

Down the Rabbit's Hole: Baby Monitors, Family Movies and Wiretap Law

by
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Your client is in the middle of a heated divorce, and a primary issue is the custody of his nine-year-old daughter and seven-year-old son. Historically well-adjusted, in recent months the daughter has shown dismaying behavioral changes. Her grades have fallen precipitously and she has been disrupting the classroom. She has been acting out at home as well, including frequent violent and prolonged tantrums without obvious explanation. Your client has eavesdropped on the children over a baby monitor for insight into his daughter's behavior, and, alarmed by comments he believes suggest sexual abuse of his daughter by the child's mother's new fiancé, has surreptitiously videotaped interactions of the children. He would like to provide the recordings to a psychologist, and has asked you to try to introduce the recordings into evidence at trial.

How do you advise your client?

Under the Supremacy Clause of the U.S. Constitution, states are precluded from adopting eavesdropping statutes that are less restrictive in allowing interceptions of communications than the federal wiretap statute; thus state wiretap statutes may be broader and more restrictive than the federal statute and less restrictive in no respect.¹ Under the federal wiretap law, Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("the Act"),² there is no violation where the interception is by a party to the communication or one party consents to it.³ While most state wiretapping laws generally track the federal Act, con-

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¹ See *Commonwealth v. Birdseye*, 670 A.2d 1124, 1126 (Pa. 1996), *cert denied*, 518 U.S. 1019 (1996).

² 18 U.S.C. §§ 2510-13, 2515-22 (2006).

³ *Id.* §2511(2)(c)-(d).

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sent standards vary.⁴ The first question is whether your client has violated the federal Act and the possible consequences thereof. Because state statutes may be more but not less restrictive, whether a state wiretap law has been violated may be a different, and vastly more difficult, question.

What follows is a technical review and critique of the wiretap laws as taken to the limits of their potential in the context of parental monitoring.⁵ While the law was never intended for the purpose of punishing parents for monitoring their children, history is full of examples of zealous prosecution under laws written for another purpose but nevertheless applicable by their technical language to the matter at hand. Consider, for example, prosecution for child pornography of children sending suggestive photographs of themselves to other children,⁶ prosecution under

⁴ Thirty-eight states and the District of Columbia follow the federal Act in requiring consent of only one participant in a communication to exempt interception thereof. Twelve states require consent of all participants, and the rest lack relevant laws, have conflicting laws, or have laws that vary in standards for different types of communications. *See* Washington. Reporters' Comm. for Freedom of the Press, "Can We Tape?": A Practical Guide to Taping Phone Calls and In-Person Conversations in the 50 States and D.C. (2008), available at <http://www.rcfp.org/taping/> (last visited April 8, 2010).

⁵ Courts have expressly found that the Act applies to domestic relations cases. *See, e.g.,* *Glazner v. Glazner*, 347 F.3d 1212, 1216 (11th Cir. 2003). This article does not attempt to survey state and federal courts for individual examples of criminal or civil cases at the extremes of application of the law as described herein. Numerous commentators have explored the practical application of the Act by courts. *See, e.g.,* Daniel R. Dinger, *Should Parents Be Allowed to Record a Child's Telephone Conversations When They Believe the Child Is in Danger?: An Examination of the Federal Wiretap Statute and the Doctrine of Vicarious Consent in the Context of a Criminal Prosecution*, 28 SEATTLE U. L. REV. 955 (2005); Shana K. Rahavy, *The Federal Wiretap Act: The Permissible Scope of Eavesdropping in the Family Home*, 2 J. HIGH TECH. L. 87 (2003); *Parental Wiretapping: Should Federal Courts Provide a Civil Remedy in a Family Law Matter?*, 48 U. KAN. L. REV. 397 (2000); Richard C. Turkington, *Protection for Invasions of Conversational and Communication Privacy by Electronic Surveillance in Family, Marriage, and Domestic Disputes Under Federal and State Wiretap and Store Communications Acts and the Common Law Privacy Intrusion Tort*, 82 NEB. L. REV. 693, 707-13 (2004).

⁶ *See, e.g.,* *Miller v. Skumanick*, 605 F. Supp. 2d 634, 637 (M.D. Pa. 2009) *aff'd sub nom.* *Miller v. Mitchell*, 598 F.3d 139 (3d Cir. 2010) (granting temporary injunction against district attorney from prosecuting a minor on charges of child pornography for "sexting").

RICO⁷ laws of political protesters,⁸ and application of statutory rape laws to punish teenagers for sexual activity with partners of similar age.⁹ Judicious prosecutorial discretion cannot be relied upon to insulate your client from criminal prosecution.¹⁰ Among other things, prosecutors may be motivated by political concerns, personal bias, or limited competence.¹¹ Therefore, advice to your client about the range of possible consequences of his interception must begin with an assessment whether the law has been technically violated.

I. Reading the Law

Under the law of statutory construction, resort may be made to legislative history for illumination of a statute's intent only where the words of the statute are unclear.¹² Accordingly, the first step to understanding the consequences of your client's actions are a close reading of the plain language of the Act.

Under the relevant provisions of the Federal Wiretap Act, a person is guilty of a violation who:

- (a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;
- (b) intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when— . . .
 - (ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

⁷ See The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961, was enacted to fight organized crime.

⁸ See Daniel B. Kelly, *Defining Extortion: RICO, Hobbs, and Statutory Interpretation in Scheidler v. National Organization for Women, Inc.*, 123 S. Ct. 1057 (2003), 26 HARV. J.L. & PUB. POL'Y 953 (2003).

⁹ See, e.g., *Humphrey v. Wilson*, 652 S.E.2d 501, 502 (Ga. 2007) (overturning ten year sentence of seventeen-year-old convicted of having oral sex with fifteen-year-old).

¹⁰ See *U.S. v. Stevens*, — S.Ct. — (U.S.,2010); No. 08-769, 2010 WL 1540082, at *13 (declining to overlook overbreadth of statute on assurances of government "to use it responsibly").

¹¹ See, e.g., Robert P. Mosteller, *The Duke Lacrosse Case, Innocence, and False Identifications: A Fundamental Failure to "Do Justice,"* 76 FORDHAM L. REV. 1337 (2007).

¹² See, e.g., *United States v. Gonzales*, 520 U.S. 1, 6 (1997), (citing *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992)).

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(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; . . .

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; [or]

(d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection . . .¹³

“Oral communication” is defined by the Act as “any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation.”¹⁴ “Intercept” is “the acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device,” and “contents” means “*any* information concerning the substance, purport, or meaning of that communication.”¹⁵ Acquisition can be aural, meaning that it need not be recorded to violate the Act; thus, eavesdropping via any device, such as a telephone extension, would fall within the Act.¹⁶

II. Potential Criminal Liability Under the Federal Act

A violation of the Act can result in up to five years imprisonment or a fine, or both,¹⁷ and any device used in an improper wiretap is subject to forfeit.¹⁸ Numerous exceptions are enumerated in the Act, pertaining primarily to law enforcement, telemarketing and telecommunication companies. None are relevant here except the following:

It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one

¹³ 18 U.S.C.A. § 2511(1).

¹⁴ *Id.* § 2510 (2).

¹⁵ *Id.* § 2510 (4) & (8) (emphasis added).

¹⁶ *Id.* § 2510 (18).

¹⁷ *Id.* § 2511(4).

¹⁸ *Id.* § 2513.

of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.¹⁹

No exception is set forth for interceptions by parents of communications by children, and “consent” is not defined by the Act.

Accordingly, by the plain language of the Act, any person, including a parent, using a device to eavesdrop on a child, and any audio, video, or other recordation by device of an oral communication of a child is federal crime if the child had a reasonable expectation that the communication would not be intercepted and did not provide prior consent, assuming that the device transmits by radio, such as a baby monitor, wireless intercom or cordless telephone, or has been transported in interstate or foreign commerce, like virtually any commercially available electronic device. Intentionally sharing, disclosing the contents of, or using or attempting to use the contents of a communication known to be intercepted in violation of the Act is also a federal crime, and the language (“or”) indicates that these offenses are disjunctive, indicating that each violation is a separate offense and is independent of violation of other provisions.²⁰ There has been no articulation by courts of the attractive proposition that a minor child cannot, at law, have a reasonable expectation that his communications would not be subject to interception by a parent.

This means that the client could be criminally liable with a maximum penalty of five years imprisonment and a fine for each act of interception, each act of disclosure, and each attempt to “use” the intercepted communication, plus forfeiture of any equipment used to intercept, including the baby monitor and video camera, or to disclose the contents of the intercepted communication, such as a computer for conversion to DVD and a DVD player and television for playback. The Act does not contain a limiting definition of “use”; thus providing the recordings to a psychologist or an attorney for *their* use could violate the

¹⁹ *Id.* § 2511(2)(d).

²⁰ *Id.* § 2511(1). See *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) (noting that terms connected by disjunctive are ordinarily given separate meanings).

statute.²¹ Taken to the extreme, your client could be held criminally liable for a separate count for each interception including both eavesdropping and recording, each instance of conveying any information to anybody about what he observed thereby, and each instance of trying to use this information in litigation, for diagnosis and treatment of the child, or for any other purpose. Each one of these instances carries a maximum penalty of five years, so, were penalties imposed consecutively, your client could potentially spend the rest of his life in federal prison for his use of a baby monitor or video recorder to observe his own children. This, of course, is an extreme, bizarre, and unlikely scenario. It does not, however, make the technical violation of the statute less troubling, nor does it illuminate how to advise your client.

III. Potential Civil Liability Under the Federal Act

The client's jeopardy is compounded by the civil liability set out by the Act which provides, in relevant part, that "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, other than the United States, which engaged in that violation such relief as may be appropriate."²²

Authorized relief includes "such preliminary and other equitable or declaratory relief as may be appropriate[,] . . . a reasonable attorney's fee and other litigation costs reasonably incurred[,] punitive damages in appropriate cases[,] and the greater of either "the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or statutory damages of whichever is the greater of \$100 a day for each day of violation or \$10,000."²³

²¹ Note that while attorney-client privilege may provide an obstacle to prosecution for this disclosure, this evidentiary rule is irrelevant to whether or not the statute has been technically violated inasmuch as there is no exception for disclosure to legal or medical professionals set out among the enumerated exceptions.

²² *Id.* § 2520(a).

²³ *Id.* § 2520(b)-(c).

To establish a civil claim under the Federal Wiretapping Act, a plaintiff must prove that “(1) his [communications were] intercepted, (2) he had an expectation that his communications were not subject to interception, and (3) that his expectations were justified under the circumstances.”²⁴ To recover punitive damages, a plaintiff “must show that defendants acted wantonly, recklessly, or maliciously.”²⁵

Here, the only potential plaintiffs are your client’s nine and seven-year-old children. That means that the person making the decision *whether* to press a claim against your client is not, ideally, a dispassionate prosecutor, but an angry opposing party in a nasty divorce action. If the claim is successful, the client could be liable for damages of *at least* the higher of \$100 for each “day” of violation or \$10,000, plus punitive damages and litigation costs.²⁶ In the unlikely event his young children could establish actual damages in excess of the statutory minimum liquidated damages, they would be entitled to actual damages in addition to litigation costs and any punitive damages.²⁷ Here, it is difficult to imagine what actual damages the children could suffer, not to mention a finding that surreptitiously observing one’s children to assess their mental state amounts to wanton, reckless or malicious conduct. Thus, it is more likely that in this case, if the plaintiff prevailed, the award would be limited to liquidated damages and litigation costs. Since the Act does not define “day of violation,” this would presumably be calculated as each twenty-four hour period in which a violation can be proven to have occurred.²⁸ Since each interception, disclosure and use of the intercepted communication is a separate violation, the children’s damages would be limited by the number of individual instances of violation that could be proven on their behalf at trial.²⁹ Even so, your client’s civil exposure could amount to many tens of

²⁴ Bradford v. Robert Peltier Nissan Pontiac, No.6:06-CV-477, 2007 WL 865685, *4 (E.D. Tex. Mar. 15, 2007), (citing Cross v. Alabama Dept. Mental Health & Mental Retardation, 49 F.3d 1490, 1508-09 (11th Cir.1995)).

²⁵ Quigley v. Rosenthal, 327 F.3d 1044, 1068 (10th Cir. 2003), quoting Jacobson v. Rose, 592 F.2d 515, 520 (9th Cir.1978)); see Bess v. Bess, 929 F.2d 1332, 1335 (8th Cir.1991).

²⁶ 18 U.S.C. 2520 (b)-(c).

²⁷ See *id.*

²⁸ Smoot v. United Transp. Union, 246 F.3d 633, 646 (6th Cir. 2001).

²⁹ *Id.*

thousands of dollars in liquidated damages and litigation costs alone, without regard to his own litigation costs and the possibility of punitive damages.

IV. Use at Trial

Regardless of your client's exposure to civil and criminal liability, the tapes will not be admissible at trial nor the testimony of any witness or any other evidence derived from the communication as to "any information concerning the substance, purport, or meaning of that communication."³⁰ This, of course, includes the psychologist's report and testimony to the extent it relies upon any information derived from the recordings, because the Act provides that

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.³¹

For all his exposure for having created the tapes, they are useless to him.

V. Potential Exposure of Third Parties

Equally troubling, it is not only your client who may be jeopardized by the recordings. The civil and criminal liability of the psychologist, of *you*, and of anyone else receiving information about the recordings mirrors the liability of the client.³² The Act makes no distinction in seriousness or penalty between the initial

³⁰ 18 U.S.C. § 2510 (emphasis added).

³¹ 18 U.S.C. § 2515.

³² Counsel hoping to be insulated from prosecution by attorney-client privilege should remember that the privilege belongs to, and can be waived by, the client, and may not apply to communications in furtherance of criminal activity such as disclosure of illegally obtained recordings. *See, e.g.* In re Grand Jury Proceedings, 87 F.3d 377, 381 (9th Cir. 1996) (discussing crime/fraud exception to attorney client privilege). For purposes of this discussion, however, the privilege is beside the point. While it may present an obstacle to prosecution of attorneys under wiretap laws for use of illegally obtained recordings, this evidentiary rule is irrelevant to whether the law has been violated.

interception and other violations flowing from it, including actual or attempted disclosure or use of intercepted communications.³³ While it does prohibit procuring another person to intercept a communication in violation of the Act³⁴, the Act does not expressly preclude receipt or review of a disclosure of an already intercepted communication even where it is known that the interception and/or disclosure is in violation of the Act, as long as the receiver was not involved in the interception and cannot be construed to have procured it or conspired to obtain it.³⁵ At least one court, however, has interpreted “use” to include review.³⁶ Even given the requirement of intent, this construction may well be overbroad, and certainly violates public policy by impediment to your representation of your client, since it would be all but impossible to advise him without receiving his disclosure as to the “substance, purport or meaning”³⁷ of the recordings. Accordingly, by itself, your review of the recordings, or review by the psychologist or other persons, should not be implicated by the plain language of the Act, but this view is not universally accepted.

By contrast, any *use or attempted use* of the recordings or their contents, with the actual or imputed knowledge (“knowing or having reason to know”)³⁸ that the information was obtained by unlawful interception of an oral communication would be a federal criminal offense.³⁹ This is very broad language, and while

³³ 18 U.S.C. § 2511.

³⁴ *Id.* § 2511 (1)(a).

³⁵ *Reynolds v. Spears*, 857 F. Supp. 1341, 1345-46 (W.D. Ark. 1994) *aff'd*, 93 F.3d 428 (8th Cir. 1996); *Fields v. Atchison, Topeka and Santa Fe Ry. Co.*, 985 F. Supp. 1308 (D. Kan. 1997); *Dorris v. Absher*, 179 F.3d 420, 426 (6th Cir. 1999)

³⁶ *Thompson v. Dulaney*, 838 F. Supp. 1535, 1547 (D. Utah 1993).

³⁷ 18 U.S.C.A. § 2510(8).

³⁸ *Nix v. O'Malley*, 160 F.3d 343, 348 (6th Cir. 1998).

³⁹ Courts have declined to find immunity for attorneys for use or disclosure. *See, e.g. id.* (no immunity for attorneys), (citing *United States v. Wuliger*, 981 F.2d 1497, 1505 (6th Cir.1992) (declining to permit attorney to receive special jury instruction for Title III's “reason to know” standard, explaining, “[t]here is nothing in the Act which affords attorneys special treatment”), cert. denied, 510 U.S. 1191 (1994)); *Rodgers v. Wood*, 910 F.2d 444, 447 (7th Cir. 1990) (no immunity for attorneys). *See also* *Noel v. Hall*, 568 F.3d 743, 752 (9th Cir. 2009) (lawyer not liable because *plaintiff* was interceptor of communication claimed to be used by attorney). Commentators have noted the absence of

it would certainly include any attempt to directly use the information in a legal context and reliance on it in a psychologist's report,⁴⁰ it could conceivably, at the extreme, even include indirect reliance in formulation of a therapeutic protocol or legal strategy, for example, or by reference in settlement negotiations. Therefore, by its plain language, the Act renders review of any intercepted communication pointless and, worse, could expose the reviewer to criminal liability for even indirect "use" if it can be shown to be intentional and with knowledge the communication was improperly obtained, assuming the underlying interception violated the Act.⁴¹

From your perspective as legal counsel, review and/or use of the recordings could also be implicated by the Rules of Professional Conduct. The Model Rules provide:

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.⁴²

The comments to this rule go on to clarify that where the client's illegal conduct continues, even if it was not initially known to violate the law, the attorney must avoid assistance in any respect, including by advice as to how to conceal the violation, and ultimately the attorney must withdraw from representation or even more.⁴³ In this context, in the most rigid interpretation, voluntary receipt from the client of any information regarding the contents of the recordings, inasmuch as it can only be accomplished through the client's violation of the Act by the disclosure, could

privileges or immunities for attorneys disclosing unlawfully intercepted communications and the resulting criminal liability. See, e.g., John C. Mayoue & Dennis G. Collard, *Third Party Blame: Novel and Expanding Claims*, 27 FAM. ADVOC. 44, 47 (Spring 2005); Mark Gruber, *When a Client Files Suit*, 27 FAM. ADVOC. 48 (Spring 2005).

⁴⁰ See *Thompson*, 838 F. Supp. at 1547-48 (acknowledging potential liability of psychological expert in custody trial for use of illegally intercepted communications).

⁴¹ *But see* *Bast v. Cohen, Dunn & Sinclair, PC*, 59 F.3d 492, 495 (4th Cir. 1995) (holding that liability of attorneys depended on actual or imputed knowledge that client "had a criminal or tortious motive in creating the tapes.")

⁴² MODEL RULES OF PROF'L CONDUCT R. 1.2 (d).

⁴³ *Id.* at R. 1.2, Comment [10].

be construed as assisting a client to commit a crime.⁴⁴ Counseling the client on concealment of his actions could likewise implicate the Rules.⁴⁵ Moreover, the client's continued violation of the Act, by continued disclosure to counsel or any other person, for example, could necessitate withdrawal from representation.⁴⁶ Of course, initial receipt of the information, and perhaps review of the recordings, may be necessary to determine the lawfulness and potential consequences of the interception, which is permissible under the Model Rules⁴⁷ and required by good practice.

Ultimately, the Act expressly provides that "no person shall disclose the contents of any wire, electronic or oral communication, or evidence derived therefrom, in any proceeding in any court, board or agency of this Commonwealth."⁴⁸ That means that not only can the recordings not be admitted at trial or used by a psychologist who will testify at trial, *no* information about their contents can be used or disclosed *at all*, and any attempt to do so could potentially subject not only your client, but you, the psychologist, and anybody else who divulges information about the videotapes, the eavesdropped conversations, or what your client learned thereby, to all of the same civil and criminal liabilities of your client.

VI. Consent

All of this, of course, depends on whether the interceptions violated the Act. This depends on two factors: whether either of your client's children can be said to have consented to the interceptions, and whether the children had a reasonable expectation that the communications would not be intercepted. As to whether the children consented, inasmuch as the interceptions were made without their knowledge, they cannot be said to have personally and affirmatively consented. Nevertheless, a question remains whether your client, as their parent, was empowered to consent on his children's behalf.

⁴⁴ *Id.* at R. 1.2 (d).

⁴⁵ *Id.* at R. 1.2 Comment [10].

⁴⁶ *Id.*

⁴⁷ *Id.* at R. 1.2(d) (good faith effort permissible to determine applicability of law).

⁴⁸ *See* 18 U.S.C.A. § 2511.

This concept is known as the doctrine of vicarious consent.⁴⁹ The primary authority on this issue is *Pollock v. Pollock*.⁵⁰ Like the majority of cases where this issue arises, the intercepted communication was a telephone conversation between a child and his non-custodial parent. There, the court held:

[A]s long as the guardian has a good faith, objectively reasonable basis for believing that it is necessary and in the best interest of the child to consent on behalf of his or her minor child to the taping of telephone conversations, the guardian may vicariously consent on behalf of the child to the recording. Such vicarious consent will be exempt from liability under Title III, pursuant to the consent exception contained in 18 U.S.C. § 2511(2)(d).⁵¹

The *Pollock* court aptly noted that “[w]e cannot attribute to Congress the intent to subject parents to criminal and civil penalties for recording their minor child’s phone conversations out of concern for that child’s well-being.”⁵² Nonetheless, the court stressed that “this doctrine should not be interpreted as permitting parents to tape *any* conversation involving their child simply by invoking the magic words: ‘I was doing it in his/her best interest,’” but acknowledged the necessity for allowing parents to act for the protection and welfare of their children.⁵³ Accordingly,

⁴⁹ There is a wealth of secondary authority on this doctrine. See, e.g., Debra Bogosavljevic, *Can Parents Vicariously Consent to Recording a Telephone Conversation on Behalf of a Minor Child?: An Examination of the Vicarious Consent Exception Under Title III of the Omnibus Crime Control and Safe Streets Act of 1968*, 2000 U. ILL. L. REV. 321; Daniel R. Dinger, *supra* note 5, at 956; Julieann Karkosak, *Tapping into Family Affairs: Examining the Federal Wiretapping Statute As It Applies to the Home*, *Pollock v. Pollock*, 154 F.3d 601 (6th Cir. 1998), 68 U. CIN. L. REV. 995 (2000); Laura S. Killian, *Concerned or Just Plain Nosy? The Consequences of Parental Wiretapping Under the Federal Wiretap Act in Light of Pollock v. Pollock*, 104 DICK. L. REV. 561 (2000).

⁵⁰ 154 F.3d 601 (6th Cir. 1998).

⁵¹ *Id.* at 610 (internal citations omitted).

⁵² *Id.* at 610 (quoting *Scheib v. Grant*, 22 F.3d 149, 154 (7th Cir.1994)).

⁵³ Relevant cases typically arise in the context of a custody proceeding, with one parent intercepting communications between the child and the other parent. Courts have not found that a parent’s intent to use intercepted communications in litigation is incompatible with the child’s best interests. See, e.g., *Pollock*, 154 F.3d 601. See also, e.g., *Wagner v. Wagner*, 64 F. Supp. 2d 895, 896 (D. Minn. 1999) (holding vicarious consent valid defense in civil action under 18 U.S.C.A. § 2520); *Campbell v. Price*, 2 F. Supp. 2d 1186, 1191-92 (E.D. Ark. 1998) (noting that Congress intended the consent exception to be interpreted

under *Pollock* and its progeny, whether the doctrine may be validly invoked is a question of fact.

Pollock references the power of a *guardian* to consent on a child's behalf⁵⁴, rather than to the power of a "parent," which both broadens and restricts the application in jurisdictions that follow parallel reasoning. *Black's Law Dictionary* defines "guardian" as "[o]ne who has the *legal authority* and duty to care for another's person or property, esp. because of the other's infancy, incapacity, or disability."⁵⁵ This would indicate that a parent must have legal custody to consent on a child's behalf, but does not address whether shared legal custody requires agreement of both parents, or whether an objection by one parent can void the consent of the other.

The definition of legal custody is a matter of state law. In Pennsylvania, for example, legal custody is defined by law as "[t]he legal right to make major decisions affecting the best interest of a minor child, including, but not limited to, medical, religious and educational decisions."⁵⁶ Although the state General Assembly has declared it the public policy of the Commonwealth to promote the sharing between parents of rights and responsibilities of childrearing, the statute does not require prior agreement of parents to *every* exercise of decision-making, especially where it is "in the best interest of the child."⁵⁷ Rather, it is only major decisions which must be shared.⁵⁸ Here, there is little doubt that the decision to seek psychological treatment for the child may be considered a major decision. A decision to permit the child to be filmed is probably not a major decision, nor do schools and other agencies seeking permission for this very purpose typically seek the signature of more than one parent.⁵⁹

broadly); *Thompson*, 838 F. Supp. at 1544 (holding vicarious consent is a defense to claim under the federal wiretapping statutes).

⁵⁴ *Pollock*, 154 F.3d at 610.

⁵⁵ BLACK'S LAW DICTIONARY (8th ed. 2004) (emphasis added).

⁵⁶ 23 PA. CONS. STAT. § 5302 (2001).

⁵⁷ *Id.* § 5301.

⁵⁸ *Grossman v. State Bd. of Psychology*, 825 A.2d 748, 759 (Pa. 2003).

⁵⁹ Requirement of consent of both parents is unusual. In Pennsylvania, for example, the consent of only one parent is required to waive confidentiality of psychological records of a child under fourteen. 55 PA. CODE § 5310.142 (1982). The consent of only one parent is required to employ a child under sixteen. 43 PA. STAT. ANN. § 44.2 (2002). The consent of only one parent pre-

Whether one parent can void the valid consent of the other might be answered by reference to the Act, which excepts from the statute interceptions that have been accomplished on “*prior consent*” of at least one party thereto.⁶⁰ That is, consent can only exempt an interception from liability under the statute if it is obtained in advance. By this reasoning, it may follow that the objection, too, would have to be raised prior to the interception to timely *negate* vicarious consent that is otherwise valid.⁶¹ In the many federal and state cases that have addressed vicarious consent, legal custody has never expressly been part of the analysis, and only four mention “legal custody” at all.⁶² In fact, the question frequently arises in the context of custody litigation, and most often the intercepted communication is between the child and the other parent, for use against the non-consenting parent. Courts have not found vicarious consent inapplicable in this context even where the other parent objects.⁶³ Accordingly, while there may be legitimate debate whether vicarious consent may be invoked by a parent without legal custody or in the face of timely

cludes conviction for luring a child into a motor vehicle. 18 PA. CONS. STAT. § 2910 (2005).

⁶⁰ 18 U.S.C. § 2511(2)(d).

⁶¹ Courts have generally treated the right to give vicarious consent as belonging to the parent in whose home the child resides when the interception is made. *See, e.g.*, *Babb v. Eagleton*, 616 F. Supp. 2d 1195, 1200 (N.D. Okla. 2007); *Smith v. Smith*, 923 So. 2d 732, 740 (La. Ct. App. 2005); *D’Onofrio v. D’Onofrio*, 780 A.2d 593 (N.J. Super. Ct. 2001). Some courts have reasoned that vicarious consent can override obligations to consult on major decisions where given in good faith for the child’s welfare. *See, e.g.*, *Robinson v. Johnson*, 3:07-CV-77 RM, 2008 WL 830729 (N.D. Ind. Mar. 26, 2008). Presumably where consent properly given by one parent is revoked by the other, interceptions made prior to revocation would be lawful.

⁶² *See Wagner*, 64 F. Supp. 2d at 897 (intercepting parent had legal custody but legal custody not part of court’s analysis of vicarious consent); *G.J.G. v. L.K.A.*, No. CN93-09835, 2006 WL 2389340, at *9 (Del. Fam. Ct. Apr. 11, 2006) (legal custody shared at time of interception); *D’Onofrio*, 780 A.2d 593, 599 (no legal custody award at time of interception; joint legal custody awarded in affirmed decision that applied vicarious consent); *West Virginia Dept. of Health & Human Resources v. David L.*, 453 S.E.2d 646, 654 (W.Va. 1994) (no award of legal custody noted in decision at time of interception but court declined to apply doctrine against parent with physical custody in her own home).

⁶³ *See, e.g.*, *Pollock*, 154 F.3d at 610; *Wagner*, 64 F. Supp. 2d at 896; *Thompson*, 838 F. Supp. at 1544; *Silas v. Silas*, 680 So. 2d 368, 371-72 (Ala. Civ. App.1996).

opposition by another parent who shares legal custody, there is no authority for limiting the doctrine to parents with sole legal custody or prior consent of the other parent.

As set forth in *Pollock*, vicarious consent depends on a finding that the “guardian has a good faith, objectively reasonable basis for believing that it is necessary and in the best interest of the child to consent on behalf of his or his minor child.”⁶⁴ Here, assuming it can be proven, your client’s intent to investigate and deal with possible sexual abuse of his young daughter would seem to meet that requirement, at least as to his daughter. As experience teaches, though, no matter how compelling the circumstances, factual findings can never be predicted with complete reliability. For all that, another route exists to liberation of your client’s interception from the constraints of the federal Act.

VII. Expectation of Privacy

To be covered by the Act at all, an interception must be of a “wire, oral, or electronic communication.”⁶⁵ An “oral communication” is “any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation.”⁶⁶ That is, a primary requirement for liability under the Act is that the children exhibited a reasonable expectation that the communication would not be subject to interception. Citing the legislative history of the Act, which “shows that Congress intended this definition to parallel the ‘reasonable expectation of privacy test’ articulated by the Supreme Court in *Katz*,”⁶⁷ courts have interpreted the requirement of an expectation that a communication would not be “subject to interception” as an expectation of privacy under the Fourth Amendment.⁶⁸ This means that for your client’s recordings to violate the Act, his children would have to

⁶⁴ *Pollock*, 154 F.3d at 610.

⁶⁵ 18 U.S.C. § 2511(1)(a).

⁶⁶ *Id.* § 2510(2).

⁶⁷ *United States v. Dunbar*, 553 F.3d 48, 57 (1st Cir. 2009) (quoting *United States v. Turner*, 209 F.3d 1198, 1200 (10th Cir.2000) (quoting *Katz v. United States*, 389 U.S. 347 (1967)). .

⁶⁸ *Id.* See also, e.g., *Quon v. Arch Wireless Operating Co.*, 529 F.3d 892, 906 (9th Cir. 2008); *Doe v. Smith*, 429 F.3d 706, 709 (7th Cir. 2005); *United States v. Peoples*, 250 F.3d 630, 637 (8th Cir. 2001); *Kee v. City of Rowlett*, 247

have exhibited a subjective expectation that their conversations were secret and, if so, that the expectation was one that society would consider reasonable under the circumstances.

Whether the children exhibited a subjective expectation of privacy is necessarily a question of fact. If the baby monitor was in plain view and the children were aware of its purpose, the absence of any effort to escape the range of the device would weigh against a finding that they shared a subjective expectation of privacy, at least as to the conversations monitored by that device. In fact, absent an affirmative exhibition of secrecy, such as swearing one another to secrecy and closing the door to the room, the children's interactions may be found to fall outside the definition of "oral communication" set forth in the Act, which requires *exhibition* of an expectation, rather than simple *possession* of one.⁶⁹ Even if the children did exhibit an expectation of privacy, however, the expectation must be found to be reasonable. It is tempting to conclude that society would unequivocally decline to elevate a child's subjective expectation of privacy above a parent's right and responsibility to care for and control the child, which is itself grounded in a constitutional right of privacy. This is a similar question to application of the doctrine of vicarious consent, but it is not the same.

Repeatedly, the United States Supreme Court has "recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children,"⁷⁰ but it

F.3d 206, 211 (5th Cir. 2001); *United States v. McKinnon*, 985 F.2d 525, 527 (11th Cir. 1993).

⁶⁹ 18 U.S.C. § 2510.

⁷⁰ *Troxel v. Granville*, 530 U.S. 57, 66 (2000), (citing *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)) ("It is plain that the interest of a parent in the companionship, care, custody, and management of her or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements'") (citation omitted); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the righ[t] . . . to direct the education and upbringing of one's children."); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (discussing "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child"); *Parham v. J. R.*, 442 U.S. 584, 602 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have con-

remains an open question how far that right goes under the wiretap statutes. In *Commonwealth v. Baldwin*,⁷¹ for example, which disavowed earlier precedent setting forth an implied “extension exception” under the state wiretap statute, a Pennsylvania father was determined to have violated the Pennsylvania wiretap law when he eavesdropped on his son’s marijuana transaction from another extension of his telephone.⁷² This case may appear to undermine an argument that a child cannot *at law* have a reasonable expectation of privacy from a parent of communications made in his parent’s home, but it can be distinguished. First, the appellants against whom the intercepted communications had been used at trial were not the son, but the other party to the telephone conversations and his co-defendant based on a search predicated on the intercepted communication. Because consent of both parties to the conversation was necessary to exempt it from the Pennsylvania Act, the son’s expectation of privacy was not at issue, and the ability of his parent to consent on his behalf was not raised. Therefore, *Baldwin* is inapposite to the expectation of privacy of your client’s child.

In interpretation of state and federal wiretap statutes, the balancing of the rights of children and parents has centered not on whether society accepts as reasonable a child’s subjective expectation of privacy, but on whether a parent has the power to consent on the child’s behalf. The *Pollock* court stressed that a parent’s authority to vicariously consent is limited to where he has “a good faith, objectively reasonable basis for believing that it is necessary and in the best interest of the child,”⁷³ which at first glance might appear to undermine an argument that courts should not recognize a child’s expectation of privacy in relation to her parents. Generally, the relevant caselaw has evolved in the context of communications between children and third par-

sistently followed that course”); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (“We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected”); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (“The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition”).

⁷¹ 422 A.2d 838 (Pa. Super. Ct. 1980).

⁷² *Id.* at 843.

⁷³ *Pollock*, 154 F.3d at 610.

ties whose expectation of privacy is also at issue. However, in considering the authority of school officials to strip-search a 13-year-old girl for an ibuprofen tablet, Justice Clarence Thomas observed

There can be no doubt that a parent would have had the authority to conduct the search at issue in this case. Parents have “immunity from the strictures of the Fourth Amendment” when it comes to searches of a child or that child’s belongings.

As acknowledged by this Court, this principle is based on the “societal understanding of superior and inferior” with respect to the “parent and child” relationship. In light of this relationship, the Court has indicated that a parent can authorize a third-party search of a child by consenting to such a search, even if the child denies [her] consent. Certainly, a search by the parent himself is no different, regardless of whether or not a child would prefer to be left alone.⁷⁴

It stands to reason that a society in which a parent’s right to strip search a child surmounts the child’s subjective expectation of bodily privacy will not recognize as reasonable a child’s expectation of privacy from a parent as to communications, which the parent finds prudent for the child’s welfare to monitor by whatever means including electronic interception. This, of course, is a much more satisfying result than the potential long-term imprisonment of a parent for listening in on his own child’s conversations, but so far the principle not been articulated by the federal courts.

⁷⁴ *Safford Unified School Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2656 (2009) (Thomas, J., dissenting) (internal citations omitted), (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985)) (A parent’s authority is “not subject to the limits of the Fourth Amendment”); *Georgia v. Randolph*, 547 U.S. 103, 114 (2006)(implying parent’s right to overrule refusal of child to consent to search); *Griffin v. Wisconsin*, 483 U.S. 868, 876 (1987) (“[P]arental custodial authority” does not require “judicial approval for [a] search of a minor child’s room”); WAYNE R. LAFAVE, *SEARCH AND SEIZURE* § 8.3(d), at 160 (4th ed. 2004) (“[A] father, ‘as the head of the household’ with ‘the responsibility and the authority for the discipline, training and control of his children,’ has a superior interest in the family residence to that of his minor son, so that the father’s consent to search would be effective notwithstanding the son’s contemporaneous on-the-scene objection.”)(citations omitted); *Id.*, § 8.4(b) (“[W]hile ‘even a minor child, living in the bosom of his family, may think of a room as ‘his,’ the overall dominance will be in his parents.’”)(citations omitted).

VIII. State Laws

Whether your client has violated state wiretap laws is a similar but necessarily distinct question. Generally speaking, the state wiretap laws are modeled on the federal Act and substantially mirror its language, but may be more restrictive in many respects to an individual's ability to lawfully intercept the communications of another individual, whether or not they have a familial relationship, and may impose different penalties if the law has been violated. Where the federal Act requires the consent of one party to a communication to exempt from the statute an interception thereof, numerous states require the consent of all parties.⁷⁵ As to your client, as parent to both participants in the conversation, the analysis may not change in a state that applies the doctrine of vicarious consent, as long as the interception was believed to be in the best interests of *both* children. However, in the majority of cases involving interception by parents of the communications of children, the communication is between one child and another individual whose consent cannot be vicariously provided by the child's parent. In these cases, eavesdropping by device on a conversation between a child and her other parent, playmate or nanny may violate a state law that requires two-party consent regardless of the parent's "good faith, objectively reasonable basis for believing that it is necessary and in the best interest of the child."⁷⁶ The law may be violated even in a one-party consent state, or where both parties are children of the interceptor, if the state will not apply vicarious consent.

States that have considered the question have mostly approved vicarious consent with regard to state wiretapping statutes.⁷⁷ They generally note the constitutional interest in the care and control of one's children and the intent that their own wire-

⁷⁵ See note 4, *supra*.

⁷⁶ *Pollock*, 154 F.3d at 610.

⁷⁷ See, e.g., *Thompson*, 838 F. Supp. at ; *Stinson v. Larson*, 893 So. 2d 462, 469 (Ala. Civ. App. 2004); *G.J.G.*, 2006 WL 2389340, at *8; *State v. Spencer*, 737 N.W.2d 124, 134 (Iowa 2007); *Smith*, 923 So. 2d at 740; *D'Onofrio*, 780 A.2d at 597; *People v. Clark*, 855 N.Y.S.2d 809, 813 (2008); *Kroh v. Kroh*, 567 S.E.2d 760 (N.C. Ct. App. 2002); *Alameda v. State*, 235 S.W.3d 218, 223 (Tex. Crim. App. 2007); *State v. Duchow*, No. 2005AP2175-CR, 2007 WL 968795, at *1 (Wis. Ct. App. 2007), *rev'd on other grounds* *State v. Duchow*, 749 N.W.2d 913 (Wis. 2007); see also *West. Va. Dep't of Health & Human Res.*, 453 S.E.2d at

tapping statutes were meant to track the federal statute. Only two dissenters have emerged. In Georgia, the court declined to adopt the doctrine,⁷⁸ but the Georgia statute was subsequently amended to contain it.⁷⁹ Consequently, Michigan stands alone in refusing to apply the vicarious consent doctrine in *Williams v. Williams*.⁸⁰ That decision has been distinguished on the grounds that, since Michigan is a *two-party* consent state, vicarious consent of the child to interception of a conversation with the non-custodial parent was insufficient to except it from Michigan's wiretap statute.⁸¹ Thus *Williams* can be distinguished in states with one-party consent requirements, or where, like here, vicarious consent would apply to all parties to the conversation. That may not help, however, in states that have not considered the question at all.

In addition to the uncertainty whether state courts will apply vicarious consent or accept a child's subjective expectation of privacy, state wiretapping statutes may also contain idiosyncrasies that further complicate advice to your client. For example, while the federal Act defines an "oral communication" as an utterance by someone "exhibiting" an expectation of privacy,⁸² which is generally understood to mean "to show outwardly,"⁸³ the definition of "oral communication" under the Pennsylvania law requires only *possession* of an expectation, which is a much more subjective determination. Perhaps more troubling still, while the federal Act proscribes intentional disclosure or use or intentional attempted disclosure or use of any information about an oral communication where the actor knows or has reason to know the information was obtained in violation of the Act,⁸⁴ Pennsylvania's provisions criminalizing actual or attempted disclosure or use of intercepted communications, *are not limited to unlawful interceptions*, nor are lawful interceptions otherwise exempted

648 (approving doctrine but refusing to apply it where tape recording was made *in the home* of the non-consenting custodial parent).

⁷⁸ *Bishop v. State*, 526 S.E.2d 917, 920 (Ga. Ct. App. 1999).

⁷⁹ GA. CODE ANN. § 16-11-66 (2000).

⁸⁰ 581 N.W.2d 777, 779-80 (Mich. Ct. App. 1998).

⁸¹ *See Spencer*, 737 N.W.2d at 133.

⁸² 18 U.S.C. § 2510(2).

⁸³ THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. Houghton Mifflin Company, 2004) (defining "exhibit").

⁸⁴ 18 U.S.C. § 2511(1).

from liability. Like the federal Act, the Pennsylvania Wiretapping and Electronic Surveillance Control Act⁸⁵ does not distinguish in sanctions between an interception and its disclosure and/or use, each of which would be a third degree felony carrying a maximum prison sentence of seven years in Pennsylvania.⁸⁶ By the plain language of the Pennsylvania Act, even if your client has not violated the law by monitoring and videotaping his children, disclosure of any information about these *lawful* interceptions or what he learned thereby, or any attempt to use them for any purpose, may still constitute a felony notwithstanding your client's good faith intent.

This, of course, sounds like a preposterous result, but it is the technical reading of the Pennsylvania Act, which the state's highest court has expressly held to require strict construction.⁸⁷ Nevertheless, in statutory construction a Pennsylvania court must assume that legislators did not intend "a result that is absurd . . . or unreasonable"⁸⁸ and did not intend to violate the Constitution,⁸⁹ and a federal court is bound to the same principles.⁹⁰ Here, since your client intercepted his children's communications entirely without government participation, there can have been no violation of the children's Fourth Amendment rights against unreasonable search and seizure. Your client, conversely, has a well established right to care for and control his children,⁹¹ which is inarguably infringed by a statute proscribing him from monitoring and conveying information about his children's communications in acquittal of his responsibility to act for their welfare and protection, and in fact the children also have an undeniable interest in preservation of their parent's liberties to do so. Particularly where, as here, no participant in an intercepted communication has a competing interest, nor is it possible to imagine a state interest in preventing parents from surreptitiously listening

⁸⁵ 18 PA. CONST. STAT. §§5701-5782.

⁸⁶ 18 PA. CONST. STAT. § 106.

⁸⁷ *Kopko v. Miller*, 892 A.2d 766, 780 (Pa. 2006) (quoting *Commonwealth v. Spangler*, 809 A.2d 234, 237 (2002) ("Because of this privacy concern, the provisions of the Wiretap Act are strictly construed.")).

⁸⁸ 1 PA. CONST. STAT. § 1922(1).

⁸⁹ *Id.* at § 1922(3).

⁹⁰ *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69-70 (1994) (citing *Public Citizen v. Dept. of Justice*, 491 U.S. 440, 453-455 (1989)).

⁹¹ *See supra* notes 70, 74 .

to or observing their own children, interpretation of the Act to proscribe acts taken in exercise of the client's fundamental right to "make decisions concerning the care, custody, and control" of the child, would run afoul of the Due Process Clause of the Fourteenth Amendment.⁹²

Fortunately, it is not necessary to interpret state or federal wiretap laws in a way that raises this difficult constitutional question, and perhaps it is impermissible as well. Courts have at least two alternatives: to universally recognize a parent's right to consent on a child's behalf to interception of the child's communications⁹³ and, more comprehensively, to articulate a principle that a child cannot possess a reasonable expectation of privacy as to interceptions by a parent.

IX. Conclusion

Most practitioners of custody and divorce law can attest that the hypothetical on which this analysis is grounded is entirely conceivable and many may have encountered similar conundrums. Importantly, though, the conduct potentially proscribed by these laws can be ubiquitous. In fact, by the rigid interpretation set forth here, it is safe to say that most parents have probably violated federal and state wiretap laws time and time again. Absent application of the principles of vicarious consent and/or findings that children's subjective expectation of privacy as to their parents cannot at law be reasonable, state and federal wiretap laws could subject a parent to felony sanctions for conduct including, but not limited to, the following:

- Eavesdropping on a child with a baby monitor, intercom or "nanny-cam";
- Eavesdropping from another extension on a child's telephone conversation to gather information about development or risk taking behavior;
- Video or audiotaping any child too young to consent;

⁹² *Troxel*, 530 U.S. at 66.

⁹³ This, of course, may not guard against legislative landmines like provisions in the Pennsylvania statute that ostensibly criminalize disclosure and use of interceptions that are themselves lawful.

- Video or audiotaping any child, at any time, who is unable to consent because of physical, mental or psychological impairment;
- Videotaping family activities to document children's development or family events for any purpose, including posterity or family entertainment, without prior consent of all parties to any communication so recorded;
- Sharing any of these family recordings; and
- Discussing the contents of any communication of the child intercepted by telephone extension, baby monitor or video recorder with doctors, lawyers, priests, psychologists, or even the other parent, even when the recordings were made with the consent of the child.

Obviously legislatures, in passing the wiretap laws, had no intention of intruding so completely on the sanctity of the family relationship. Lawmakers cannot have intended to prevent parents from taking steps to monitor the activities of the children in their care, even where the children themselves actively conceal this information, nor from acting on the information they have obtained by sharing it with appropriate third persons reasonably deemed by parents to be necessary to the goal of protecting the best interests of their children. The legislature cannot have intended to make it illegal for parents to make recordings of their children at play without express prior consent. Congress and state legislatures, in passing these laws, never intended to subject a parent to felony sanctions for secretly documenting the behavior of a child for illustration to a mental health professional. If this had been the intent of lawmakers, these laws could not survive constitutional scrutiny. However, by the law of statutory interpretation, since there exists an interpretation of the wiretap laws that does not implicate the Constitution nor compel an absurd and unintended result, the questions need not be reached.

So, how do you advise your client? Under the federal law, as long as he can show that he had a good faith belief that the interceptions were in the best interests of at least one of the children, he is insulated from criminal and civil liability, and may freely use the recordings and information obtained by interception. His liability under state laws is much murkier: In Pennsylvania, for example, by the plain language of the wiretap law of that state, he has already committed multiple felonies by eaves-

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dropping on his children and making the recordings, by telling you about them, and even by simply *asking* you introduce them at trial. Worse, he has no use for them that does not expose you and any reviewing psychologist to criminal and civil liability as well. They cannot be admitted at trial or used for assessment or treatment of the child, and your representation of the client may itself be in jeopardy.

Realistically, while it is likely the recordings would be excluded from evidence in a state court, together with any report or testimony of the psychologist reliant on them, it seems exceedingly unlikely a prosecutor would reach so far as to prosecute a parent for eavesdropping upon and secretly videotaping his own children, and it seems equally unlikely a civil jury would be willing to assign blame. Unfortunately, though, as long as wiretap laws fail to expressly exempt interception by parents of their children's communications and courts fail to uniformly adopt principles to otherwise insulate parents for this kind of routine act of parenting, enforcement of wiretap laws against parents may remain as unpredictable as falling down a rabbit hole.