Parent-Child Wiretapping: Is Title III Enough?

Deana A. Labriola

Follow this and additional works at: http://scholarship.law.edu/lawreview

Recommended Citation
COMMENTS

PARENT–CHILD WIRETAPPING: IS TITLE III ENOUGH?

Deana A. Labriola

Title III of the Omnibus Crime Control and Safe Streets Act of 19681 (the Act) prohibits the interception of any wire, oral, or electronic communication by any person.2 Many states have also enacted similar laws prohibiting this conduct.3 Under Title III, a party is subject to both criminal and civil liability if found to have violated the Act.4

---

1. J.D. Candidate, May 2001, The Catholic University of America, Columbus School of Law.
3. See id. § 2511(1)(a) (making it unlawful to intercept communications of another person). Among other things, the Act has come to protect citizens from having their telephone conversations wiretapped. Title III provides in relevant part:
   (1) Except as otherwise specifically provided in this chapter any person who—
      (a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication . . . shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

Id.

3. See, e.g., ALA. CODE §§ 13A-11-31, 13A-11-33, 13A-11-35 (1994 & Supp. 1999) (making it a crime to use any device with the intent to eavesdrop, which mirrors the federal Act); 720 ILL. COMP. STAT. ANN. 5/14-1 to 14-9 (West 1993 & Supp. 2000) (including exemptions, liabilities, and definitions, just as the federal Act does); see also Steve Leben, Evidence for the Family Lawyer: Intrafamily Wiretapping, the Fifth Amendment and Other Selected Topics, 68 J. KAN. B.A. 24, 26-27 (1999) (providing that the admissibility of evidence in lawsuits for wiretapping cases will depend on whether a person violated the federal statute or a state statute, or both).

4. See 18 U.S.C. § 2511(4)(a), (b)(i) (establishing criminal liability for violating the Act). Title III provides that: “(a) Except as provided in paragraph (b) of this subsection or in subsection (5), whoever violates subsection (1) of this section shall be fined under this title or imprisoned not more than five years, or both.” Id. § 2511(4). Title III authorizes the recovery of civil damages, providing in relevant part:
   (a) In General.—Except as provided in section 2511(2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate.
   (b) Relief.—In an action under this section, appropriate relief includes—
      (1) such preliminary and other equitable or declaratory relief as may be appropriate;
      (2) damages under subsection (c) and punitive damages in appropriate
Congress enacted Title III to combat organized crime. Even with this goal in mind, however, Congress provided two exceptions to liability under the Act. A party may not be liable if his or her conduct falls under the "extension telephone" exception or the "consent" exception.

Although the language of Title III fails to include a specific "domestic relations" exception, many courts have interpreted the Act to include such an exception. Courts have used the Act's legislative history, rather

...
than the language of Title III itself, to fashion a domestic relations exception in order to exempt a spouse or family member from liability for wiretapping another spouse or family member. The broad domestic relation exception includes two specific exceptions that courts use to exempt spouses or family members from liability under the Act. These exceptions are known as the “interspousal” exception and the “parent-child” exception.

Since the Act’s inception, a number of cases have debated the existence of an interspousal exception under the Act. Some of these cases question the existence of a Title III exception when one spouse intercepts the telephone calls or conversations of another. Some circuits claim that an interspousal exception to Title III exists because domestic relations cases present issues within state control, and the federal Act does not stretch far enough to include domestic relations. Other circuits disagree, however, holding that Title III does not specifically delineate an exemption for domestic relations cases. In these jurisdictions, a

See id. at 2262.

See Jonathan D. Niemeyer, Note, All in the Family: Interspousal and Parental Wiretapping Under Title III of the Omnibus Crime Act, 81 Ky. L.J. 237, 243 (1992-1993) (claiming that a domestic relations exception exists under Title III because Congress never “intended to meddle in domestic relations” with the passage of Title III).

See Anonymous v. Anonymous, 558 F.2d 677, 679 (2d Cir. 1977) (acknowledging a parent-child exception within the Act); Simpson v. Simpson, 490 F.2d 803, 810 (5th Cir. 1974) (holding that an interspousal exception exists under the Act to exempt spouses from wiretapping each other); see generally Anderman, supra note 6, at 2262-67 (citing the use by some courts of the interspousal and parent-child exceptions).

Leben, supra note 3, at 26-27 (describing interspousal and parent-child telephone interceptions as the two situations that may be considered under the federal statutes).

Compare Simpson, 490 F.2d at 810 (finding an interspousal exception), and Rushing v. Rushing, 724 So.2d 911, 915 (Miss. 1998) (same), with Heggy v. Heggy, 944 F.2d 1537, 1541 (10th Cir. 1991) (finding no interspousal exception), and Pritchard v. Pritchard, 732 F.2d 372, 374 (4th Cir. 1984) (same), and United States v. Jones, 542 F.2d 661, 668-69 (6th Cir. 1976) (same); see generally Niemeyer, supra note 10, at 239 (indicating that the courts are still debating the issue of interspousal wiretapping under Title III).

See supra note 13 and accompanying text.

See, e.g., Simpson, 490 F.2d at 805 (asserting that Congress did not intend for Title III to extend into the marital home because it is an area generally left to the states); Anonymous, 558 F.2d at 679 (using Simpson to determine that parent-child wiretapping is exempt from liability under the Act); see also Anderman, supra note 6, at 2264-65 (emphasizing that a number of courts have used the reasoning from Simpson to find a parent-child exception).

See, e.g., Heggy, 944 F.2d at 1539-40 (using the Act’s clear and unambiguous language to determine that no exception for domestic relations exists under the Act); Pritchard, 732 F.2d at 374 (reaffirming that the Act does not include an exception for interspousal wiretapping scenarios); Jones, 542 F.2d at 668-69 (explaining that Congress intended for liability under Title III to reach all areas of electronic surveillance, including cases between spouses).
spouse can be held accountable for violating the Act.\(^{17}\)

Only recently, however, has a new issue arisen: whether one parent has the right to intercept his or her child's telephone conversations with the other parent.\(^{18}\) These cases generally address this issue in the context of divorce or custody disputes.\(^{19}\) In these domestic relations cases, courts generally have interpreted Title III in conjunction with evidentiary rulings to determine whether tape recordings between a parent and child are admissible in custody disputes.\(^{20}\) This is no small task, since most of the recorded conversations would provide crucial evidence about the parent-child relationship, thereby making it easier for a judge to decide which parent is best suited to have custody of the child.\(^{21}\)

Many courts have had to reevaluate their approach to interpreting Title III because of the nature of the parent-child relationship.\(^{22}\) Special concerns arise in such cases because one of the parties is a minor, and the future of familial relationships is at stake. Although domestic conflicts are generally a state issue, many federal courts have been forced to tackle such issues directly when dealing with potential violations of Title III.\(^{23}\)

---

\(^{17}\) See 18 U.S.C. § 2511(4) (1994) (permitting criminal punishment for violating the Act); id. § 2520 (allowing for the recovery of civil damages for violating the Act); see also Jones, 542 F.2d at 670 (ruling that Congress enacted Title III to protect the privacy of telephone users from all persons, including third parties or spouses).

\(^{18}\) See generally Fishman & McKenna, supra note 5, §§ 7.12, 7.16 (recognizing the number of court cases that have raised the issue of a parent's authority to consent to the interception of the child's conversations).

\(^{19}\) See Anderman, supra note 6, at 2291 (stating that only one case involving parent-child wiretapping has not involved a couple that is divorced or pending divorce); Cori D. Stephens, Note, All's Fair: No Remedy Under Title III for Interspousal Surveillance, 57 Fordham L. Rev. 1035, 1048 (1988) ("Courts recognize that the act of surveillance is really an extension of a domestic dispute. Since interspousal surveillance is rooted in a domestic dispute, the act occurs in the course of family activity").

\(^{20}\) Cf., Richard I. Zuber, Domestic Eavesdropping and Wiretapping: Admissibility of Intercepted Communications, 21 Colo. Law. 455, 458 (1992) (describing the admissibility and inadmissibility requirements of the contents of a wiretapped recording and any other evidence derived therefrom into evidence at a trial).

\(^{21}\) See Gottsfield, supra note 7, at 33 (claiming that tape-recorded evidence admitted at custody hearings may be the best evidence to demonstrate which parent should have custody).

\(^{22}\) See Anderman, supra note 6, at 2303 (noting that the parent-child relationship is a delicate one). Further, a function of the law is to keep that relationship intact. See id. at 2304. Therefore, a parent is presumed to have to act in the best interests of his or her child, because the child is unable to do so himself. See id. at 2290-91. The Supreme Court has even recognized a parent's right and duty to prepare his or her child for obligations such as the instillation of moral standards, religious beliefs, and the components of good citizenship. See, e.g., Wisconsin v. Yoder, 406 U.S. 205, 233 (1972).

\(^{23}\) See Elizabeth Williams, Annotation, Applicability, in Civil Action, of Provisions
This Comment addresses Title III's broad scope and its evolution through judicial interpretation. First, this Comment explores the exceptions in Title III, namely the telephone extension exception and the consent exception. This Comment then considers judicial interpretations of Title III, focusing on the statute's express language and legislative history. Next, this Comment analyzes the consent exception specifically and the various reasons for treating this exception differently. Finally, this Comment argues for a consent age of eighteen and inclusion of a good faith requirement to the vicarious consent exception. In support of this recommendation, this Comment further argues that Congress, not the judiciary, is best suited to make these determinations by amending Title III.

I. HISTORICAL DEVELOPMENT OF TITLE III: TWO EXCEPTIONS OR MORE

Title III makes it illegal for any person to "intentionally intercept, endeavor to intercept, or procure any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication." There are, however, two exceptions to Title III: the extension telephone exception and the consent exception. Moreover, no part of Title III's language specifically grants an exception for domestic relations cases.

The "extension telephone" exception is drawn from 18 U.S.C. § 2510(5)(a)(i). Essentially, this exception involves a scenario in which a person picks up another telephone extension in the house while someone else is on the line. It is not a violation of Title III to pick up an extension in the home and listen to another person's conversation; that type of interception is not intentional, as required by Title III. Also, the exten-
sion telephone exception excludes from liability those interceptions by a subscriber that occur in the ordinary course of business. Case law indicates that recording conversations in one's own home on an extension telephone is within a user's ordinary course of business, and therefore does not violate Title III.

The "consent" exception is codified at 18 U.S.C. § 2511(2)(d). The consent exception makes it lawful to intercept a communication when at least one party to the communication consents to the interception. From the consent exception in Title III, courts have formulated the doctrine of vicarious consent. The vicarious consent doctrine permits one

phone in the home. See id. Intrusions of this nature are not punishable under Title III because liability under Title III requires the act to be intentional. See 18 U.S.C. § 2511(1)(a)-(b). A 1986 amendment lowered the level of intent required to violate Title III from "willful" to "intentional." Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, § 101(f)(1), 100 Stat. 1848, 1853.

30. See Leben, supra note 3, at 26 (recognizing that the federal statute exempts from liability under the Act those "interceptions that occur via telephone instruments to a subscriber by the phone company when used in the ordinary course of business"). Interceptions within the home are described as ordinary because they are usually accidental, and therefore do not fulfill the Title III requirement that interceptions be intentional. See Anderman, supra note 6, at 2276; see, e.g., Anonymous v. Anonymous, 558 F.2d 677, 678-79 (2d Cir. 1977) (noting that listening in on an extension telephone in a home would certainly be in the "ordinary course of [the user's] business"). BLACK'S LAW DICTIONARY defines "ordinary course of business" as ":[t]he transaction of business according to the common usages and customs of the commercial world generally or of the particular community or of the ordinary individual whose acts are under consideration." BLACK'S LAW DICTIONARY 1098 (6th ed. 1990). More generally, business is defined as "[t]hat which habitually busies or occupies or engages the time, attention, labor, and effort of persons as a principal serious concern or interest ...." Id. at 198; see also infra note 31 and accompanying text (showing some courts' interpretation of the ordinary course of business standard). But see Watkins v. L.M. Berry & Co., 704 F.2d 577, 583 (11th Cir. 1983) (holding that a personal call cannot be intercepted under the ordinary course of business exception, except for those interceptions necessary to determine if a call is personal or not). This limitation only allows the interception in the ordinary course of business to determine the nature of the call, not the content. See id.; see also supra note 7 and accompanying text (showing how the ordinary course of business arises out of the extension telephone exception).

31. See, e.g., Newcomb v. Ingle, 944 F.2d 1534, 1536 (10th Cir. 1991) (expanding to homes the exemption to Title III by claiming that Congress would not give an exemption to businesses that it would not intend to give to private homes); Anonymous, 558 F.2d at 678-79 (admitting that the use of an extension telephone in the appellee's home falls under a user's ordinary course of business as stated in the Act).

32. See supra note 8 and accompanying text (providing the statutory language for the consent exception).

33. See id.

34. See, e.g., Campbell v. Price, 2 F. Supp. 2d 1186, 1189 (E.D. Ark. 1998) (using the consent exception to allow vicarious consent); Thompson v. Dulaney, 838 F. Supp. 1535, 1544-45 (D. Utah 1993) (basing the decision to allow vicarious consent on the consent exception of the Act found in 18 U.S.C. § 2511(2)(d)). The Thompson court required a good
parent to consent on a child's behalf to the taping of the child's telephone conversations with the other parent. Some courts have allowed vicarious consent by the parent because children do not have the legal capacity to consent for themselves. Moreover, many courts have recognized a growing need for the vicarious consent exception in order to protect a child's welfare.

Title III has divided many courts, however, because it does not specifically include a domestic relations exception. Some courts look no further than the language of the Act itself when deciding whether a domestic relations exception exists. These courts argue that since there is no faith, objectively reasonable purpose by a parent to consent to the taping of conversations of a minor child. See id. Some courts have adopted this standard for vicarious consent. See id.

35. See Gottsfield, supra note 7, at 33 (explaining that the vicarious consent exception is premised on § 2511(2)(d) of the Act, which is the consent exception, to exclude parents from liability).

36. See, e.g., Thompson, 838 F. Supp. at 1544; Silas v. Silas, 680 So. 2d 368, 371 (Ala. Civ. App. 1996). Black's Law Dictionary defines "capacity" as a "legal qualification, such as legal age, that determines one's ability to sue or be sued, to enter into a binding contract, and the like." BLACK'S LAW DICTIONARY 199 (7th ed. 1999). "Capacity" is further defined as the "mental ability to understand the nature and effects of one's acts." Id. Capacity has been a source of debate in regard to juvenile offenders. See generally Donald L. Beschle, The Juvenile Justice Counterrevolution: Responding to Cognitive Dissonance in the Law's View of the Decision-Making Capacity of Minors, 48 EMORY L.J. 65, 67 (1999) (noting that minors are considered to have less than full capacity, which makes them less than fully culpable for the crimes they commit).

37. See Anderman, supra note 6, at 2266. Anderman notes:

In order to determine whether such an intrusion is justified, the law often mandates an inquiry into whether the "best interests" of a child will be served by governmental involvement. Under this standard, the argument for exempting parental wiretapping from the prohibitions of Title III is persuasive only if one assumes that parents act in the best interests of their children when they eavesdrop on their conversations.

Id. A parent's responsibility to serve the child's best interests, however, often competes with a person's—here the child's—right to privacy, which does not allow for the child's telephone conversations to be tapped. Cf. Katz v. United States, 389 U.S. 347, 350-51 (1967) (concluding that the government's eavesdropping activities violated the petitioner's right to privacy); James W. Hilliard, A Familiar Tort That May Not Exist in Illinois: The Unreasonable Intrusion on Another's Seclusion, 30 LOY. U. CHI. L.J. 601, 606 (1999) (discussing that the right of privacy is not explicitly set forth in the United States Constitution, but is inherent in many of the amendments). The existence of substantive due process, as interpreted from the Due Process Clause, has also been the source by which personal freedoms are protected from governmental interference. See WILLIAM A. KAPLIN, THE CONCEPTS AND METHODS OF CONSTITUTIONAL LAW 140 (1992). Privacy rights are especially protected under this analysis. See id.

38. See supra note 13 and accompanying text; see also Williams, supra note 23, at 526 (finding that the circuits are split on whether Title III reaches into the realm of domestic relations to address cases of interspousal wiretapping).

39. See, e.g., Kempf v. Kempf, 868 F.2d 970, 973 (8th Cir. 1989) (agreeing with the
mention of a domestic relations exception, one does not exist. Further, if a statute's language is clear and unambiguous, and that language conveys Congress's intent, the language controls.

Other courts, however, have construed the Act to include a domestic relations exception based on the Act's legislative history. Courts looking to the legislative history have found some evidence that liability under the Act does not include domestic relation cases. Therefore, these courts have held that a spouse or family member is not liable under the Act. The testimony of Professor Herman Schwartz at a Senate hearing on wire interception and eavesdropping is one example of the evidence that courts have relied upon to articulate the domestic relations exception to the Act. Professor Schwartz argued that "there may be cases

holding of Pritchard v. Pritchard, 732 F.2d 372 (4th Cir. 1984), and adhering to the Act's language; Pritchard v. Pritchard, 732 F.2d 372, 374 (4th Cir. 1984) (refusing to allow a domestic relations exception because the language of the Act is clear and unambiguous); United States v. Jones, 542 F.2d 661, 668 (6th Cir. 1976) (asserting that the Simpson court was wrong in finding an exception to liability for spouses because it contradicts the explicit language of the Act and the clear intent of Congress); see also, e.g., Niemeyer, supra note 10, at 238-39 (reiterating that many federal courts have found no implied exception to the Act as the clear language of the Act is controlling).

40. See, e.g., Kempf, 868 F.2d at 973 (agreeing with the Pritchard court that no express exception exists in the language of the Act); Pritchard, 732 F.2d at 374 (same); Jones, 542 F.2d at 668 (same); see also, e.g., Niemeyer, supra note 10, at 238-39 (observing that many courts have permitted the clear and manifest language to control, thereby denying the existence of a domestic relations exception). Courts have allowed the language of the Act to control and have not allowed an interspousal exception for the following reasons: 1) the Act's language of making "any individual" liable includes no exception for spouses; 2) Title III's purpose was to lessen the amount of electronic surveillance throughout the country, and is not concerned with marital conflicts; and 3) the legislative history of the Act reveals a congressional intent to reach all private electronic surveillance, which would also encompass domestic relations cases. Id. at 238-39.

41. See Niemeyer, supra note 10, at 241. A court will usually not refer to legislative history in interpreting a statute if the statutory text is clear and unambiguous on its face. See e.g., United States v. Jones, 542 F.2d 661, 667 (6th Cir. 1976) (presuming that Congress intended a literal interpretation of the text of the statute).

42. See, e.g, Newcomb v. Ingle, 944 F.2d 1534, 1536 (10th Cir. 1991) (using legislative history to exempt a parent from liability for wiretapping his or her child's telephone conversations with the other parent); Anonymous v. Anonymous, 558 F.2d 677, 678-79 (2d Cir. 1977) (basing a parent's exemption from liability on testimony and statements made at congressional hearings on the Act); Simpson v. Simpson, 490 F.2d 803, 807-09 (5th Cir. 1974) (noting only scattered suggestions that Congress's intention was to include interspousal wiretapping under the Act).

43. See Anderman, supra note 6, at 2281 (citing a statement by Professor Schwartz at a Senate hearing on wiretapping as one of the reasons that courts exclude family members from liability under the Act).

44. See Niemeyer, supra note 10, at 246 ("Contrary to fundamental rules of statutory construction, these courts postulated that since Congress did not explicitly include spouses within an Act of such import, Congress resolved to exclude them.").

where you do not want the law involved." He explained that "[w]hen a father picks up the phone and listens in to his teenage daughter . . . maybe these [scenarios] should be excluded from the bill, but the bill does not exclude only those." Some courts have argued that this is clear evidence that Congress intended to include a domestic relations exception in the statute. Further, some federal courts instead rely on the Act's legislative history to exempt parents from liability, noting that domestic relations is a state issue which is beyond the scope of a federal statute such as Title III.

In most jurisdictions Title III coincides with a similar state statute prohibiting the same type of interception. Thus, parties generally bring suit under both Title III and the parallel state statute. The federal rules of jurisdiction indicate that these suits, brought under both federal and state law, can be heard in either federal or state courts. Therefore, both federal and state courts have been involved in the interpretation of Title III.

---

See, e.g., Newcomb v. Ingle, 944 F.2d 1534, 1536 & n.5 (10th Cir. 1991) (citing Professor Schwartz's statement); Anonymous v. Anonymous, 558 F.2d 677, 679 (2d Cir. 1977) (same); Campbell v. Price, 2 F. Supp. 2d 1186, 1190 (E.D. Ark. 1998) (same). But see Anderman, supra note 6, at 2281-82 (asserting that Professor Schwartz's statement has been taken out of context and does not imply a domestic relations exception as some courts would hold).

See, e.g., Anonymous, 558 F.2d at 679 (holding that the father's taping of his child's conversations does not rise to a violation of the federal Act and is a matter to be handled by state courts); Simpson v. Simpson, 490 F.2d 803, 810 (5th Cir. 1974) (concluding that the facts of the case did not rise to a federal cause of action, even though the court did look to the legislative history and the extension telephone exception).


See, e.g., Silas v. Silas, 680 So. 2d 368, 369-70 (Ala. Civ. App. 1996) (noting that the mother argued for exemption from liability for tapping her child under both the federal Act and section 13A-11-31 of the Alabama Code); see also Zuber, supra note 20, at 456 (acknowledging that the federal Act is the minimum constitutional standard for protection of privacy and noting that state courts may set stricter standards if they deem it necessary to protect their citizens from wiretapping).

See 28 U.S.C. § 1331 (delineating requirements for federal question jurisdiction); see also Grubb v. Public Util. Comm'n of Ohio, 281 U.S. 470, 475 (1930) (maintaining that state and federal courts have concurrent jurisdiction over suits that arise under both federal and state law).

See Thompson v. Dulaney, 838 F. Supp. 1535, 1538 (concluding that the federal court had subject matter jurisdiction over both state law and federal law claims that the mother was bringing by way of supplemental jurisdiction under 28 U.S.C. § 1367(a)); Silas,
A. The Birth and Development of a Domestic Relations Exception

The first case under Title III to address the domestic relation exception was Simpson v. Simpson.\(^{54}\) The Simpson court held that a husband, suspicious of his wife's fidelity, was not liable under Title III for taping her conversations.\(^{55}\) The Simpson court was the first case to find an interspousal exception in Title III.\(^{56}\) The court simply stated that Title III did not cover domestic relations as manifested by Congress' passage of the extension telephone exception.\(^{57}\) The Simpson court stated that the extension telephone exception was clear evidence that Congress did not want to decide questions of familial relations within the context of the Act.\(^{58}\)

The Simpson decision created a progeny of case law that followed its ruling.\(^{59}\) In Anonymous v. Anonymous,\(^{60}\) the Second Circuit adopted the analysis of the Fifth Circuit in Simpson.\(^{61}\) Although Anonymous was the first case to address the issue of parent-child wiretapping, the Second Circuit used the Simpson interpretation pertaining to interspousal wiretapping to hold a parent exempt from liability for wiretapping his or her child.\(^{62}\) The Anonymous court found that a parent taping a child's telephone conversations with the other parent during a domestic dispute

---

\(^{54}\) 540 F.2d 803 (5th Cir. 1974).

\(^{55}\) Id. at 804 (holding that Title III is not sufficiently specific in defining liability to hold the husband liable for violating the Act).

\(^{56}\) Id. at 805. The court specifically noted that "[t]he naked language of Title III, by virtue of its inclusiveness, reaches this case. However, we are of the opinion that Congress did not intend such a farreaching [sic] result, one extending into areas normally left to states, those of the marital home and domestic conflicts." Id.; see also infra note 59 (listing subsequent cases reaffirming the Simpson holding).

\(^{57}\) See Simpson, 490 F.2d at 809 (noting as a further consideration the existence of an extension telephone exception to exempt family members from liability under the federal Act).

\(^{58}\) Id.

\(^{59}\) See Scheib v. Grant, 22 F.3d 149, 153 (7th Cir. 1994) (holding that the same reasoning that allows an interspousal exemption to the Act also supports parent-child wiretapping); Newcomb v. Ingle, 944 F.2d 1534, 1536 (10th Cir. 1991) (agreeing with the Simpson court that Congress's intent was to stay out of domestic relations); Anonymous v. Anonymous, 558 F.2d 677, 679 (2d Cir. 1977) (expanding Simpson's finding of a domestic relations exception to also include parent-child wiretapping scenarios, not simply interspousal wiretaps).

\(^{60}\) 558 F.2d 677 (2d Cir. 1977).

\(^{61}\) See id. at 679 (finding, like Simpson, that taping a conversation is no different than permissibly overhearing it, and that therefore, a spouse was not subject to liability under the Act for wiretapping the other spouse).

\(^{62}\) See id.
over custody did not rise to the level of a Title III violation. The court found no distinction between taping the conversations and accidentally overhearing them, which is clearly protected by the Act through the extension telephone exception.

Ten years later, the Second Circuit again addressed the issue of parent-child wiretapping in *Janecka v. Franklin*. Similar to *Anonymous*, *Janecka* involved a parent taping a child's conversations with the other parent during an ongoing custody dispute. The district court in *Janecka* deemed the decision in *Anonymous* to be controlling, and the Second Circuit agreed. Like *Anonymous*, the Second Circuit found that this type of custody dispute did not rise to a violation of Title III, thereby solidifying the parent-child exception by analogy to the telephone extension exception and the limitations on federal power over domestic disputes.

Up until this point, the circuits that articulated a domestic relations exception to Title III had not yet held vicarious consent to be an alternate means of exemption from liability. Both *Janecka* and *Anonymous* raised the issue of vicarious consent. These courts, however, found that the facts of these cases did not warrant further judicial review by a fed-

---

63. *Id.* (concluding that custody disputes are a matter for state courts, and therefore not actionable under federal law).

64. *See id.* (finding the difference between taping and overhearing a "distinction without a difference").

65. 843 F.2d 110 (2d Cir. 1988).


67. *Id.* at 27 (acknowledging that the court here is bound by the Second Circuit's holding in *Anonymous*).

68. *See Janecka*, 843 F.2d at 111 (affirming the district court's decision to follow the authority of *Anonymous*).


70. *See Janecka*, 684 F. Supp. at 26 (exempting parents from liability under the Act because it does not rise to the level of a federal violation); *Anonymous*, 558 F.2d at 679 (same).

71. *See, e.g.*, *Janecka*, 684 F. Supp. at 26 (proclaiming the court's awareness of vicarious consent, but choosing not to use it as a defense because the defendant was exempted from liability on other grounds); *Anonymous*, 558 F.2d at 679-80 (voicing no need to look at the vicarious consent defense because exemption from liability was found by other means).

eral court because the disputes were state matters, and therefore not addressed by the Act. As a result, these courts did not address the question of vicarious consent, deciding the cases on the scope of the Act instead. Because exemption from liability usually was found on other grounds, most cases did not address the merits of vicarious consent directly.

In the 1994 case of Scheib v. Grant, the Seventh Circuit used both the Second and Tenth Circuit's reasoning to exempt from liability under Title III a father who taped his son's telephone conversations with the son's mother. Although the court ultimately relied on the extension telephone exception to exempt the father from liability, the court adopted a "child's-best-interest" line of reasoning, which came closer to the vicarious consent exception than had any prior case.

Recent decisions rely more heavily on the vicarious consent exception. The case of Silas v. Silas directly tackled the issue of vicarious consent. In Silas, the court admitted into evidence tape recordings of the children's telephone conversations with their mother in a custody hearing. As a result of this admission, the court awarded custody to the

73. See Anonymous, 558 F.2d at 679 (holding that one parent taping the other parent's conversations with his or her child does not rise to a violation of Title III because it is purely a domestic matter that is better handled by the state courts). The court in Janecka also held that the facts surrounding the case were purely domestic and should be handled by the state courts. Janecka, 684 F. Supp. at 26.

74. See Anonymous, 558 F.2d at 679-80 (holding that because the facts of the case were not a violation of Title III, the alternate argument of vicarious consent did not need to be addressed by the court); Janecka, 684 F. Supp. at 26 (finding Title III inapplicable to the case and considering it unnecessary to address the issue of vicarious consent).

75. See, e.g., Silas v. Silas, 680 So. 2d 368, 370 (Ala. Civ. App. 1996) (recognizing that most federal courts hearing domestic relations cases under the Act had not addressed whether a parent may consent on behalf of a minor child to permissibly record the child’s telephone conversations with the other parent).

76. 22 F.3d 149 (7th Cir. 1994).

77. See id. at 154-55 & n.6 (holding the parent not liable).

78. Id. at 154-55 (finding the parent exempt from liability by way of the extension telephone exception by following the holding in Anonymous). The court, however, noted that the question of whether taping the conversations was in the child's welfare was a genuine issue of material fact that would require review by the district court if exemption from liability had not already been found. See id.

79. See, e.g., Campbell v. Price, 2 F. Supp. 2d 1186, 1191 (E.D. Ark. 1998) (limiting a parent's use of vicarious consent to those times when it is in the child's best interest); Silas, 680 So. 2d at 372 (finding that vicarious consent exempts a parent from liability under the Act).


81. See id. at 370 (acknowledging that most courts previously had not addressed whether a parent could vicariously consent to wiretapping on behalf of a child).

82. Id. at 369.
The court held that because the children (ages three and five) lacked legal capacity to consent for themselves, the father could consent vicariously to the taping on the children's behalf after he observed that the children became upset during telephone conversations with their mother. The court concluded:

that the father had a good faith basis that was objectively reasonable for believing that the minor child was being abused, threatened, or intimidated by the mother; therefore, it was permissible for the father to vicariously consent on behalf of the minor child to the taping of the telephone conversations.

The 

B. The Flipside: No Domestic Relations Exception Found

Although some courts furthered the existence of the domestic relations exception, others doubted its existence. Many federal courts and state courts have not agreed on cases regarding parent-child wiretapping. Many courts disagree on the most fundamental of issues, namely, whether or not a domestic relations exception even exists, explicitly or implicitly, in the federal Act. Additionally, some courts agree with the

---

83. See id.
84. See id. at 371 (stating that the children were unable "in any meaningful sense, [to] have given actual consent, either express or implied, since they were incapable of understanding the nature of consent and of making a truly voluntary decision to consent").
85. See id. at 371-72.
86. Id. at 372.
87. 838 F. Supp. 1535, 1544 (D. Utah 1993) (allowing exemption under the Act for parents if they had a good faith, objectively reasonable basis to believe the wiretapping was necessary "to act in the best interests of the child").
88. See Silas, 680 So. 2d at 370 (using the Thompson holding as a guide for this issue of first impression for the Alabama court); see also Pollock v. Pollock, 154 F.3d 601, 610 (6th Cir. 1998) (limiting the use of the vicarious consent doctrine to occasions when there is a good faith, objectively reasonable belief that it is in the child's best interest to tape the conversations); Campbell v. Price, 2 F. Supp. 2d 1186, 1191 (E.D. Ark. 1998) (same).
89. See, e.g., Heggy v. Heggy, 944 F.2d 1537, 1540 (10th Cir. 1991) (rejecting the holding of the Simpson court, and finding congressional intent to include domestic relations liability under the Act); United States v. Jones, 542 F.2d 661, 666-67 (6th Cir. 1976) (deciding that the Act was not definite or specific enough to exclude liability under the Act).
90. See Niemeyer, supra note 10, at 239 (asserting that courts are divided over interspousal wiretapping and citing the recent increase in parent-child wiretapping as aggravating the dispute).
91. See id. at 242-43 (implying that the judicial split on interspousal wiretapping may exist because it is unclear whether Congress intended to include spousal liability under the
concept of vicarious consent, but are reluctant to use it in all cases.92

Because Title III is devoid of language creating a domestic relations exception,93 many courts have read an implicit exception into the statute.94 United States v. Jones95 was the first case to take a hard-line approach to Title III and its interpretations.96 Jones, a Sixth Circuit case, decided after Simpson but before Anonymous, created the split in the circuits regarding interspousal wiretapping.97 The Jones court cited evidence in the legislative history of the Act to show Congress's intention to include domestic relations matters within the Act.98 This evidence, according to the court, demonstrated that Congress was aware of the extent of wiretapping in domestic disputes, although it chose not to make an exception for it.99 The Sixth Circuit emphatically disagreed with the rea-

92. See, e.g., Pollock, 154 F.3d at 610 (choosing to adopt the vicarious consent doctrine but declining to apply it under the facts of the case because a question of material fact existed as to the mother's motivations for taping the child); Williams v. Williams, 581 N.W.2d 777, 780 (Mich. Ct. App. 1998) (prohibiting the use of vicarious consent, even though the court could conceive of situations where it would be valuable).

93. See Niemeyer, supra note 10, at 237.

94. See, e.g., Newcomb v. Ingle, 944 F.2d 1534, 1536 (10th Cir. 1991) (exempting family members from liability under the Act by a broad reading of the extension telephone exception); Anonymous v. Anonymous, 558 F.2d 677, 679 (2d Cir. 1977) (using the legislative history, the court found no violation of the federal Act because it is a matter to be handled by the state courts); Simpson v. Simpson, 490 F.2d 803, 809 (5th Cir. 1974) (supporting a finding that Congress did not intend to include family members or spouses as liable under the Act).

95. 542 F.2d 661 (6th Cir. 1976).

96. Compare id. at 670 (holding that intercepting any person's telephone conversations is a violation of Title III, regardless of spousal or familial status), with Anonymous, 558 F.2d at 679 (finding an exception under the Act for parent-child wiretapping), and Simpson, 490 F.2d at 809 (holding an exception under the Act for interspousal wiretapping cases).

97. Compare Jones, 542 F.2d at 667 (holding that the language of Title III expresses a clear prohibition on all wiretapping unless specifically exempted, which interspousal wiretapping is not), with Simpson, 490 F.2d at 806 (finding that there is no clear indication in the language of the Act that Congress intended to intrude into marital relations).

98. Jones, 542 F.2d at 668 (stating that the testimony of Professor Blakey evidenced Congress's intent to include domestic relations liability under the Act). Professor Robert Blakey, credited with being the author of Title III, testified at the congressional hearings on the Right to Privacy Act of 1967 that "private bugging in this country can be divided into two broad categories, commercial espionage and marital litigation." Right to Privacy Act of 1967: Hearings on S. 928 Before the Subcomm. on Admin. Practice and Procedure, 90th Cong. 413 (1967) (statement of Robert G. Blakey, Professor, Notre Dame Law School). The Jones court took this statement as proof that Congress knew about private bugging in marital litigation and intended the Act to cover it as a result. Jones, 542 F.2d at 667 & n.10.

99. See Jones, 542 F.2d at 668 ("[T]he legislative history leaves no doubt that the Act
soning in Simpson, which held that a domestic relations exception existed under Title III, and continues to do so.100

Although the Sixth Circuit found no statutory exception for spouses in the language of Title III, the court was more willing to consider an exception for parent-child wiretapping.101 Recently the Sixth Circuit and the Court of Appeals of Michigan analyzed the exception for parent-child wiretapping through the vicarious consent approach.102

In Williams v. Williams,103 the Michigan Court of Appeals took a hard-line approach to vicarious consent.104 The court held that vicarious consent by a parent on behalf of a child is never allowed.105 The court stated that it could conceive of instances where vicarious consent would be necessary, but the danger of liberal application of the doctrine was far worse than banning it altogether.106 The court reasoned that, because the Act is silent as to a vicarious consent exception, no such exception exists.107 Further, if such a safe harbor provision were needed, Congress would have created one.108 The Williams court, however, did defer the issue of vicarious consent, stating that it was within Congress's authority to decide, not within the judiciary's consent.109

The most recent case to address the issue of vicarious consent is Pollock v. Pollock.110 Even though the case arose in the Sixth Circuit and was bound by the Jones decision to extend liability under the Act to do-

---

100. See id. at 671 (disputing the Simpson court's use of the limited legislative history to find an exception for domestic relations within the statute).
101. Compare id. at 673 (finding no implied interspousal exception under Title III), with Pollock v. Pollock, 154 F.3d 601, 610 (6th Cir. 1998) (adopting the vicarious consent exception in the Sixth Circuit to exempt parents from liability, although not applying it here for other reasons).
104. Id. at 781 (denying the use of the vicarious consent doctrine under any circumstances).
105. See id.
106. See id.
107. See id. at 780
108. See id. (stating that if Congress intended a vicarious consent doctrine to allow exemption from liability under the Act for parents, they would have explicitly included an exemption in the language of the Act itself).
109. Id. at 781 ("We instead commend to the legislative branch the delicate question of the extent of privacy that family members may expect within their home vis-à-vis each other.").
110. 154 F.3d 601 (6th Cir. 1998) (adopting the doctrine of vicarious consent).
mestic relations cases, the court was reluctant to follow precedent. The court agreed that a vicarious consent exception exists, but limited its application in *Pollock*, and refused to follow it in the circumstances of that case.

The *Pollock* court used reasoning similar to that in *Silas* when it restricted the use of vicarious consent to only those times when the consenting parent can "demonstrate a good faith, objectively reasonable basis for believing such consent is necessary for the welfare of the child." Although the court agreed with the vicarious consent doctrine in theory, the court declined to apply it because it questioned the mother's good faith reason for taping her child.

### C. Continuing Court Confusion Over Title III

Case law addressing the Act becomes increasingly disharmonious with each new decision. The Tenth Circuit has found it difficult to follow the very law that it set forth. Also, the Tenth Circuit seems to make a
clear distinction between interspousal wiretapping and parent-child wiretapping. As a result of this distinction, the two situations are treated differently under the law of the Tenth Circuit.

In Heggy v. Heggy, the Tenth Circuit agreed with the Fourth, Sixth and Eighth Circuits that interspousal wiretapping was a violation of Title III. Its reasoning, similar to the Fourth, Sixth, and Eighth Circuits, noted that the clear and unambiguous language of Title III provides no exception; thus, none exists.

The Tenth Circuit, however, neglected to associate this same reasoning with respect to parent-child wiretapping. In Newcomb v. Ingle, the court held that under a broad reading of the extension telephone exception, a family member may tape a conversation of another in the home. The court reasoned that interspousal wiretapping is “qualitatively different from a custodial parent taping a minor child's conversations within

Newcomb v. Ingle, 944 F.2d 1534, 1536 (10th Cir. 1991) (exempting a parent for wiretapping the telephone conversations of his or her child with the other parent because Congress intended to exclude domestic relations cases from the purview of Title III via the extension telephone exception).

118. See, e.g., Newcomb, 944 F.2d at 1535-36 (stating that interspousal wiretapping is qualitatively different than parent-child wiretapping). The Court did not explain why or how the two situations were different. See id.

119. See Thompson v. Dulaney, 970 F.2d 744, 748 (10th Cir. 1992) (allowing the vicarious consent exception to exempt parents from liability under Title III), on remand to 838 F. Supp. 1535 (D. Utah 1993); Heggy, 944 F.2d at 1540 (allowing no exception for interspousal wiretapping); Newcomb, 944 F.2d at 1535-36 (allowing an exception for parent-child wiretapping through the telephone extension exception).

120. 944 F.2d 1537 (10th Cir. 1991).

121. Id. at 1539 (holding that Title III does not make an exception for interspousal wiretapping because of the clear and unambiguous language of the statute); see also, Kempf v. Kempf, 868 F.2d 970, 973 (8th Cir. 1989) (concluding there is “no legal basis for Title III or its legislative history to insulate a spouse in this situation from the Title's reach or its civil penalties”); Pritchard v. Pritchard, 732 F.2d 372, 374 (4th Cir. 1984) (finding that “Title III prohibits all wiretapping activities unless specifically excepted”); United States v. Jones, 542 F.2d 661, 667 (6th Cir. 1976) (stating that the language of § 2511(1)(a) clearly expresses a prohibition on all wiretapping beyond those explicit exceptions in the statute).

122. See Heggy, 944 F.2d at 1540-41. The Heggy court claimed that the legislative history of Title III showed Congress's awareness of the large use of wiretapping devices and their intent to prohibit the use of these devices. See id. (using the remarks of Senator Long, Professor Blakey, and Senator Hruska in the Act's legislative history to determine congressional awareness of the widespread use of domestic wiretapping at the Act's inception).

123. See Newcomb, 944 F.2d at 1536 (permitting a broad reading of the extension telephone exception to allow an exemption from liability under the Act for parent-child wiretapping); Thompson, 838 F.Supp. at 1545 (allowing an exemption from liability for parent-child wiretapping by way of the vicarious consent doctrine).

124. 944 F.2d 1534 (10th Cir. 1991).

125. Id. at 1536.
the family home." The court gave no indication as to why the situations were "qualitatively different," but found that the parent was not liable under Title III based on the extension telephone exception. The Newcomb court followed the reasoning set forth in Simpson and Anonymous by finding no liability through the extension telephone exception.

The Tenth Circuit solidified the distinction between interspousal wiretapping and parent-child wiretapping in Thompson v. Dulaney. Decided on vicarious consent grounds, Thompson widened the spectrum of Tenth Circuit decisions interpreting Title III. The Thompson court held that a wife could vicariously consent on behalf of her children, although not under the particular facts of the case. The court held that situations involving vicarious consent are not subject to Title III liability because vicarious consent cases usually deal with children lacking the legal capacity to consent due to their age. The court reasoned that if a child lacks the legal capacity to consent for himself, the parent has a right to do so; thus, fitting such a situation into the consent exception of the Act.

The Thompson court, however, did make efforts to distinguish its holding from Heggy, the Tenth Circuit case rendering spouses liable for wiretapping under Title III. For example, the court focused on the issue of intent in the interception. The court stated that, barring a spe-

126. Id. at 1535-36.
127. Id. at 1536.
128. Id. (exempting family members from liability under the extension telephone exception in 18 U.S.C. § 2510(5)(a)(i); see also, Anonymous v. Anonymous, 558 F.2d 677, 679 (2d Cir. 1977) (using the extension telephone exception as further evidence of Congress's intent to stay out of familial relations and leave these matters to state courts); Simpson v. Simpson, 490 F.2d 803, 809 (5th Cir. 1974) (considering as another reason for an interspousal exception to Title III, the existence of the extension telephone exception).
129. 970 F.2d 744 (10th Cir. 1992), on remand to 838 F. Supp. 1535 (D. Utah 1993).
130. Thompson, 838 F. Supp. at 1544.
131. Id. (basing the decision to not exempt the mother from liability on factual reasons pertaining to the case). Evidence submitted during the trial indicated that the conversations between the mother and child were not harmless. See id.
132. See id. (recognizing a parental right to consent on behalf of their children because they lack legal capacity to consent and cannot give actual consent for themselves).
133. See id.
134. Id. at 1541 (noting that the Heggy court made wiretapping between spouses illegal under those circumstances where the interception was intentional). The vicarious consent defense used in Thompson is a defense that exists to override the intentionality of the wiretapping and is therefore not liable under the Act if found to be done for a good faith, objectively reasonable aim. Id. at 1542-44.
135. See id. at 1542 ("'Defendant's act must [be shown to] have been the product of defendant's conscious objective rather than the product of mistake or an accident.'")
specific exception exempting him or her from liability, a person could only be held liable under the Act for intentionally, rather than inadvertently, intercepting a communication.\textsuperscript{136} The court explained that the spouse was liable in Heggy because intent existed without falling into one of Title III's exceptions.\textsuperscript{137} The court, finding that vicarious consent is a statutory exception, held that the wife in Thompson could not be found liable if the factual circumstances of the case allowed for its use.\textsuperscript{138} Accordingly, within the Tenth Circuit there is now a clear dichotomy of rulings between interspousal and parent-child wiretapping.\textsuperscript{139}

II. THE GREAT DIVIDE: LANGUAGE OR LEGISLATIVE HISTORY

Fundamentally, judicial indecision regarding the Act is a matter of statutory interpretation.\textsuperscript{140} This division is of particular concern to many attorneys because inconsistency in decisions makes it difficult to advise clients involved in delicate familial disputes.\textsuperscript{141}

\begin{quote}
(quoted United States v. Townsend, 987 F.2d 927, 930 (2d Cir. 1993)).
\end{quote}

\begin{enumerate}
\item \textsuperscript{136} See id.
\item \textsuperscript{137} See id. at 1541 (concluding that the wife in Heggy had the requisite intent).
\item \textsuperscript{138} Id. at 1544. By way of showing the circumstances under which vicarious consent could be used lawfully as a defense by a parent, the Thompson court stated, 
In this case, or perhaps a more extreme example of a parent who was making abusive or obscene phone calls threatening or intimidating minor children, vicarious consent is necessary to enable the guardian to protect the children from further harassment in the future. Thus, as long as the guardian has 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, vicarious consent will be permissible in order for the guardian to fulfill her statutory mandate to act in the best interests of the children.
\item \textsuperscript{139} See id. at 1544 (allowing vicarious consent to be an exemption to liability under the Act for parent-child wiretapping cases); Heggy v. Heggy, 944 F.2d 1537, 1540 (10th Cir. 1991) (prohibiting an exemption from liability under the Act for situations of interspousal wiretapping); Newcomb v. Ingle, 944 F.2d 1534, 1536 (10th Cir. 1991) (permitting parent-child wiretapping under the extension telephone exception).
\item \textsuperscript{140} See Williams, supra note 23, at 526 (highlighting the split among the federal circuit courts on whether Title III covers domestic relations cases). The court in Heggy v. Heggy characterized the debate over interpretation of the statute. Heggy, 944 F.2d at 1540. The Heggy court felt no need to resort to looking to legislative history because the statute was clear and unambiguous on its face. Id. However, the appellant in Heggy urged adoption of the Simpson court's view in which legislative history was looked at to find Congress's intent for the statute. Id.
\item \textsuperscript{141} See Zuber, supra note 20, at 456. The Tenth Circuit's split in decisions allowing an exception for parent-child wiretapping but not allowing an exception for interspousal wiretapping is an area "fraught with danger" for the family law attorney. Id. Zuber recognizes that the Tenth Circuit's discontinuity makes advising clients on the probable outcome of their claim difficult. See id. To further this difficulty in advising clients is the recognition of possible ethical consequences an attorney may face if he or she advises a
Two interpretations of Title III have spawned the great division between the circuits. On the one hand, courts argue that the statute is clear and unambiguous on its face and does not include a domestic relations exception. Conversely, other courts argue that Congress intended a domestic relations exception to exist in the statute, as evidenced by its legislative history.

A. The Language Approach: the Plain Statutory Language Controls

For courts that look directly to the language of the statute for their interpretation, there is no place within the Act providing any explicit exception for marital or familial cases. In fact, the language is quite clear: "any person" is liable under the Act for wiretapping unless they fall into either the telephone extension or consent exception. Therefore, any person, including spouses or other family members, could be liable under the Act. Courts have concluded that the reach of the statute clearly includes domestic relations situations by proscribing any person from wire-

142. See generally Niemeray, supra note 10, at 237 (categorizing the two interpretations of Title III as either allowing no domestic relations exception because the language is clear and unambiguous or recognizing the legislative history of the Act shows Congress's intent to include a domestic relations exception).


144. See, e.g., Scheib v. Grant, 22 F.3d 149, 154 (7th Cir. 1994); Anonymous v. Anonymous, 558 F.2d 677, 679 (2d Cir. 1977); Simpson v. Simpson, 490 F.2d 803, 809 (5th Cir. 1974).

145. See Niemeyer, supra note 10, at 238-39 (recognizing that the Fourth, Sixth and Eighth Circuits have used the clear and manifest language of the statute to find no implied exception for spouses or family members).


147. See id.; see also infra note 150 and accompanying text (giving examples of courts that found no exemption for family members or spouses under the Act's language).
tapping except as specifically provided in the statute. Generally, if the bare language of a statute is unambiguous and the clear intent of Congress is expressed, the language is controlling. Therefore, there is no reason to look to the legislative history to interpret the statute.

Courts adhering to the language approach acknowledge that Congress was aware of the use of electronic surveillance in marital and familial cases. Congress recognized its use, but provided no protection for these cases through a clearly stated exception. Courts argue that this lack of exception proves Congress's intent to include domestic relations liability under the Act.

These courts also argue that the legislative history does not prove Congress intended for a domestic relations exception to exist. Rather, these courts assert that the legislative history provides even more conclusive proof of Congress's intent to include domestic relations cases under the Act. Despite knowing the amount of surveillance used in domestic relations cases, Congress remained silent regarding an exemption from

---

148. See, e.g., Heggy v. Heggy, 944 F.2d 1537, 1540 (10th Cir. 1991) (holding that a husband could not tape his wife's telephone conversations because the statute clearly prohibits the interception of communications by any person); United States v. Jones, 542 F.2d 661, 667 (6th Cir. 1976) (expressing that the language of the Act puts a blanket prohibition on all electronic surveillance, except those scenarios specifically named in the Act); State v. Shaw, 404 S.E.2d 887, 889 (N.C. Ct. App. 1991) (conceding that Title III makes no express exception exempting family members from liability for wiretapping one another).

149. See United States v. Underhill, 813 F.2d 105, 111 (6th Cir. 1987); see also Niemeyer, supra note 10, at 241 (emphasizing that the language of a statute controls when, like Title III, it is unambiguous and clearly expresses Congress's intent to include spouses and family members as liable under the Act).

150. See, e.g., Heggy, 944 F.2d at 1540 (noting no need to resort to legislative history, because the reach of the statute is clear on its face).

151. See, e.g., id. at 1540-41 (citing statements from Sen. Long and Professor Robert Blakey as evidence of congressional awareness of the use of eavesdropping in domestic cases); Jones, 542 F.2d at 669 & n.14 (emphasizing Professor Robert Blakey's testimony at a Senate hearing as clear evidence of congressional awareness of domestic wiretapping). Professor Blakey testified that "[t]he widespread use of electronic surveillance techniques in this country by private hands is an abomination. I can find no justification for their use and, thus, I welcome the attempt of the Right of Privacy Act to strike at these practices." Hearings, supra note 45, at 412 (statement of Robert G. Blakey, Professor, Notre Dame Law School).

152. See Heggy, 944 F.2d at 1540 (agreeing that the legislative history shows congressional awareness of the use of wiretapping in domestic relations cases; evidencing a choice by Congress to provide no exception for domestic relations scenarios).


154. See, e.g., Jones, 542 F.2d at 668 (stating that the legislative history of Title III leaves no doubt as to Congress's intentions to impose liability under the Act to domestic relations cases).

155. See, e.g., id.
liability.\textsuperscript{156} Title III accomplishes its goals indiscriminately by making any person liable for wiretapping, not a stated few.\textsuperscript{157}

B. The Legislative History Approach: There is More to the Act than Meets the Eye

There is another school of thought regarding Title III interpretation. Although no exception is clearly stated, some courts reasoned that Congress intended a domestic relations exception to exist.\textsuperscript{158} A number of courts followed this interpretation by holding that a domestic relations exception exists, thereby exempting spouses and family members from liability.\textsuperscript{159} These courts allow an interspousal and parent-child exception to the Act because: (1) the extension telephone and consent exceptions indicate Congress' intent to exclude domestic relations cases; and (2) Congress's intent was not to reach into the arena of domestic affairs.\textsuperscript{160}

First, courts contend that the mere existence of a consent exception and extension telephone exception proves Congress's intent to include a

\textsuperscript{156} See Heggy, 944 F.2d at 1541 ("[H]ad it been the intent of Congress to keep interspousal wiretapping beyond the reach of Title III, Congress could have expressly excluded such wiretapping when it amended certain parts of Title III in the Electronic Communications Privacy Act of 1986."). The Electronic Communications Privacy Act of 1986 was an Act amending several provisions of Title III. See What is the Electronic Communications Privacy Act ("ECPA") (visited Aug. 17, 1999) <http://www.people.virginia.edu/~klb6q/infopaper/ECPA.html>. However, neither the consent exception nor the telephone extension exception were substantially changed from their original form. See Steven P. Garmisa, Court Refuses to Bar Surreptitious Tape Recordings, CHI. DAILY L. BULL., Nov. 24, 1995, at 6 (noting that the ECPA amended nearly every section in the federal Act, but did not touch the judicially created domestic relations exemptions found in the Act, namely the extension telephone and consent exceptions).

\textsuperscript{157} See, e.g., Shaw, 404 S.E.2d at 889 (finding that Congress's use of the word "any individual" in the language of the Act includes "any family member").

\textsuperscript{158} See generally Niemeyer, supra note 10, at 237-38 (enumerating the various courts that have refused to find liability under the Act for spouses and family members who wiretap each other).

\textsuperscript{159} See, e.g., Scheib v. Grant, 22 F.3d 149, 154 (7th Cir. 1994) (noting that Congress could have set forth in greater detail the extension telephone exception, but its failure to do so is not a reason to deny looking to Congress's intent for interpretation of the statute); Campbell v. Price, 2 F. Supp.2d 1186, 1189-90 (E.D. Ark. 1998) (recognizing that the Act does include a domestic relations exception through both the consent exception and extension telephone exception).

\textsuperscript{160} See Niemeyer, supra note 10, at 238 (listing the explicit inclusion of the extension telephone exception as a reason why Congress intended to exclude domestic relations cases from liability under the Act); see also Thompson v. Dulaney, 838 F. Supp. 1535, 1543 (D. Utah 1993) (observing that Congress intended the consent exception to be interpreted broadly); In re Burrus, 136 U.S. 586, 593-94 (1890) (noting a domestic relations exception in federal diversity jurisdiction in custodial and visitation proceedings because domestic relations are a matter of state, not federal, law). This continuing limitation of federal power applies to all domestic relations scenarios. See Stephens, supra note 19, at 1050.
domestic relations exception to the Act. The courts reason that both the consent and extension telephone scenarios are more likely to happen in the context of a residential setting; therefore, these scenarios must be excluded from liability under the Act.

The holding of the Simpson court best describes the line of reasoning that courts use to find a domestic relations exception to the Act. The Simpson court concluded that the main purpose of the Act was to enhance crime control, not to influence domestic disputes. Further, the court relied on the extension telephone exception as evidence of Congress's intent to exclude from the Act's purview telephone conversations intercepted between household members. Because intercepting a call by picking up another line in the house is not a violation of the Act, the court concluded that any method of intercepting calls between family members must also be excluded from liability.

The Simpson court construed Congress to have made an exception to liability even though Congress did not clearly express such an intent in the Act. The court believed that Congress did not wish to become involved in familial relations, an issue generally limited to the states. The Simpson court, using Professor Schwartz's statement at a United States Supreme Court case, concluded that Congress's intent was to protect citizens from invasions of privacy through the use of complicated surveillance equipment.

---

161. See, e.g., Newcomb v. Ingle, 944 F.2d 1534, 1536 (10th Cir. 1991) (concluding that the existence of the extension telephone exception is evidence of Congress's intent to abjure from deciding domestic relations cases); see also e.g., Thompson, 838 F. Supp. at 1543 (finding that permitting voluntary consent through the consent exception is a legal issue to be addressed by the court).

162. See Stephens, supra note 19, at 1049 (speculating that less privacy exists in a shared residence because of another individual's presence in that dwelling). Because of the closeness of the marital and familial relationship and the lowered expectation of privacy as a result of a shared residence, domestic relations cases must be outside of the purview of the Act. See id.

163. Simpson v. Simpson, 490 F.2d 803, 806 (5th Cir. 1974) (holding that Congress's intention to not include domestic relations cases under liability for the Act is evidenced by the inclusion of the telephone extension exception and through the legislative history); see also Niemeyer, supra note 10, at 244 (providing that the Simpson case gives an extensive analysis of the legislative history of the Act that has been used to find a domestic relations exception).

164. Simpson, 490 F.2d at 806 (reviewing the legislative history and finding that the Act's major purpose is crime control). The Simpson court further noted that Title III was intended to protect citizens from invasions of privacy through the use of complicated surveillance equipment. Id.

165. See id. at 809.

166. See id. (seeing no distinction between overhearing a person's telephone conversation in the family home, which is permissible under the Act, and the ability to overhear via an installed tape recorder as presented here). Both scenarios, according to Simpson, are covered by the extension telephone exception. Id.

167. Id.

168. See id.
Senate hearing, in which he denied that the possible broad scope of liability under the Act was Congress's intent, decided that a specific exception exists for domestic relations cases.\textsuperscript{169} Other courts have followed this reasoning in finding a domestic relations exception through the Act's legislative history.\textsuperscript{170}

Further, many courts found that cases involving wiretapping between spouses or family members are purely domestic conflicts, and should be left to the states to adjudicate.\textsuperscript{171} The states historically make the judicial determinations that govern domestic conflicts.\textsuperscript{172} Courts argue that this long history makes the federal courts reluctant to meddle in familial affairs.\textsuperscript{173} For example, the \textit{Janecka} court, citing the holding of \textit{Anonymous}, found that Congress's intent in enacting the Act was not to "furnish a vehicle for the importation into federal court of matters so peculiarly within the exclusive province of state tribunals."\textsuperscript{174}

Next, courts did not want to invade areas usually left to state legisla-
States enact the statutes regarding domestic conflicts, divorce, and custody without federal intervention. Consequently, many federal courts explain that holding family members liable under the Act invades the states' domestic relations authority.

C. Vicarious Consent—Closer Resolution or Further Division?

Even though the two approaches have not agreed on the existence of a domestic relations exception, many courts agree that the vicarious consent doctrine may be warranted for cases involving intrafamilial wiretapping. Even courts that consider only the language of Title III for their interpretation have recognized vicarious consent as a necessary doctrine in some circumstances.

The telephone extension exception appears to apply only to commercial activities, but some courts have found no reason why Congress would exempt a business extension and not an extension in the home. It is likely that businesses expect a certain amount of their calls to be moni-

175. See, e.g., Anonymous, 558 F.2d at 679 (emphasizing that custody disputes are a matter under the purview of the state courts); Simpson v. Simpson, 490 F.2d 803, 805 (5th Cir. 1974) (stating that issues regarding tapping within the marital home involve an area generally left to the states).

176. See Stephens, supra note 19, at 1051. In Pennoyer v. Neff, 95 U.S. 714, 734-35 (1877), overruled on other grounds by Shaffer v. Heitner, 433 U.S. 186 (1977), the Supreme Court proclaimed that "[t]he State . . . has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved." For example, the Supreme Court upheld state residency restrictions regulating how couples may obtain a divorce. See Stephens, supra note 19, at 1051 n.121 (citing the holding of Sosna v. Iowa, 419 U.S. 393, 409 (1975)).

177. See, e.g., Anonymous, 558 F.2d at 679 (indicating that the facts presented were a purely domestic conflict, which are best handled by the state courts); Simpson, 490 F.2d at 805 (acknowledging that the states normally handle issues arising in the marital home or domestic conflicts); Janecka, 684 F. Supp. at 26 (agreeing with the Anonymous court in leaving matters such as domestic wiretapping under the jurisdiction of the states).


179. See, e.g., Pollock, 154 F.3d at 612 (adopting the vicarious consent doctrine but failing to use it under the facts of the case because of questions arising as to the motives of the mother); Williams v. Williams, 581 N.W.2d 777, 780-81 (Mich. Ct. App. 1998) (admitting that there are situations in which vicarious consent should be used but denying its adoption within the state because of the potential negative results in practice).

180. See, e.g., Newcomb v. Ingle, 944 F.2d 1534, 1536 (10th Cir. 1991) (concluding that it would be illogical for Congress to include an exemption for business extensions but not one in the home); see also, e.g., Simpson v. Simpson, 490 F.2d 803, 809 (5th Cir. 1974) ("[i]t is clear that Congress did not intend to prohibit a person from intercepting a family member's telephone conversations by use of an extension phone in the family home . . . [the extension phone exception] directly covers this point.").
tored because of the volume of calls they place to other businesses.\textsuperscript{181} Is the same true for the home? Generally, interceptions that happen in the home by picking up a line that another person is on are accidental, not intentional.\textsuperscript{182} Title III does not punish those interceptions.\textsuperscript{183} However, installing a recording device on a phone to tape another is intentional and results in liability under Title III.\textsuperscript{184} This distinction could explain why the courts began deciding cases of parent-child wiretapping on vicarious consent grounds.\textsuperscript{185}

The Williams court, which denied the use of vicarious consent in all situations, recognized the value of having the vicarious consent doctrine.\textsuperscript{186} Even in light of this value, the court held that allowing vicarious consent in some situations would be more detrimental than banning it altogether.\textsuperscript{187} The court reasoned that vicarious consent generated widespread implications because all parents would be afforded the statute's protection, even those with less than worthy motives.\textsuperscript{188} The Williams court, in recognizing that vicarious consent permits a parent to take any action necessary to provide for a child's best interest, considered this all-inclusive power dangerous because it made the scope of parental power unlimited.\textsuperscript{189} Thus, vicarious consent was a valuable doctrine, but not one

\textsuperscript{181} See Anderman, supra note 6, at 2275 (detailing situations where business calls could be recorded such as 911 emergency services and quality control in telemarketing services).

\textsuperscript{182} See id. at 2276 (noting that interceptions within the home are arguably unpunishable because they do not fulfill the requirement for liability under Title III that interceptions be intentional).

\textsuperscript{183} See supra notes 30 and 31 and accompanying text (describing the ordinary course of business exemption under the extension telephone exception); Anderman, supra note 6, at 2276. Intrusions of privacy such as the casual and unintentional overhearing of a conversation of a family member are expected and should not be punished under Title III. See id. Originally, the statute required only willfulness to intercept, but it was amended, and now requires intentional interceptions in order to be liable under the Act. See Newcomb, 944 F.2d at 1535 n.2.

\textsuperscript{184} See Heggy v. Heggy, 944 F.2d 1537, 1542 (10th Cir. 1991) ("An act is done intentionally or wilfully if it is done knowingly and voluntarily as distinguished from accidentally; or is done with a bad purpose; or without justifiable excuse.").

\textsuperscript{185} See, e.g., Campbell v. Price, 2 F. Supp. 2d 1186, 1191-92 (E.D. Ark. 1998) (exempting the parent from liability under the Act by way of both the extension telephone exception and consent exception). The court accepted vicarious consent as sufficient reason for exemption because it was subject to an objective test, which is the good faith standard. See id. Although the court found an exemption under both exceptions, it concluded that a parent acting in good faith for the best interests of a child was a compelling factor to allow freedom from liability under the Act. See id.


\textsuperscript{187} See id.

\textsuperscript{188} See id. at 781.

\textsuperscript{189} Id.
the Williams court was prepared to use in cases involving Title III.\textsuperscript{190}

Not all courts agree with Williams.\textsuperscript{191} Even though some courts have chosen not to adopt vicarious consent because of the particular circumstances of their cases, they nonetheless find the doctrine to be sound and appropriate under the right circumstances.\textsuperscript{192} For example, the Pollock court conceived of situations, such as verbal, mental, or physical abuse by the other parent, which makes the doctrine necessary to protect the welfare of the child.\textsuperscript{193} The Pollock court further stated that this necessity is heightened for children who are very young, most likely because they have no means of protecting themselves.\textsuperscript{194}

The Pollock court, therefore, adopted the vicarious consent doctrine, allowing vicarious consent in situations where the parent has a good faith, objectively reasonable basis to believe it is necessary and in the best interest of the child to consent to the taping of the phone conversations with the other parent.\textsuperscript{195} In Pollock, a case that involved the taping of a fourteen-year-old girl's conversations with her father, the court declined to limit the application of the doctrine to a certain age because each child develops differently.\textsuperscript{196} Likely, the court hesitated in making a definitive age for children to consent to taping because it was not willing to apply vicarious consent under these circumstances; therefore, a determination of a consent age was not needed.\textsuperscript{197}

Courts that agree on a domestic relations exception to Title III embrace the vicarious consent doctrine.\textsuperscript{198} They hold that the doctrine is necessary to provide for the welfare of the child, which is a parent's re-
responsibility. Many courts have begun using the vicarious consent doctrine more frequently in recent years. The increasing use of the doctrine may be explained by the inability of most people, including opponents to a domestic relations exception, to deny the value of having a vicarious consent doctrine. Therefore, although opponents argue that the extension telephone exception is a weak basis for allowing wiretapping between family members, vicariously consenting to the taping when it is in the best interests of the child provides a solid foundation.

D. Legislating the Family: There is More to the Story than Just Language and Legislative History

In addition to using legislative history or the language of the statute, courts often consider various discreet issues. Congress did not intend for this Act to be an avenue by which children could put their parents in jail. Congress entrusts parents with a right to decide on their children's behalf in many situations, so consenting to wiretapping of a telephone conversation seems a natural extension of those parental rights.

However, there is a need to restrict the scope of this power. Other-
wise, parents with less than pure motives may be allowed to wiretap with governmental sanction.\footnote{206}

Further, as technology increases, it will be both easier and less expensive for parents to wiretap their children's telephone conversations.\footnote{207} Considering the rights of parents under current law and technological advancements, there may be no limit as to how far a parent is allowed to go in the protection of his or her child.\footnote{208} If broad interpretations of Title III's exceptions continue, some courts may find that videotaping a child, reading a child's e-mail, and installing locator devices on a child's car are also acceptable.\footnote{209}

III. THE FUTURE OF TITLE III—HOW VICARIOUS CONSENT CAN FIND A WAY

It is obvious that courts are confused as to Congress's intent for Title III.\footnote{210} The legislative history of the Act reveals Congress's awareness of issues of spousal wiretapping falling into the Title III domain.\footnote{211} Thus, it appears equally obvious that Congress' silence on the matter, even with

\footnote{n.8. Rather, the doctrine is allowed under this restricted scope to ensure that a parent will fulfill his or her statutory duty to act in the best interests of the child. \textit{See id.} at 1544.}

\footnote{206. \textit{See, e.g.}, Williams v. Williams, 581 N.W.2d 777, 781 (Mich. Ct. App. 1998) (recognizing vicarious consent's many implications, including scenarios where parents with less than worthy motives could wiretap their children's conversations).
}

\footnote{207. \textit{See Wiretapping and Eavesdropping: Is There a Cause for Concern} (visited Sept. 14, 2000) <http://www.vortex.com/privacy/prc.wire-9.z> (recognizing that technology improvements have made wiretapping another person's phone conversations much easier); \textit{see, e.g.}, Jacqueline L. Salmon, \textit{Children Under Surveillance; When Parents' Trust Wears Out, Some Resort To Spying on Their Teens}, \textit{WASH. POST}, Feb. 28, 1999, at A1 (giving examples of easier ways for parents to spy on their children). Currently, a kit sold online for $60 can detect the presence of drugs by testing a single lock of hair. \textit{See id.} Home urinalysis kits and computerized devices to track a car are also available to aid parents' efforts to spy on their children. \textit{See id.}
}

\footnote{208. \textit{See, e.g.}, supra note 209 and accompanying text (discussing the lengths parents will go to spy on their children using current technology).
}

\footnote{209. \textit{See, e.g.}, Ross Werland, \textit{The Spies Who Love Me; Do Parents Cross the Line When They Invade Their Teen's Privacy?}, \textit{CHI. TRIB.}, Mar. 28, 1999, at 13-1 (noting that wiretapping is illegal under federal and state statutes, but video monitoring "falls within a parent's rights," and describing recent technology that attaches on a car so that the car's location and how fast it is going can be known). Parents have used these devices to monitor their teen's activities. \textit{See id.; see also} Salmon, \textit{supra} note 207, at A1 (describing a mother who, while reading her 14-year-old daughter's e-mail, discovered the daughter used marijuana).
}

\footnote{210. \textit{See, e.g.}, \textit{supra} note 13 and accompanying text (giving examples of the inconsistent interpretations of Title III in the context of interspousal wiretapping); \textit{see also infra} notes 214-15 and accompanying text.
}

\footnote{211. \textit{See supra} note 98 and accompanying text (recognizing that marital litigation is a large category in which wiretapping is used).}
this awareness, indicates that Congress intended liability under the Act for at least some domestic cases.\footnote{212}

A. Merits of a Legislative Answer

As such, it is unclear whether parent-child wiretapping was intended specifically to fall under the purview of the Act.\footnote{213} Confusion arises from the myriad of federal and state court interpretations of Title III.\footnote{214} Not only have the courts contradicted each other, but in the case of the Tenth Circuit, courts have even been reluctant to follow precedent they set themselves.\footnote{215} Courts are fumbling the question of liability and the legislature should intervene.\footnote{216} There is no uniform precedent binding the circuits because the United States Supreme Court has not granted certiorari on any case that involves parent-child wiretapping.\footnote{217} As a result, it only seems reasonable for Congress to step in and clarify the ambiguity in the Act.\footnote{218}

Accordingly, if Congress amends Title III, the confusion between the courts may end. The \textit{Williams} court claimed that a legislative, rather than judicial, answer is needed.\footnote{219} The court contended that because the

\footnote{212. \textit{See} Anderman, \textit{supra} note 6, at 2271 (claiming that the language and legislative history of Title III shows that it was enacted first and foremost to ban all private wiretappings, and allow for exceptions after).}

\footnote{213. \textit{See id.} at 2273 (noting that courts are left with the extension telephone exception and consent exception to keep parent-child wiretapping out of the Act's purview).}

\footnote{214. \textit{See, e.g.}, Newcomb \textit{v.} Ingle, 944 F.2d 1534, 1535 n.3 (10th Cir. 1991) (highlighting the circuit split on the issue of the existence of a domestic relations exception to Title III).}

\footnote{215. \textit{Compare} Heggy \textit{v.} Heggy, 944 F.2d 1537, 1541 (10th Cir. 1991) (claiming that there is no judicially created exception for interspousal wiretapping as other courts would suggest), \textit{with} Newcomb, 944 F.2d at 1536 (finding an exemption of parents from liability for wiretapping their children through the extension telephone exception). \textit{Newcomb} was decided about one month before \textit{Heggy}. \textit{Heggy}, 944 F.2d at 1537 (noting date of decision as Oct. 2, 1991); \textit{Newcomb}, 944 F.2d at 1534 (noting date of decision as Aug. 28, 1991). The \textit{Heggy} court declined to extend the same type of freedom from liability as it had given in \textit{Newcomb}. \textit{Heggy}, 944 F.2d at 1538 n.1.}

\footnote{216. \textit{See, e.g.,} Williams \textit{v.} Williams, 581 N.W.2d 777, 781 (Mich. Ct. App. 1998) (recommending a legislative answer over a judicial one, to cure the confusion surrounding Title III).}

\footnote{217. \textit{Cf.} Hohn \textit{v.} United States, 118 S. Ct. 1969, 1978 (1998) (holding that Supreme Court decisions are binding precedent until either the Supreme Court sees fit to revisit the same question, regardless of whether future cases raise doubt as to the precedent's validity).}

\footnote{218. \textit{See, e.g.,} Stephens, \textit{supra} note 19, at 1052 (claiming that only a positive expression of congressional intent overcomes the inconclusive legislative history applying Title III to interspousal wiretapping cases).}

\footnote{219. \textit{Williams}, 581 N.W.2d at 781 (acknowledging the resources Congress has, in contrast to the judiciary, to make changes to the Act in order to serve the competing interests at stake).}
legislature is able to hold hearings and sort through the competing interests and policy issues at stake, it is better-suited to address the problem.\textsuperscript{220} A legislative answer allows for consistency among the courts.\textsuperscript{221} Lawsuits may not end, but the inconsistency between rulings likely would end.\textsuperscript{222}

**B. Mechanics of Proposed Legislation**

In order to draft a legislative answer, certain lines must be drawn to balance children's privacy rights against a parent's right to protect them.\textsuperscript{223} A legislative response should include a vicarious consent exception in which a parent can vicariously consent on behalf of his or her child until the child reaches the consent age.

**1. Finding a Consent Age**

Thus far, there is no consent age established for children that limits a parent's right to consent to the taping of their telephone conversations. Parents, in the eyes of the law, make many decisions for their children.\textsuperscript{224} For example, minors needing medical treatment or seeking marriage need the permission of their parents.\textsuperscript{225} Generally, a parent may consent

\textsuperscript{220} See id.

\textsuperscript{221} See, e.g., Niemeyer, supra note 10, at 255 (noting that courts are looking for a congressional answer to the domestic wiretapping dispute under the Act).

\textsuperscript{222} Cf. ROBERT L. JORDAN & WILLIAM D. WARREN, COMMERCIAL LAW 63 (4th ed. 1997) (noting that the revision of Article 9 (more specifically §9-503(a)) of the Uniform Commercial Code resolved the circuit split, discussed in Pearson v. Salina Coffee House, Inc., 831 F.2d 1531 (10th Cir. 1987), over use of a trade name). The revisions decided whether a trade name was sufficient for purposes of filing financial statements to perfect a security interest. See id. An amendment to Title III would also resolve the circuit split, which is similar to the revision of Article 9.

\textsuperscript{223} See supra note 37 and accompanying text (discussing the privacy rights of both a child and adult, and how they often compete against one another); see also infra note 247 and accompanying text (comparing these competing interests).

\textsuperscript{224} See Bellotti v. Baird, 443 U.S. 622, 637 (1979) (recognizing that states protect their youth from adverse governmental action and from their lack of maturity by requiring parental consent to important decisions by minors); see also Leben, supra note 3, at 28; see, e.g., supra note 204 and accompanying text (giving examples of decisions, such as marriage of a minor child and waiver of counsel in a juvenile proceeding, that parents make on their child's behalf).

\textsuperscript{225} See, e.g., MASS. GEN. LAWS ANN. ch. 207, § 7 (West 1994) (requiring parental consent for marriage of persons under eighteen); MASS. GEN. LAWS ANN. ch. 112 § 12S (West 1994) (requiring parental consent for girls under the age of eighteen to receive an abortion); see also, e.g., Bellotti, 443 U.S. at 643 (striking down a Massachusetts statute requiring parental consent in all cases where a minor wanted to have an abortion). The court, however, replaced this requirement with one in which a minor may seek an abortion if: (1) she has parental consent; or (2) a court deems the abortion in her best interests or that she is mature enough to make the decision independently. See id. at 643-44. Minor is defined as "[a]n infant or person who is under the age of legal competence.... In most
on behalf of his or her child in the above-named situations until the child is eighteen years old, the age at which a child is considered a legal adult. To promulgate a vicarious consent exception, Congress first needs to explore a consent age to properly assess when a child can consent legally to the wiretapping.

Congress should establish age eighteen as the consent age because it is the only plausible age that can be set. Reasonably, eighteen is the best age because this is the age at which the law recognizes that children are legally capable of making their own decisions as adults. If Congress makes a consent age lower than eighteen, it will likely bring a storm of controversy and lawsuits because lower ages are inconsistent with many other laws making the consent age for various activities that of eighteen. Consistency in the age of consent will reduce ambiguity and lessen the need to evaluate subjectively individual children's ability to consent.

states, a person is no longer a minor after reaching the age of 18 (though state laws may still prohibit certain acts until reaching a greater age; e.g. purchase of liquor). BLACK'S LAW DICTIONARY 997 (6th ed. 1990).

226. See Beschle, supra note 36, at 90 (realizing that curfews and minimum drinking ages are examples of situations where minors are deemed incapable of making their own decisions). As opposed to a minor, an adult is one who attained the legal age of majority, generally 18 years. BLACK'S LAW DICTIONARY 51 (6th ed. 1990); see also Stanford v. Kentucky, 492 U.S. 361, 374 (1989) (arguing that the laws that set age 18 as the legal age for activities, such as driving, drinking, and voting, may not represent the age where all persons are mature enough to handle those responsibilities).

227. See Pollock v. Pollock, 154 F.3d 601, 610 (6th Cir. 1998) (denying to set a consent age for application of vicarious consent because each child develops differently); see, e.g., Stanford, 492 U.S. at 370. As of the ruling in this 1989 case, 37 states permitted capital punishment. See id. Out of those 37 states, 15 declined to impose capital punishment on sixteen-year old offenders, and 12 states declined to impose it on seventeen-year old offenders. See id. Such numbers indicate that states cannot agree on an age lower than 18 to allow capital punishment. Therefore, because a number of people disagree on proper consent ages, as state legislatures do with capital punishment, Congress is unlikely to agree on a consent age for Title III lower than 18.

228. See, e.g., Stanford, 492 U.S. at 374 (noting the laws, which create the age of participation as 18, do not determine maturity, but rather make determinations for the mass of people these laws protect). The court stated that "[t]hese laws set the appropriate ages for the operation of a system that makes its determinations in gross, and does not conduct individualized maturity tests for each driver, drinker, or voter." Id.

229. Cf. id. at 370-71 (recognizing that many states differ in opinions on whether a child less than 18 can be subjected to capital punishment); see also supra note 227 and accompanying text (explaining that disagreement will happen if the consent age is lower than 18, just as there is disagreement between states involving a capital punishment age lower than 18).

230. See Anderman, supra note 6, at 2290 (defining adult as one who by law has the authority to decide what is best for oneself without having to consult anybody, including his or her parents).
2. Language of a Vicarious Consent Exception

The vicarious consent doctrine is a recent line of reasoning that many courts use.\(^{231}\) Many courts in the past have used the extension telephone exception to justify parent-child wiretapping under the Act, but it appears to be an arguable line of reasoning at best.\(^{232}\) The extension telephone exception exempts from liability intercepted communications used in the ordinary course of business.\(^{233}\) Assuming arguendo that the extension telephone exception does apply to the home, there are questions as to whether wiretapping is expected in the ordinary course of business in the home.\(^{234}\) This is further evidence that unambiguous language is needed to clarify the intent of Congress in the statute.

C. Application of the Vicarious Consent Exception

There is no doubt that the vicarious consent doctrine has virtuous motives.\(^{235}\) Few people can deny that a child has a right to be protected from abuse, and that the best person to provide that protection is usually a parent.\(^{236}\) The absence of a vicarious consent doctrine could endanger children whose needs for protection would go unmet without it.\(^{237}\) A parent may never be able to learn the truth about the other parent’s rela-


\(^{232}\) See Stephens, supra note 19, at 1047 (recognizing the split in the courts over interpretation of the extension telephone exception). Some courts permit this exception to invade the private home to exempt liability, while others do not. See id. at 1047-48. The legislative history raises only questionable support for applying Title III to interspousal wiretapping, which makes the possible outcomes for a court decision uncertain. See id. at 1049-50.

\(^{233}\) See 18 U.S.C. § 2510(5)(a) (1994); Leben, supra note 3, at 26 (recognizing that the Act exempts liability for those telephone interceptions that occur to a telephone company subscriber when used in the ordinary course of business).

\(^{234}\) See Anderman, supra note 6, at 2275 (assuming that the extension telephone exception applies to home telephones; noting, however, that the ordinary course of business for a commercial business is different than the ordinary course of business in a home).

\(^{235}\) See, e.g., Thompson v. Dulaney, 838 F. Supp. 1535, 1544 (C.D. Utah 1993) (recognizing situations such as mental, physical or emotional abuse in which it is necessary for parents to consent on behalf of their children).

\(^{236}\) See Anderman, supra note 6, at 2290-91 (presuming that a parent has, by law, the ability to determine what is best for the child); see also supra note 37 and accompanying text (describing the competing rights at stake for both children and adults in these situations).

\(^{237}\) See, e.g., Pollock v. Pollock, 154 F.3d 601, 610 (6th Cir. 1998) (stressing the importance of vicarious consent to protect the child’s welfare, especially young children, in cases of abuse).
tionship with the child unless a vicarious consent exception exists. There may be no other available means to receiving the same type of information about the other parent than by tapping his or her phone conversations with the child. Leaving the parent in this hopeless position could allow for both psychological and physical damage to the child, as one parent cannot find out the true nature of the other parent's relationship with the child.

This does not mean, however, that Congress should allow parents the unfettered power to take whatever actions may be necessary to find out about the relationship between the child and the other parent. There needs to be some standard to protect a child's right of privacy, as well as a parent's right to protect his or her child. This standard needs to be established especially in the context of vicarious consent cases.

Generally, divorce produces harsh feelings between the parties. This may prompt one parent to wiretap the other parent's conversations with the child in order to appear better-suited to handle custody of the child in the eyes of the court. An objective good faith basis is necessary to keep a parent's motives for wiretapping limited to the best interests of the child.

For example, the Pollock court seemed to take into consideration the
privacy rights of all parties involved when it invoked a good faith, objectively reasonable requirement to limit when a parent may tape another parent's telephone conversations with his or her child. This good faith, objectively reasonable test should be incorporated into the Act; however, the legislature needs to qualify the test further in order to properly ensure that the rights of all concerned parties are protected.

A test that allows for wiretapping by a parent when the parent has a good faith, objectively reasonable belief that the child is being physically, mentally, or sexually abused by the other parent may be the answer. This qualifies the statute to specific circumstances in which a parent may wiretap, while also respecting the rights of the other parties. Included in this test should be a requirement that the parent who is wiretapping produce evidence that the child displayed signs of abuse caused by the other parent prior to the wiretapping. This requirement would further prove a good faith, objectively reasonable motive by the parent in wiretapping the conversations, and ensure that parents are wiretapping for a worthy reason specifically related to the child. Although this solution

246. See id. (conceiving of situations such as mental, physical, or sexual abuse by the other parent that make vicarious consent necessary for the welfare of the child).
248. See, e.g., Campbell v. Price, 2 F. Supp. 2d 1186, 1191 (E.D. Ark. 1998). The facts of Campbell indicate that the father witnessed several instances in which the child would cry, become upset, and mope around after talking on the phone with her mother. Id. at 1187. This evidence was sufficient for the court to find a good faith, objectively reasonable belief by the father to wiretap the child's telephone conversations. See id. at 1191.
249. But see Thompson, 838 F. Supp. at 1544 & n.8 (stressing the court's unwillingness to use vicarious consent in all circumstances). However, the court noted that the mother needs to meet the good faith, objectively reasonable test of vicarious consent, before they would exempt her from liability. See id. at 1544. Even though there were two minor children involved and the father was undermining the guardian/mother, making it permissible to use the doctrine, she was found not exempt on other grounds. See id. at 1544 & n.8.
250. See, e.g., Silas v. Silas, 680 So. 2d 368, 371 (Ala. Civ. App. 1996) (using the reasoning in Thompson and R.J.D. v. Vaughan Clinic, P.C., 572 So. 2d 1225, 1227 (Ala. 1990), to exempt a parent from liability through the vicarious consent defense). The Silas court found the facts similar to that in Thompson, so as to allow the vicarious consent defense. Silas, 680 So. 2d at 371. As in Vaughan Clinic, Silas agreed that a parent decides what is necessary for the welfare of a child. Id. Therefore, the good faith, objectively reasonable
would result in more Congressional intervention in the private lives of citizens, intervention to prevent abuse of children by their parents, however, is necessary. 251

With regard to the interspousal exception under the Act, the language of Title III clearly covers interspousal wiretapping. 252 Although courts have twisted the words of the legislative history to find an interspousal exception, the language of Title III does not specifically permit one. 253 In order to cure the confusion over interspousal wiretapping, Congress must go no further but to state that the language of Title III stands.

As has been noted, parent-child wiretapping is much different. 254 It requires a much more complicated solution because the parties involved are minors. 255 The law affords minors special protection because they are not capable of protecting themselves. 256 If Congress implemented a vicarious consent exception and a good faith, objectively reasonable test, it would ensure the adequate protection of children under the law, and prevent the arbitrary violation of parent’s privacy rights.

VI. CONCLUSION

There is no specific domestic relations exception under the Act that exempts interspousal wiretapping and parent-child wiretapping. However, some courts find a domestic relations exception to exist by using the legislative history of the Act. Conversely, other courts follow the explicit language of the Act to find no domestic relations exception to exist.

The division between courts on domestic relations cases of wiretapping is extensive. This division may never be reconciled unless Congress steps in to clarify. Congress needs to intervene in order for courts to make consistent rulings. Acceptance of a vicarious consent exception and a

\[\text{See id.}\]

251. See e.g., Pollock, 154 F.3d at 610 (refusing to use vicarious consent under the present circumstances, but realizing that situations such as emotional, verbal, or sexual abuse is where the doctrine of vicarious consent would be necessary).

252. But see Stephens, supra note 19, at 1052 (claiming that Title III would apply to interspousal wiretapping if the presumption that federal law does not apply to domestic relations cases could be overcome).


254. See supra notes 22-23 and accompanying text (noting the delicate nature of the parent-child relationship as a reason why the analysis for parental liability under Title III is different from other forms such as interspousal liability).

255. See Anderman, supra note 6, at 2308 (admitting that special protection is required because the parties involved in Title III cases are sometimes children who lack legal capacity).

256. See Gottsfield, supra note 7, at 33 (showing that vicarious consent is grounded in the principle of protection for the child who lacks legal capacity to consent).
good faith, objectively reasonable standard would protect a child’s best interests. This test, however, should be limited. Congress should exempt a parent from liability under the Act only when the parent has a good faith, objectively reasonable belief that the child is being mentally, physically, or sexually abused by the other parent. Furthermore, the parent should be required to produce evidence that the child displayed signs of abuse before the parent began wiretapping.

By adopting this test, the confusion between decisions in the circuit and state courts would lessen. The test limits the scope in which a parent may vicariously consent, but still protects the best interests of the child while upholding the protection rights of parents. This solution provides a win-win situation for all so that children are afforded the privacy they deserve and parents maintain their right to protect their child.