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CALIFORNIA'S EAVESDROPPING LAW ENDANGERS VICTIMS OF DOMESTIC VIOLENCE

JOHN E.B. MYERS*

Nancy and Ken met in San Diego while Ken was waiting to be discharged from the Navy.¹ They started dating, and soon were living together; within a year, they were married. Ken got a job driving a delivery truck and Nancy continued her career as a nurse. Before long, the happy couple welcomed a daughter, Ann.

When Ann was three, Ken started drinking to excess several times a week and lost his job because he showed up for work drunk. Unemployed, sitting at home with nothing to do, and struggling with alcoholism, Ken became increasingly irritable. He complained to Nancy that she didn't make enough money, and didn't take proper care of the home, Ann, or him. One night, Ken's anger erupted, and he hit Nancy in the face with his fist, knocking her to the floor. He straddled her on the floor and choked her with both hands. As Nancy felt she was losing consciousness, three-year-old Ann jumped on Ken's back, yelling, "Daddy, stop hurting mommy! Stop! Bad daddy." Ken threw Ann against a wall and stormed out of the house.

This wasn't the first incident of domestic violence, but it was the most severe, and Nancy decided she'd had enough. While Ken was gone, Nancy packed a few suitcases, put Ann in the car seat, and drove to her parent's home in Fresno. Nancy filed for divorce. The couple litigated custody, with Ken denying any domestic violence, and accusing Nancy of fabricating the domestic violence story to alienate him from his daughter and gain an advantage in court. Eventually, the family court granted a divorce, with joint legal custody, and primary physical custody to Nancy. Ken was awarded parenting time and was ordered to pay child support.

Nancy remained in Fresno. She remarried and had a child with her new husband, John. Ken remained in San Diego. He got his alcohol

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1. The following scenario is a hypothetical.

problem under control, and went back to UPS.

Ken was constantly late with child support payments, accumulating an arrearage of more than \$30,000. He was regularly hauled into court by the department of child support services. On three separate occasions, Ken returned to family court seeking full custody of Ann, each time the court refused to change custody. Ken told Nancy, "I will never give up until I have full custody of my daughter." From Nancy's point of view, the constant litigation over support and custody was a way for Ken to punish her, from Ken's perspective, he was seeking justice.

When Ann was thirteen, she was spending a week with Ken in San Diego. Late one night, Ann texted Nancy, "Mom. I want to come home. I hate it here. Dad won't let me do anything. He won't even let me talk to my friends. Please please please please come get me."

After Ann fell asleep, Ken picked up her cell phone and read the text to Nancy. He was furious. He yelled at Ann, "You are a clone of your mother! You don't care about anybody but yourself. You are a selfish little brat. If you want to go home so bad, pack your fucking suitcase. I'll drive you home tonight."

Ken called Nancy just after midnight. When Nancy saw it was Ken calling, she smelled trouble, and decided to record the conversation. With the recorder going, Nancy answered the phone and got an earful, "I'm bringing Ann home tonight. I'll be in Bakersfield by six in the morning. Be at the Starbucks where we usually exchange custody. If you aren't there, I'll leave her and she can find her own way home. You are such a fucking bitch. You ruined our daughter. You turned her into a selfish whore just like you. I don't want anything more to do with her. I should have killed you when I had the chance a long time ago. I should kill you now for ruining my life. Be at Starbucks at six, and fuck you very much."

Nancy woke her husband and told him what happened. They took their child to his grand parents' and set out for Bakersfield. On the way, Nancy said she was afraid to confront Ken. He seemed out of control, and John said he would do the exchange. They agreed to record the exchange, in case of any trouble.

Nancy and John pulled into Bakersville at 5:30 a.m., and parked across the street from Starbucks. Before long, Ken pulled into the Starbucks parking lot. John turned on the audio recorder, put it in his pocket, got out of the car, and walked across the street toward Ken's car. Ken emerged from his car, walked aggressively toward John, and stopped a few feet from him on the sidewalk. Ken said, "Fuck you, John.

Fuck you. You are supposed to be normal, but you let her mother twist her mind. She's fucked up, she's mentally ill, she's fucking psychotic, thanks to Nancy; and you just let it happen. What kind of a man are you? Fuck you." As Ken was speaking, Ann got out of Ken's car and ran crying to Nancy's car. She heard what her father said, and sobbed on the way home, until she fell asleep.

Once home, Nancy decided she needed protection from Ken, whom she viewed as dangerous. After all, he threatened to kill her for "ruining [his] life." She filed the paperwork for a temporary domestic violence restraining order (DVRO), which was granted the same day. The temporary order named Nancy and Ann as "protected persons," and prohibited Ken from contacting, abusing, or harassing them. The sheriff served the temporary restraining order on Ken at his workplace in San Diego. The papers informed Ken there would be a hearing in two weeks on Nancy's request for a permanent DVRO. Ken retained counsel, who filed a response denying any domestic violence. The matter was set for trial. Nancy's attorney informed Ken's attorney that Nancy would offer the two audio recordings in evidence: The audio of the telephone call in which Ken threatened to kill Nancy, and Ken's angry words directed to John in front of Starbucks. Ken's attorney objected, arguing that the audio recordings violated California's eavesdropping law and were inadmissible in evidence. Ken's attorney added that if the recordings were offered, he would contact the local prosecutor and ask that Nancy be prosecuted for violating the eavesdropping law, and Ken would sue Nancy for violating his privacy, as well.

CALIFORNIA'S STATUTORY FRAMEWORK FOR DOMESTIC VIOLENCE RESTRAINING ORDERS

California has a comprehensive statutory framework for domestic violence protective orders. Protective orders can be issued under the Family Code – DVRO²; the Penal Code – criminal protective order (CPO)³; and the Code of Civil Procedure – civil harassment order.⁴ Under the Family Code, DVROs are available to the following victims: spouses, former spouses, cohabitants, former cohabitants, persons who dated abusers, persons having a child in common with an abuser, persons related by consanguinity or affinity within the second degree to an abuser, and children of abuse victims.⁵ "Abuse" includes intentionally or recklessly causing or attempting to cause bodily injury, sexual assault, placing a person in reasonable apprehension of imminent serious bodily

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2. See CAL. FAM. CODE §§ 6200-6409 (2014).
 3. CAL. PENAL CODE §§ 273.5(j), 646.91 (2014).
 4. CAL. CODE OF CIV. PRO. § 527.6 (2014).
 5. FAM. § 6211.

injury, stalking, and threatening.⁶

DVRO practice under California's Family Code is accomplished through forms provided by the Judicial Counsel.⁷ Although the forms are lengthy, the staff at the Judicial Counsel does an admirable job of simplifying the forms so lay persons can understand them. Simplicity is vital because most litigants seeking DVRO protection have neither an attorney nor the experience to navigate complex legal forms.

The first step in the DVRO process is filing the form requesting an *ex parte* temporary restraining order (TRO).⁸ The request is reviewed by a judge the same day it is filed for the day following.⁹ The judge then grants or denies the request, and sets the matter for a short cause hearing, if necessary.¹⁰ The alleged abuser must be personally served with any TRO and given notice of the hearing.¹¹ The alleged abuser may file a response.¹²

If an alleged abuser was properly served, but fails to appear at the hearing, or appears but does not contest the matter, the court typically grants a Restraining Order After Hearing (DVRO), lasting up to five years.¹³ If the alleged abuser files a response and denies the abuse, the matter is typically set for a long cause trial.¹⁴

CALIFORNIA'S EAVESDROPPING STATUTE

California's eavesdropping law was enacted in 1967, as part of a comprehensive legislative reform designed to protect privacy.¹⁵ For pre-

6. *Id.* at § 6203, 6320.

7. *Id.* at § 6221(c).

8. Request for Domestic Violence Restraining Order, Cal. Form DV-100 (2014), available at <http://www.courts.ca.gov/documents/dv100.pdf>.

9. *Domestic Violence*, CALIFORNIA COURTS, <http://www.courts.ca.gov/selfhelp-domesticviolence.htm> (last visited Sept. 14, 2014).

10. Temporary Restraining Order, Cal. Form DV-110 (2014), available at <http://www.courts.ca.gov/documents/dv110.pdf>.

11. Notice of Court Hearing, Cal. Form DV-109 (2012), available at <http://www.courts.ca.gov/documents/dv109.pdf>.

12. Response to Request for Domestic Violence Restraining Order, Cal. Form DV-120 (2014), available at <http://www.courts.ca.gov/documents/dv120.pdf>.

13. *Domestic Violence*, *supra* note 9.

14. *Respond to a Restraining Order*, CALIFORNIA COURTS, <http://www.courts.ca.gov/1265.htm> (last visited Sept. 14, 2014).

15. CAL. PENAL CODE §§ 630-638 (2014). In Section 630, the Legislature stated its intention "to protect the right of privacy of the people of this state." See *Kearney v. Salomon Smith Barney, Inc.*, 137 P.3d 914, 928 (Cal. 2006) ("In 1967, the California Legisla-

sent purposes, the key provision is Section 632, which provides in part:

(a) Every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of...telephone, or other device,... shall be punished.¹⁶

Subsection (c) defines “confidential communication” as any communication that occurs in circumstances that reasonably indicate that “any party to the communication desires it to be confined to the parties....”¹⁷ A communication is not confidential if it occurs at a public gathering or under conditions “in which the parties to the communication may reasonably expect that the communication may be overheard or recorded.”¹⁸ The recording of a confidential communication in violation of Section 632 is not admissible in court.¹⁹

The Legislature realized that some confidential communications constitute powerful evidence of crime,²⁰ indeed, some communications are themselves criminal.²¹ With this in mind, Penal Code Section 633.5 allows one party to a confidential communication to record the communication in order to preserve evidence that the other party is committing or has committed extortion, kidnapping, bribery, or “any felony involving violence against the person.”²² This portion of Section 633.5 applies to face-to-face communications and communications by phone and other media.²³

Section 633.5 also allows the recording of telephone calls intended by one party to annoy the other party, and in which the offending party uses obscene language or threatens to injure the other party or the party’s family.²⁴ This portion of 633.5 does not extend to face-to-face en-

ture enacted a broad, protective invasion-of-privacy statute in response to what it viewed as a serious and increasing threat to the confidentiality of private communications resulting from advances in science and technology that had led to the development of new devices and techniques for eavesdropping upon and recording such private communications.”).

16. PENAL § 632(a).

17. *Id.* at § 632(c).

18. *Id.*

19. *Id.* at § 632(d).

20. *See* *People v. Parra*, 165 Cal. App. 3d 874 (1st Dist.1985).

21. *See* PENAL § 518; PENAL § 519 (extortion); PENAL § 701 (criminal threats); PENAL § 646.9 (stalking); CAL. FAM. CODE § 6320 (2014) (domestic violence threats).

22. CAL. PENAL CODE § 633.5 (2014).

23. *Id.*

24. *Id.*

counters.²⁵

Section 633.6 authorizes a judge issuing a DVRO to permit the victim to record communications from the abuser that would normally violate Section 632.²⁶ This provision is useful *after* a DVRO is granted, but does nothing to help a victim prove the violence that entitles her to protection.

CASE LAW INTERPRETING SECTION 632

There is surprisingly little case law interpreting Penal Code Section 632. Most appellate cases arose in the commercial context – *e.g.*, businesses recording telephone calls from customers – rather than from communication between individuals.²⁷ There appear to be no California cases interpreting 632 in the context of domestic violence. The Supreme Court’s decision in *Flanagan v. Flanagan*²⁸ is the leading authority defining when communication is “confidential.” The court ruled that a conversation is confidential when a party to the interaction has an objectively reasonable expectation that the conversation is private.²⁹

In *Kearney v. Salomon Smith Barney, Inc.*,³⁰ the Supreme Court clarified that California law requires the consent of both parties to record a confidential communication. The court wrote that Section 632 “does not absolutely preclude a party to a telephone conversation from recording the conversation, but rather simply prohibits such a party from secretly or surreptitiously recording the conversation, that is, from recording the conversation without first informing all parties to the conversation that the conversation is being recorded.”³¹

One Court of Appeals decision sheds light on recording conversations in the domestic violence context. In *People v. Parra*,³² the court interpreted sections 632 and 633.5. Kay Parra was a long-time client of

25. *Id.*

26. See Request for Domestic Violence Restraining Order, Cal. Form DV-100 (2014), available at <http://www.courts.ca.gov/documents/dv100.pdf>; Restraining Order After Hearing (Order of Protection), Cal. Form DV-130 (2014), available at <http://www.courts.ca.gov/documents/dv130.pdf>. The recording must still comply with the federal eavesdropping statute. See PENAL § 633.6(a).

27. See, *e.g.*, *Kearney v. Salomon Smith Barney, Inc.*, 137 P.3d 914 (Cal. 2006).

28. *Flanagan v. Flanagan*, 41 P.3d 575 (Cal. 2002).

29. *Id.* at 575.

30. *Kearney v. Salomon Smith Barney, Inc.*, 137 P.3d 914, 914 (Cal. 2006).

31. *Id.* at 929.

32. *People v. Parra*, 165 Cal. App. 3d 874 (1st Dist. 1985).

attorney Lloyd Haines. Parra had worked in various capacities for Haines, including painting his house.³³ Haines returned from vacation to find his home burglarized. He called the police and also contacted Parra, thinking Parra might be able to locate the stolen property.³⁴ Haines gave Parra \$4,000 to buy back the stolen property. Parra did not return the money, and avoided Haines' efforts to contact her. Eventually, Parra sent a letter accusing Haines of a robbing and battering Parra, and threatening Haines with violence.³⁵ Finally, a call was placed to Parra, the conversation was recorded, during which Parra admitted receiving the \$4,000 from Haines, Parra was charged with theft of the \$4,000.³⁶

The prosecutor offered the recording of the telephone call, in which Parra admitted receiving the money, and Parra objected based on Section 632.³⁷ The trial court admitted the recording, and the appellate court affirmed.³⁸ The Court of Appeals began by noting that under Section 632, "It is settled in California that the intentional electronic recording of a confidential telephone communication without the consent or knowledge of all parties to such communication is illegal...."³⁹ The facts of this case, however, met the requirements of Section 633.5, which allows surreptitious recording "for the purpose of obtaining evidence reasonably believed to relate to the commission by another party to the communication of...any felony involving violence against the person...." In her letter to Haines, Parra threatened violence, thus authorizing Walker to record his call to Parra, in order to obtain evidence related to the violence.⁴⁰

A victim of domestic violence who surreptitiously records a conversation with an abuser can rely on *People v. Parra* and Section 633.5 to justify the recording when she reasonably believes recording is necessary to obtain evidence of any violent felony against her. A history of domestic violence supplies the necessary reasonable belief.

FEDERAL AND STATE EAVESDROPPING LAWS

Congress has passed a plethora of laws dealing with wiretapping

33. *Id.* at 876.

34. *Id.* at 877.

35. *Id.*

36. *People v. Parra*, 165 Cal. App. 3d 879 (1st Dist. 1985).

37. *Id.* 878.

38. *Id.*

39. *Id.* at 878.

40. At trial, Walker testified that he recorded the call to Parra because she had threatened him with violence. *Id.* at 877.

and eavesdropping.⁴¹ Most federal laws concern conduct by law enforcement and national security officials. One provision, however, 18 U.S.C. § 2511, forbids eavesdropping by private citizens.⁴² Under the federal eavesdropping law, an individual who is not acting under color of law, *i.e.*, a private individual, who is a party to a communication, may record the communication without consent of the other party. Section 2511(2)(d) specifies that it is not a violation of the federal eavesdropping statute for one side of a communication to record the communication.⁴³ Thus, the federal eavesdropping statute is a one-party consent statute: only one party needs to consent to the recording.⁴⁴

All states have some type of eavesdropping law, and like the federal law, the majority of states have one-party consent laws.⁴⁵ As the California Supreme Court put it in *Kearney v. Salomon Smith Barney, Inc.*,⁴⁶ “Privacy statutes in a majority of states (as well as the comparable federal provision)...prohibit the recording of private conversations except with the consent of one party to the conversation.”⁴⁷ California, like a handful of other states, is a two-party consent state:⁴⁸ In Califor-

41. See, CLIFFORD S. FISHMAN & ANNE T. MCKENNA, *WIRETAPPING & EAVESDROPPING: SURVEILLANCE IN THE INTERNET AGE* (3d ed. 2012).

42. 18 U.S.C. § 2511 (2014).

43. 18 U.S.C. § 2511(2)(d) provides: “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 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.”

44. See, *People v. Otto*, 831 P.2d 1178, 1183 (Cal. 1992) (referring to the federal law, the California Supreme Court wrote, “[O]ne party may record a conversation without the knowledge or consent of the other party, or may authorize another to do so.”).

45. See KRISTEN RASMUSSEN, JACK KOMPERDA, & RAYMOND BALDINO, REP. COMM. FOR FREEDOM OF THE PRESS, *REPORTER’S RECORDING GUIDE: A STATE-BY-STATE GUIDE TO TAPING PHONE CALLS AND IN-PERSON CONVERSATIONS 2* (2012), available at <http://www.rcfp.org/rcfp/orders/docs/RECORDING.pdf>. (“Thirty-eight states and the District of Columbia permit individuals to record conversations to which they are a party without informing the other parties that they are doing so.”).

46. *Kearney v. Salomon Smith Barney, Inc.*, 137 P.3d 914 (Cal. 2006).

47. *Id.* at 932.

48. See Rasmussen et al., *supra* note 45 (“Twelve states require, under most circumstances, the consent of all parties to a conversation. Those jurisdictions are California, Connecticut, Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, Pennsylvania and Washington.”).

Illinois is a two-party consent state. In *People v. Coleman*, the Illinois Supreme Court wrote:

nia, both sides of the communication must consent to recording.⁴⁹

CALIFORNIA'S EAVESDROPPING LAW ENDANGERS VICTIMS OF DOMESTIC VIOLENCE

In many domestic violence cases, the most powerful evidence of abuse is the angry telephone call or the heated face-to-face confrontation, where the abuser thinks the only one listening is the victim.⁵⁰ It is in these circumstances that the full extent of the abuser's fury is on display.

In court, the victim is free to repeat what the abuser said, but if the abuser denies it – which they will – it is the victim's word against the abuser's. The victim needs the recording to prove what really happened. A recording is far and away the best evidence, yet, if the recording violates the eavesdropping law, it is inadmissible. This dilemma does not arise under federal eavesdropping law because the federal law requires only one party to consent to recording, nor does it arise in states following the federal model. The dilemma is acute and potentially deadly in California, where both parties must consent to record confidential communications.

Return to Nancy and Ken, and consider the impact of Penal Code Section 632 on Nancy's quest for a DVRO. As you recall, Nancy recorded two communications with Ken, the late-night telephone call, in which Ken said, "I should kill you now for ruining my life," and the profanity-laced confrontation with Nancy's husband in front of Starbucks. Ken's lawyer would argue that both violate Section 632 and are inadmissible.

Nancy must somehow shoehorn the recordings into the eavesdropping law. As for the telephone call, Nancy has two arguments, both from Section 633.5. First, Section 633.5 allows recording of a confidential communication to obtain evidence reasonably believed to relate to a felony involving violence.⁵¹ A threat to kill certainly qualifies. Moreo-

Congress intended to pre-empt this area, but specifically permitted concurrent state regulation... That is, states may adopt standards more stringent than those in title III...The Illinois General Assembly has enacted a rigorous eavesdropping statute, which prohibits recording conversations unless all the parties consent or one party consents and prior judicial authorization is obtained.

People v. Coleman, 882 N.E.2d 1025, 1029 (Ill. 2008).

49. CAL. PENAL CODE § 632(a) (2014). See People v. Windham, 145 Cal. App. 4th 881, 883 (1st Dist. 2007)(the California privacy law differs from federal law "in that it forbids wiretapping . . . unless *all* parties to a communication consent, while [federal law] permits a conversation to be intercepted or recorded where only *one* person has consented.")(emphasis in original).

50. The abuser's words may themselves constitute abuse (e.g., threats – "I'll kill you"). Often, the abuser's words corroborate the victim's testimony, lending support for her testimony describing physical or other abuse.

51. PENAL § 633.5.

ver, the fact that Ken physically abused Nancy in the past – he punched and choked Nancy and threw three-year-old Ann against a wall – is relevant to the reasonableness of Nancy’s belief in the need to record the call.

Nancy’s second argument is Section 633.5’s language allowing recordation to gather evidence of a violation of Section 653m. Section 653m criminalizes telephone calls made with the intent to annoy, and employing obscene language or threats to injure the person called or members of the person’s family.⁵² Again, the threat to kill suffices.

In the end, Nancy should succeed against Ken’s Section 632 challenge to the phone call. However, the early morning confrontation in front of Starbucks is another story. Section 653m does not apply because it only concerns phone calls.⁵³ Nancy’s best argument under Section 632 is that the Starbucks encounter was not confidential because it occurred on a public street. Further, thirteen-year-old Ann was present, and the presence of third parties generally destroys any expectation of confidentiality. Ken can counter that he spoke so as not to be overheard by others, and, given the early hour, there were no passersby to listen in. The court will have to resolve this factual dispute. Interestingly, the best way to resolve the issue is to listen to the recording.

Nancy should not have to go through these machinations to get the recordings into evidence, nor should other victims. In domestic violence litigation – civil and criminal – recordings that are relevant to proving domestic violence should *always* be admissible.⁵⁴ The California Legislature needs to amend the eavesdropping statute to this end. The next section suggests ways to accomplish this goal.

AMENDING CALIFORNIA’S EAVESDROPPING LAW

There are several ways to amend the eavesdropping law to better protect victims of domestic violence. Any amendment should pave the way for recordings that are relevant to proof of domestic violence. One option is adding the following subsection to Section 632:

(g) This section does not apply to any recording, whether audio, visual,

52. *Id.* at §§ 633.5, 653m.

53. The relevant language states, “Every person who, with intent to annoy, telephones or makes contact by means of an electronic communication device with another....” *Id.* at § 653m.

54. “Always” is pretty strong, so let’s temper “always” with, unless some rule of evidence or constitutional provision requires exclusion.

or both, made by or at the request of a person who is or who becomes the complaining party or victim in civil or criminal litigation regarding allegations of domestic violence as defined in Section 6211 of the Family Code.

The proposed subsection is simple: It lifts recordings by domestic violence victims out of the eavesdropping statute. The proposal is narrowly tailored so as not to undermine the eavesdropping statute outside the context of domestic violence.

The language “or at the request of a person” is necessary because cases arise where victims need someone else to make the recording, because it may not be safe for the victim to meet face-to-face with the abuser. Allowing the victim to designate another to push “record” enhances victim safety. Recall Nancy and Ken, on the way to Starbucks in Bakersfield. Nancy asked her husband to record the exchange with Ken because Ken “seemed out of control.”

Another solution is to adopt one-party consent for the recording of communications relevant to domestic violence, while retaining two-party consent for other communications. The following language would accomplish this end:

§ 632. Eavesdropping on or recording confidential communications

(a) Except as provided in subdivision (g), every person who intentionally and without the consent of all parties to a confidential communication...

(g) It shall not be unlawful under this section, or under any other provision of law, for a person who is or who becomes the complaining party or victim in civil or criminal litigation regarding allegations of domestic violence as defined in Section 6211 of the Family Code, to record one or more communications that the person reasonably believes to be relevant to the domestic violence of which the person is a victim. The person may designate another person to make the recording or recordings authorized by this subsection.⁵⁵

WHILE YOU'RE AT IT, ADOPT THE VICARIOUS CONSENT RULE

Gearing up to improve California's privacy law, as described above, affords an excellent opportunity to kill two birds with one stone. The Legislature should adopt the “vicarious consent rule” approved by many courts.⁵⁶ The vicarious consent rule (VCR) creates an exception to the

55. The federal eavesdropping law approves such authorization. *See* *People v. Otto*, 831 P.2d 1178, 1183 (Cal. 1992) (referring to the federal law, the California Supreme Court wrote, “[O]ne party may record a conversation without the knowledge or consent of the other party, or may authorize another to do so.”).

56. *See, e.g., Commonwealth v. F.W.*, 986 N.E.2d 868 (Mass. 2013); *State v. Whitner*, 732 S.E.2d 861 (S.C. 2012).

federal wiretapping law, allowing parents to surreptitiously record communications between their children and third parties. Without VCR, such recording would violate federal law. The United States District Court for the District of Utah was the first to articulate VCR with its decision in *Thompson v. Dulaney*.⁵⁷ The District Court explained:

[A]s 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 duty to act in the best interests of the children.⁵⁸

Can anyone argue that adoption of VCR would not be good public policy for California?

CONCLUSION

California's eavesdropping law was enacted in 1969 for the laudable purpose of protecting privacy. The Legislature's primary focus was curbing abuses by law enforcement and commercial enterprises.⁵⁹ The 1960s preceded the national awakening to the prevalence and seriousness of domestic violence, an awakening that gained traction in the 1970s. It is fair to say that domestic violence was not on the minds of legislators crafting the original eavesdropping law.⁶⁰ As a consequence, the original law often disserves the interests of victims and the search to truth in domestic violence litigation. The Legislature can remedy this problem with the simple "fix" suggested above, all without compromising the overall goal of protecting privacy.

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

58. *Id.* at 1544.

59. See Lee Ashley Smith, Note, *The Admissibility of Tape Recordings in Criminal Trials Involving Domestic Disputes: California's Proposition 8 and Title III of the Federal Omnibus Crime Control and Safe Streets Act*, 15 HASTINGS WOMEN'S L. J. 217, 218 (2004).

60. The author, Ms. Smith, observed, "Familial and other domestic cases of eavesdropping and wiretapping pose a special problem to sets of laws that were initially designed to govern police misconduct or occasional political and business-related espionage." *Id.* at 219.