storage.” Beyond that, even if stored communications acts are violated, the fruits of such illegality may still be admitted in civil court proceedings because, unlike wiretap acts, stored communications acts do not contain an exclusionary rule.

Electronic surveillance in domestic conflicts may be tortious under the common law privacy intrusion tort. This tort fills a void because it would reach silent video surveillance – an activity that is not regulated under wiretap and stored communications acts. In the examination of privacy intrusion tort cases it is clear that surreptitious audio and video surveillance in domestic conflict cases may constitute tortious conduct even if the conduct does not violate wiretap and stored electronic communications acts. I examine the extent to which parties may have reasonable expectations of privacy in conversations and communications within the meaning of the privacy intrusion tort. I also conclude that it is clear that it would be tortious for a spouse to access e-mail stored in a home computer if the e-mail is stored in a segregated e-mail account and the parties have maintained separate private passwords.

Much evidence that is obtained by illegal electronic surveillance may be admissible in marriage and custody proceedings because violations of stored electronic

communications acts and the privacy intrusion tort do not provide a basis for excluding evidence in civil court proceedings. I suggest that protective orders based upon discovery rules and constitutional privacy rights may provide a way to protect privacy by excluding some communications or images from admissibility in judicial records.