SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Health Matrix: The Journal of Law-Medicine

Volume 5 | Issue 2

1995

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COVERT VIDEO SURVEILLANCE OF MUNCHAUSEN SYNDROME BY PROXY: THE EXIGENT CIRCUMSTANCES EXCEPTION

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I. INTRODUCTION AND DEFINITION

MUNCHAUSEN SYNDROME BY PROXY (MSBP)[1] is a form of child abuse in which a parent, most often a mother,[2] fabricates or induces illness in a child in order to gain medical attention. The term Munchausen Syndrome is named for the Baron Karl von Munchausen, who traveled widely and told fanciful tales of his adventures. The term is used to describe persons who intentionally produce or feign physical or psychological symptoms with the motivation of assuming the

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The author wishes to acknowledge Dr. Bernard Kahan for many years of collaboration regarding the clinical aspects of detection of MSBP, Vicky Gribble, pediatric nurse and graduate research assistant enrolled in the College of Law at Georgia State University, and the dedicated staff of Scottish Rite Children's Medical Center in Atlanta, GA.

1. *See* AMERICAN PSYCHIATRIC ASS'N., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 725 (4th ed. 1994) [hereinafter DSM IV] (classifying Munchausen Syndrome by Proxy under the heading of Factitious Disorders by Proxy). While Factitious Disorder by Proxy (FDP) is the currently correct title, this article uses the term Munchausen Syndrome by Proxy because it is so widely used in the literature. *See also* Roy Meadow, *Munchausen Syndrome by Proxy: The Hinterland of Child Abuse*, THE LANCET, Aug. 13, 1977, at 343 (addressing use of the term *Munchausen Syndrome by Proxy* to label mothers who make their children ill).

2. Donna A. Rosenberg, *Web of Deceit: A Literature Review of Munchausen Syndrome by Proxy*, 11 CHILD ABUSE & NEGLECT 547, 555 (1987) (finding that 98% of abusers are biologic mothers and 2% are adoptive mothers). A survey by protective service workers conducted in 1991 found 77 suspected cases of MSBP in which 90% of perpetrators were mothers, 1.4% were fathers, 4.3% were foster/surrogate mothers, 2.9% were grandmothers, and 1.4% were babysitters. Bernard Kahan & Beatrice Crofts Yorker, Unpublished Survey of Protective Services Workers, Georgia State University (1991) (on file with the author).

sick role.[3] When a person exhibits illness fabrication with a dependent in their care, rather than themselves, the term "by proxy" is applied. There are over two hundred documented case studies of MSBP.[4] The vast majority of published cases are in pediatric, psychiatric, and medical journals, with less than ten articles in the legal literature.[5]

There are numerous obstacles to intervention in MSBP cases.[6] First, there is a general lack of awareness on the part of health professionals of the possibility that an illness may have been intentionally produced.[7] Second, the mothers who engage in falsifying their child's illness are described as exemplary mothers, quite contrary to the typical child abuse perpetrator.[8]

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3. Richard Asher, *Munchausen's Syndrome*, THE LANCET, Feb. 10, 1951, at 339-41.

4. Rosenberg, *supra* note 2, at 552 (reviewing 117 published cases). Additional cases were described in clinical studies presented by Judith Libow of Children's Hospital in Oakland, California at the Division of Family and Children's Health Services Social Services Conference in Atlanta, Georgia in January, 1995, and Catherine Ayoub of Massachusetts General Hospital in Boston, Massachusetts at the American Professional Association on the Abuse of Children, in San Diego, California, also in January, 1995.

5. *See* Bernard Kahan & Beatrice Crofts Yorker, *Munchausen Syndrome by Proxy: Clinical Review and Legal Issues*, 9 BEHAVIORAL SCI. & L. 73, 78 (1991) (noting that psychiatric diagnostic systems sometimes do not even include classification of MSBP); Robert Kinscherff & Richard Famularo, *Extreme Munchausen Syndrome by Proxy: The Case for Termination of Parental Rights*, 40 JUV. & FAM. CT. J. 41 (1991); Beatrice Crofts Yorker & Bernard Kahan, *The Munchausen Syndrome by Proxy Variant of Child Abuse in the Family Courts*, 42 JUV. & FAM. CT. J. 51 (1991). *See also* Stephen J. Boros & Larry C. Brubaker, *Munchausen Syndrome by Proxy: Case Accounts*, 61 FBI L. ENFORCEMENT BULL., June 1992, at 16, 20 (articulating the warning signs of MSBP in an effort to help law enforcement officers identify perpetrators and aid the victims); Kathryn A. Hanon, *Child Abuse: Munchausen's Syndrome by Proxy*, 60 FBI L. ENFORCEMENT BULL., Dec. 1991, at 8, 8-11 (discussing general symptoms and characteristics of MSBP). For a review of the British legal literature, see Barbara Mitchels, *Munchausen Syndrome by Proxy: Protection or Correction*, 23 NEW L.J. 105 (1983); Catherine Williams, *Munchausen Syndrome by Proxy: A Bizarre Form of Child Abuse*, 16 FAMILY LAW 32, 33 (1986) (advocating the wardship of children in MSBP as it allows for the removal of children from the mother in an emergency upon showing risk or harm); Catherine Williams & Vaughan T. Bevan, *The Secret Observation of Children in Hospitals*, THE LANCET, Apr. 2, 1988, at 700 (discussing justifications for surveillance of MSBP patients). *See also* Melissa Searle, *Munchausen Syndrome by Proxy: A Guide for California Attorneys*, 10 W. ST. L. REV. 393, 397 (1993) (discussing Rosenberg's study).

6. *See, e.g.*, David. A. Waller, *Obstacles to the Treatment of Munchausen by Proxy Syndrome*, 22 J. AM. ACAD. CHILD PSYCHIATRY 80-85, 80 (1983) (outlining the obstacles to adequate assessment and care for a child).

7. Herbert Schrier & Judith Libow, HURTING FOR LOVE: MUNCHAUSEN BY PROXY SYNDROME 42 (1993) (discussing a variety of barriers to intervention and stating that the possibility that intentional and deceptive acts could be a cause of confusing or recurrent symptoms is simply not part of the mindset of the average physician).

8. One of the hallmark warning signs of MSBP is that the perpetrator mothers are described as competent, caring, and totally devoted to their children. *Id.* at 16.

Third, it is difficult to obtain evidence of a parent secretively producing symptoms.[9] Finally, the courts are reluctant to believe that this form of symptom production is potentially lethal to a child.[10]

The spectrum of MSBP includes "help-seekers," "doctor addicts," and "active inducers."[11] The first type covers anxious mothers who cannot be reassured that their child is not ill. They may exaggerate or lie about their child's symptoms in order to continue getting the doctor's attention. In the second group, some perpetrators will actually fabricate symptoms, sometimes adding their own menstrual blood to the child's urine, stool, or gastric content laboratory specimens.[12] Such fabrication results in numerous unnecessary diagnostic procedures. Most MSBP victims are subjected to frequent and prolonged hospitalizations that are injurious to the child because they interfere with normal peer relationships and contribute to the child's self-concept as a chronically ill patient.[13] The most dangerous type of MSBP perpetrator is the parent who actually produces symptoms in a child. However, even the perpetrators who fabricate or exaggerate symptoms are also considered harmful as any needle-stick, surgery, or insertion of tubes into the rectum, urethra, esophagus, or bronchus that is not absolutely medically justified constitutes child abuse. Examples of "active inducers"[14] include mothers who smother or asphyxiate a child to produce apnea, or remove blood from intravenous tubing to cause anemia, inject a child with medications to pro-

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9. The *Diagnostic & Statistical Manual of Mental Disorders IV* states that "the type and severity of signs and symptoms [of MSBP] are limited only by the medical sophistication and opportunities of the perpetrator. Cases are often characterized by an atypical clinical course in the victim, and inconsistent laboratory test results that are at variance with the seeming health of the victim." DSM IV, *supra* note 1, at 725.

10. *See, e.g.*, Kinscherff & Famularo, *supra* note 5, at 47.

11. *See* Judith A. Libow & Herbert A. Schrier, *Three Forms of Factitious Illness in Children: When is It Munchausen Syndrome by Proxy?*, 56 AM. J. ORTHOPSYCHIATRY 602, 604-09 (1986) (giving examples of the three types of MSBP).

12. *See* Meadow, *supra* note 1, at 344 (describing how mothers fabricate their child's symptoms).

13. Tona L. McGuire & Kenneth W. Feldman, *Psychologic Morbidity of Children Subjected to Munchausen Syndrome by Proxy*, 83 PEDIATRICS 289, 292 (1989) (describing how MSBP victims often adopt Munchausen Syndrome behavior later in life).

14. Libow & Schrier, *supra* note 11, at 606 (noting that "active inducers" are both the most described and sensational of MSBP cases).

duce a variety of symptoms, poison a child, or introduce infectious agents into the skin, tissue, or bloodstream.[15]

Evidence that a parent is causing or fabricating the child's illness is very difficult to obtain since the symptom production is done quite secretively. Successful methods of obtaining evidence against the mother include toxicologic studies that reveal medications not prescribed by the doctor or other toxic agents. Eyewitness accounts of the perpetrators' actions also provide direct evidence. The most compelling form of circumstantial evidence in MSBP cases is improvement of the child's condition upon separation from the mother.[16] Additionally, expert testimony regarding MSBP has aided criminal prosecutions and juvenile custody proceedings in determining that the mother was causing the child's illness.[17] One of the most effective ways of detecting active induction of symptoms is through covert video surveillance in the child's hospital room.[18]

Hospital personnel have obtained evidence of many such activities through surreptitious video surveillance. For instance, one video shows a mother who has brought her child to the emergency room on repeated occasions for apnea reaching over the side of the crib, placing her hand over the infant's mouth and nose while the infant struggles.[19] Another video shows a mother looking over her shoulder into the hallway, taking a piece of plastic wrap out of her purse, and repeatedly placing it over her child's mouth and nose until the nursing staff intervenes.[20] Another video shows an eighteen-month-old boy hospitalized for recurrent bouts of severe diarrhea who did not improve until the mother was convinced to leave the hospital and

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15. Asher, *supra* note 3, at 552 (noting that the three most recurrent symptoms prior to death are apnea, decreased level of consciousness, and bleeding).

16. Beatrice Crofts Yorker, *Legal Issues in Factitious Disorder by Proxy, in* THE SPECTRUM OF FACTITIOUS DISORDERS (Marc Feldman & Stuart Eisendrath eds.) (forthcoming 1996).

17. *See, e.g.*, People v. Phillips, 122 Cal. App. 3d 69, 79 (Cal. Ct. App. 1981) (describing expert witness' testimony regarding MSBP behavior by a mother who deliberately added a sodium compound into the food of each of her children which resulted in poisoning).

18. Martin P. Samuels & David P. Southall, *Munchausen Syndrome by Proxy*, 47 BRIT. J. HOSP. MED. 759, 760 (1992) (arguing that video recordings made without the parent's knowledge provides the most definitive evidence of MSBP).

19. *See* Carol L. Rosen et al., *Two Siblings With Recurrent Cardio-Respiratory Arrest: Munchausen Syndrome by Proxy or Child Abuse?*, 71 PEDIATRICS 715, 715-20 (1983) (describing two case studies of parentally induced cardio respiratory arrest).

20. *Dateline NBC* (NBC television broadcast, Dec. 29, 1992).

spend some time at home away from the child. Within twenty-four hours of the mother's return to the hospital, she was observed twice squirting the contents of a syringe in the child's mouth. Hospital security searched the room and found empty syringes and containers of castor oil, milk of magnesia, phenobarbital elixir, and other drugs that were completely contraindicated for the child's care.[21] Still another video shows a mother sticking her finger down her own throat in the bathroom, and then returning to her child's crib carrying a partially filled emesis basin, only to call the nurse into the room, stating that the child had just thrown up.[22] The author has personally observed a videotape that showed a mother rinsing a thermometer under running water, then calling in the nurse to read an elevated temperature.[23] Videotaped evidence has been used to both confront the mothers with evidence of their harmful behavior and to convince protective service workers that these children had been abused.

Health care personnel are eager for legal guidance regarding the best way to obtain evidence of this form of child abuse. There is currently no case law regarding the admissibility of covert video surveillance in the prosecution of MSBP cases. This Article will analyze the constitutional provisions relating to search and seizure, review anti-wiretapping legislation, and discuss related case law.

II. CONSTITUTIONAL PROVISIONS

The Fourth Amendment of the United States Constitution reads:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation,

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21. Mark A. Epstein et al., *Munchausen Syndrome by Proxy: Considerations in Diagnosis and Confirmation by Video Surveillance*, 80 PEDIATRICS 220, 221 (1987) (presenting one incident to illustrate the characteristics of MSBP).

22. American Health Consultants, *Munchausen Syndrome by Proxy*, HOSP. RISK MGMT., Mar. 1993, at 33, 40 (discussing hospitals' duty to protect pediatric patients from abusive parents).

23. This surveillance video was viewed in preparation for a Juvenile Court hearing in Cobb County, Georgia.

> and particularly describing the place to be searched, and the persons or things to be seized.[24]

With the advent of electronic wiretapping technology, the courts have recognized the potential for surreptitious eavesdropping to violate the securities outlined in the Fourth Amendment.[25] The landmark case of *Katz v. United States* defines governmental electronic surveillance as a "search" under the Fourth Amendment if it violates an individual's "reasonable expectation of [p]rivacy."[26] In reversing it's earlier scope of Fourth Amendment protection that had been limited to an owner's private property, the Supreme Court in *Katz* extended the Fourth Amendment protection to "people, not places."[27] This concept was further expanded into a two-pronged test articulated in *Smith v. Maryland*.[28] The two-pronged test requires that first, a person must have "exhibited an actual (subjective) expectation of privacy," and second, that the expectation must be "one that society is prepared to recognize as 'reasonable.' "[29]

In *United States v. White*, the Supreme Court further clarified the "expectation of privacy" test by allowing the use of evidence obtained by electronic surveillance with the consent of only one party.[30] The lack of privacy expected by an individual who talks to an informant may be analogized to MSBP

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24. U.S. CONST. amend. IV.

25. *See* Kent Greenfield, *Cameras in Teddy Bears: Electronic Visual Surveillance and the Fourth Amendment*, 58 U. CHI. L. REV. 1045, 1047 (1991) (summarizing Justice Brandeis' dissent that the unregulated use of technology endangers the public's "right to be let alone — the most comprehensive of rights and the right most valued" by "civilized" people, and asserting that electronic video surveillance (EVS) allows for the absolute infringement of privacy). *See also* Olmstead v. United States, 277 U.S. 438, 478-79 (1928), (Brandeis J., dissenting) *overruled by* Berger v. New York, 388 U.S. 41 (1967) (stating that the wiretapping of a defendant's phone by federal officers is an unlawful invasion of privacy which violates the Fourth Amendment).

26. Katz v. United States, 389 U.S. 347, 352-35 (1967) (holding that unreasonable searches of telephone interceptions are prohibited because individuals have a "reasonable expectation of privacy" during a phone conversation, even when conducted from a public phone booth).

27. *Id.* at 351 (asserting that what an individual seeks to maintain as private "even in an area accessible to the public may be constitutionally protected").

28. 442 U.S. 735, 740 (1979) (holding that the Fourth Amendment applies only where the individual can claim a "legitimate expectation of privacy" violated by government action).

29. *Katz*, 389 U.S. at 361 (Harlan, J. concurring).

30. 401 U.S. 745, 748-49 (1971) (stating that there is no constitutionally protected expectation that a person with whom he or she is conversing will not relay the conversation to the police).

cases. Without electronic surveillance, information gained by any informant is admissible; "[i]n these circumstances, 'no interest legitimately protected by the Fourth Amendment is involved,' " for the Fourth Amendment affords no protection to "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal [the information]."[31] The majority believed that simply taping an informant's conversation did not substantially alter one's expectation of privacy.

Justice Douglas vehemently dissented:

> Electronic surveillance is the greatest leveler of human privacy ever known. How most forms of it can be held "reasonable" within the meaning of the Fourth Amendment is a mystery. To be sure, the Constitution and Bill of Rights are not to be read as covering only the technology known in the 18th century. Otherwise its concept of "commerce" would be hopeless when it comes to the management of modern affairs. At the same time the concepts of privacy which the Founders enshrined in the Fourth Amendment vanish completely when we slavishly allow an all-powerful government, proclaiming law and order, efficiency, and other benign purposes, to penetrate all the walls and doors which men need to shield them from the pressures of a turbulent life around them and give them the health and strength to carry on.[32]

This interpretation of electronic eavesdropping as a "search" in Fourth Amendment terms means that the warrant requirements apply, and evidence obtained without a warrant is subject to the exclusionary rule.[33] To be valid, a search warrant requires a finding of "probable cause" by a neutral magistrate who confirms that the warrant states with particularity the area to be searched and the items to be found. Further, there must be "a 'substantial basis for conclud[ing]' that a search [will] uncover evidence of wrongdoing."[34]

The Supreme Court has recognized exceptions to this general rule for a search warrant. These exceptions have been up-

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31. *Id.* at 749 (quoting Hoffa v. United States, 385 U.S. 293, 302 (1966)).

32. *Id.* at 756 (Douglas, J., dissenting) (asserting the need for a "strict construction" of the Fourth Amendment).

33. *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961) (holding that any evidence obtained by an unconstitutional search or seizure is inadmissable in state court).

34. Illinois v. Gates, 462 U.S. 213, 236 (1983) (alteration in original) (citing Jones v. United States, 362 U.S. 257, 271 (1960), which provided the traditional standard for reviewing the issuance of search warrants).

held in "exigent circumstances," such as when a suspect is believed to soon destroy the evidence.[35] Similarly, if there is a concern that persons may be in danger, a warrantless search is justified.[36] Other courts have emphasized that the exigent circumstances exception generally involves an imminent or "immediate" threat to human life.[37]

Although the Fourth Amendment does not specify the exclusion of evidence seized by government agents, in 1914 the Court held in *Weeks v. United States* that evidence obtained through an unlawful search and seizure by federal agents could not be admitted in federal criminal trials.[38] Then, in *Burdeau v. McDowell*, the Supreme Court narrowed this holding, finding that evidence obtained in an illegal search was not excluded from trial when obtained by a private party.[39] Despite Judge Brandeis' indignation at the Court's failure to sanction illegal acts,[40] the majority "reasoned that the drafters of the Constitution never intended to restrain the activities of individuals who are not employed by the government."[41] Simply stated, the exclusionary rule has no impact upon individuals whose search is motivated by purely personal reasons since it was intended to

35. Cupp v. Murphy, 412 U.S. 291, 292 (1973) (upholding the collection of evidence without a warrant where the defendant refused to allow the police to scrape what appeared to be blood from his finger because of the high probability that the blood would be removed while a warrant was obtained).

36. *See, e.g.*, Michael Janofsky, *A Judge Upholds Evidence Seized at Simpson Home*, N.Y. TIMES, July 8, 1994, at A1 (describing the ruling that a warrantless search of O.J. Simpson's home was justified by the brutal nature of the crimes and the reasonable belief that people inside the home could be in danger).

37. U.S. v. Costa, 356 F. Supp. 606, 611-12 (D.D.C. 1973) (finding that since narcotics do not present an immediate danger to the public or to police, the exigent circumstances exception is inapplicable).

38. 232 U.S. 383, 398 (1914) (finding prejudicial error where a federal court admitted letters into evidence that had been transferred by federal agents in violation of the defendant's Fourth Amendment rights).

39. 256 U.S. 465, 475 (1921) (noting that the history and origin of the fourth Amendment should apply to government agents and not private actors).

40. *Id.* at 477 (Brandeis J., dissenting) (asserting that failure to sanction illegal acts will undermine the public's respect for the law).

41. *Id.* at 475. *See* Austin A. Andersen, *The Admissibility of Evidence Located in Searches by Private Persons*, 58 FBI L. ENFORCEMENT BULL., Apr. 1963, at 15 (noting the majority's reasoning that the Constitution was intended solely to restrain governmental actors).

deter overzealous police officers from conducting illegal searches and seizures.[42]

Immunity of private parties from the exclusionary rule has evolved through the years, providing guidance on a number of issues. In *Torres v. State*, a burglar allegedly broke into the defendant's apartment and found child pornography depicting the defendant engaged in illegal acts with a three-year-old child.[43] This information was sent anonymously to the police and was found admissible in court because of the defendant's inability to prove that the anonymous burglar had acted in concert with the police.[44] A review of cases in which there was some degree of governmental involvement with the search illustrates that searches governed by the Fourth Amendment rest on issues such as who initiates the search[45] and who controls the search.[46] In *Gold v. United States*, the Ninth Circuit held that the government must explicitly instigate the search for the exclusionary rule to apply.[47]

III. CASE LAW REGARDING "REASONABLE EXPECTATIONS OF PRIVACY" AND VIDEO SURVEILLANCE

The Framers of the Constitution undoubtedly never envisioned the technological capabilities available in the 1990s to record and electronically communicate activities that were easily kept private in the 1700s. Justice Brennan's dissent in *Lopez v. United States*,[48] which later became the philosophy of the Court in *Katz*, states: "Electronic aids add a wholly new di-

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42. Anderson, *supra* note 41, at 25-26 (describing the Court's reasoning that the exclusionary rule is not among the private remedies for private actors who unlawfully obtain evidence).

43. 442 N.E. 2d 1021, 1023 (Ind. 1982).

44. *See* Andersen, *supra* note 41, at 26 (discussing *Torres*). *See also* State v. Dold, 722 P.2d 1353, 1356 (Wash. Ct. App. 1986) (placing the burden of proof for showing collusion between the police and the citizen-informant on the defendant).

45. *See* United States v. Walther, 652 F.2d 788, 793 (9th Cir. 1981) (holding the Fourth Amendment applicable where the government "knowingly acquits and encourages directly or indirectly a private citizen" to initiate a motion if the citizens' sole motivation to act is the expectation of a reward).

46. *See* State v. Cox, 674 P.2d 1127, 1130 (N.M. Ct. App. 1983) (holding the Fourth Amendment applicable for a search conducted by the joint effort of private and governmental actors).

47. 378 F.2d 588, 591 (9th Cir. 1967) (holding a search warrant unnecessary where airline agents initiate and conduct a search for their own purposes).

48. 373 U.S. 427, 446 (1963) (Brennan, J., dissenting).

mension to eavesdropping. They make it more penetrating, more indiscriminate, more truly obnoxious to a free society. Electronic surveillance, in fact, makes the police omniscient; and police omniscience is one of the most effective tools of tyranny."[49] Interestingly, these strong words were written long before the advent of electronic video surveillance (EVS).

Kent Greenfield discusses the relationship between the Supreme Court cases about wiretapping technology and the potential for further electronic surveillance capabilities.[50] In *Berger v. New York*,[51] the Court reviewed various kinds of "sophisticated electronic devices" available at the time and those capable of eavesdropping on anyone in almost any given situation."[52] The Supreme Court has yet to rule on the admissibility of EVS, as distinct from wiretapping technology; however, many lower federal courts have entertained discussions regarding EVS. As Judge Posner of the Seventh Circuit stated, "television surveillance is exceedingly intrusive . . . and inherently indiscriminate, and . . . could be grossly abused to eliminate personal privacy as understood in modern Western nations."[53] The judicial decisions rendered thus far permitting or excluding video surveillance evidence provide some parameters within which to judge covert video surveillance of MSBP.

A. Video Surveillance of Public Areas or "In Plain View"

It has long been established that surveillance of areas that are visible to the public eye are admissible under the "plain view" doctrine.[54] For example, video surveillance tapes of suspected gambling activities conducted in various locations in two Detroit bars over a period of 152 days were admitted as evi-

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49. *Id.* at 466.

50. Greenfield, *supra* note 25, at 1057-77.

51. 388 U.S. 41, 46-47 (1967) (distinguishing wiretaps from the sophisticated electronic devices called "bugs").

52. Greenfield, *supra* note 25, at 1049 (noting that "the Court was astute in starting its analysis this way, for the measure of danger to Fourth Amendment interests is not capped by the level of technology actually used in any specific case, but by the technology that government *could* bring to bear").

53. United States v. Torres, 751 F.2d 875, 882 (7th Cir. 1984), *cert. denied*, 470 U.S. 1087 (1985) (holding that the District Court was authorized to issue a warrant for video surveillance of a terrorist group's "safe house").

54. Harris v. United States, 390 U.S. 234, 236 (1968) (holding that a registration card from a stolen car that fell into the plain view of a police officer is admissible into evidence).

dence to show that several Detroit police officers maintained contact with a known criminal.[55] The video surveillance camera was placed in a hole in the wall between one of the bars and the adjoining space rented by the police.[56] In its decision to admit the electronic evidence, the court reasoned:

> The Anchor Bar is a public tavern. Therefore, people in the bar must expect to be observed by those members of the public who patronize the bar. A video tape machine, insofar as it photographs only, is merely making a permanent record of what any member of the general public would see if he entered the tavern as a patron. Accordingly, to photograph Sergeant Rickard's presence in the bar did not violate his "reasonable expectations of privacy." The Fourth Amendment protects only "reasonable expectations of privacy."[57]

The circumstances of the following 1983 case are particularly relevant to determining the expectation of privacy in a hospital room. In *State v. Abislaiman*,[58] a hospital security system placed security cameras on the top of light poles in the hospital parking lot. An off-duty police officer was hired to work with security personnel and monitor the security cameras from a room containing remote control equipment. The defendant in the case drove into the parking lot and remained in the car. The security officer used the zoom lens of the camera to look directly into the front seat of the car whereby he observed the defendant rolling an unidentifiable substance into a cigarette wrapper and removing a gun from his waistband. The officer approached the car and asked the occupant to step out. The officer then seized the gun, a small bag of marijuana, and some quaaludes which were visible in the car.[59] The Third District Court of Appeals reversed the trial court's order to suppress the physical evidence. Judge Nesbitt, writing for the majority, provided perhaps the most cogent rationale regarding Fourth Amendment protection and expectations of privacy in a hospital:

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55. Sponick v. City of Detroit Police Dep't, 211 N.W.2d 674, 687 (Mich. Ct. App. 1973).

56. *Id.* The surveillance was not originally aimed at these officers; however, the agents on surveillance duty noticed these officers frequently visited the bars and appeared friendly to the primary target of the investigation. *Id.*

57. *Id.* at 687.

58. State v. Abislaiman, 437 So.2d 181, 182-83 (Fla. Dist. Ct. App. 1983).

59. *Id.* at 183.

> Because accidents and illnesses occur at all hours, a hospital's emergency room parking lot is one of the few places where one would expect a certain amount of traffic even at 2:30 a.m. . . . The hospital certainly has a right to protect its patients, employees, and property by employing reasonable security measures.[60]

Another location where no constitutionally protected expectation of privacy has been recognized is an accessible, viewable area in a place of employment. In *United States v. Felder*,[61] a hidden television camera was placed in an open work area. Investigators observed an employee stealing several government checks. The court held that the video surveillance did not intrude upon any expectation of privacy.

There are, however, limits to permissible video surveillance of public places.[62] Contrary to the permissible surveillance in *Felder*,[63] public employees do have some expectations of privacy.[64] For example, surveillance of a private office with a locked door would likely require a warrant.[65] Also, cameras located above the stalls of public restrooms to observe any illicit sexual behavior have been found to violate the "momentary occupants' expectations of privacy."[66]

B. Video Surveillance in Protected Areas

Some courts have inferred an extension of the decision in *United States v. White*,[67] which permits audiotaping with the consent of one party, to videotaping with only one party's consent. For example, an undercover agent was permitted to intro-

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60. *Id.* (finding no reasonable expectation of privacy in a hospital emergency room parking lot).

61. 572 F. Supp. 17, 19 (E.D. Pa.), *aff'd*, 722 F.2d 735 (3d Cir. 1983) (holding video surveillance of a federal government part-time employee permissible).

62. *See generally* Robert Fiatal, *Lights, Camera, Action: Video Surveillance and the Fourth Amendment* (pt. 1), 58 FBI L. ENFORCEMENT BULL., Jan. 1989, at 23 (reviewing the constitutionality of video surveillance in publicly accessible areas).

63. *Felder*, 572 F. Supp. at 19.

64. *See generally* Daniel Schofield, *Fourth Amendment Rights of Law Enforcement Employees Against Searches in their Workplace*, 56 FBI L. ENFORCEMENT BULL., July 1987, at 24 (discussing organizational policy and procedures that are consistent with Fourth Amendment requirements and also meet legitimate law enforcement objectives).

65. Fiatal, *supra* note 62, at 26 (asserting that individuals have a reasonable expectation of privacy for activities within a private, closed office).

66. *See* People v. Dezek, 308 N.W.2d 652, 655 (Mich. Ct. App. 1981) (analogizing bathroom stalls to the telephone booth cited in *Katz*).

67. 401 U.S. 745, 745 (1971).

duce evidence of a videotaped narcotics transaction from a two-way mirror in a hotel room.[68] In another case, a victim of sexual assault by her physician was permitted to introduce video evidence obtained through a hidden camera in her home.[69]

IV. LEGISLATIVE GUIDANCE

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, which was amended by the Electronic Communications Privacy Act of 1986,[70] addressed and codified suggestions by the Supreme Court for monitoring electronic audio communications as listed in *Berger v. New York*, including:[71]

(1) That the judicial official approving the electronic surveillance order certify that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;"[72]

(2) That the electronic surveillance warrant contain "a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;"[73]

(3) That the period of the electronic surveillance be no "longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days;"[74] and

(4) That the interceptions must "be conducted in such a way as to minimize the interception of communications not otherwise subject to interception."[75]

The seminal case regarding EVS is *United States v. Torres*,[76] where the Seventh Circuit upheld a district court's

68. State v. Jennings, 611 P.2d 1050, 1053 (Idaho 1980) (finding a person's expectation to privacy is no greater when being videotaped than when being tape recorded).

69. Avery v. State, 292 A.2d 728, 743 (Md. Ct. Spec. App. 1972) (finding no constitutional violation where the video transmission evidence was transmitted with the full cooperation and consent of the victim).

70. 18 U.S.C. § 2510-2521 (1988 & Supp. 1994) (defining what type of electronic surveillance may be undertaken by law enforcement officials, who must approve the surveillance, what parties may undertake the surveillance, and what types of action may be intercepted using electronic surveillance).

71. Berger v. New York, 388 U.S. 41, 46-49 (1967) (expressing concern over the pervasiveness of sophisticated electronic devices and the possible intrusiveness into individual's privacy).

72. 18 U.S.C. § 2518 (3)(c) (1988 & Supp. 1994).

73. *Id.* § 2518 (4)(c).

74. *Id.* § 2518 (5).

75. *Id.*

76. 751 F.2d 875 (7th Cir. 1984).

authorization of covert television surveillance inside an apartment used as a "safe house" for terrorists assembling bombs.[77] The court looked to Title III for guidance and incorporated the four warrant requirements listed above in their decision.[78] To date, these warrant requirements have been used by courts in the Second, Fifth, Seventh, and Tenth Circuits, in district courts in New York and California, and in New York and Maryland state courts. The Seventh Circuit, however, remains the only court to apply both the warrant requirements and the reasonableness balancing test to EVS cases.[79] The "reasonableness" balancing test weighs "privacy interests, as measured by the level of intrusion of the search, against the strength of the government interests, as measured by the availability of other evidence, and the severity of the suspected crime."[80]

Title III was enacted to protect the privacy of wire and oral communications and to provide uniform guidelines regarding interception.[81] It does not specifically address EVS. "Unlike wiretapping and eavesdropping, however, the use of videotape cameras for surreptitious observance of domestic crimes and domestic criminals in nonpublic areas is neither authorized nor prohibited by any federal statute."[82] The Second Circuit entertained a challenge to surreptitious video surveillance of private premises in *United States v. Biasucci*,[83] using Title III grounds

77. *Id.* at 883-86 (finding the four statutory provisions of Title III provide the constitutional guidelines for government authorization of covert television surveillance). For a complete discussion of the *Torres* construction of Title III, see Greenfield, *supra* note 25, at 1054-55.

78. *See* Greenfield, *supra* note 25, at 1054.

79. *Id.* at 1069 (recommending that because EVS is such a severe intrusion, it should be analogized to an unconsented surgical intrusion to the body, such as the "substantial" intrusion of surgical removal of a bullet from the defendant in Winston v. Lee, 470 U.S. 753, 766 (1985)). Greenfield argues that a judge should not allow EVS unless there is a compelling need or other evidence providing probable cause for arrest. *Id.* at 1072. A compelling need exists if the crime is serious, and most probably, cause would not exist without use of EVS evidence. *Id.*

80. S. REP. No. 1097, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2153 (asserting that Title III was enacted to legislate the constitutional requirements for electronic eavesdropping based upon the standards set forth in *Berger* and *Katz*).

81. Cheryl Spinner, *Let's Go to the Videotape: The Second Circuit Sanctions Covert Video Surveillance of Domestic Criminals*, 53 BROOK. L. REV. 469, 471-72 (1987) (stating that the only federal statute authorizing video surveillance is limited to national security investigations and foreign intelligence matters).

82. *Id.*

83. 786 F.2d 504, 507-12 (2d Cir. 1986), *cert. denied*, 479 U.S. 827 (1987) (finding that the four provisions of Title III provide the measure of the government's constitutional obligations when obtaining a warrant for video surveillance).

by analogizing EVS to wiretapping. In *Biasucci*, the FBI had obtained a warrant that met all four criteria and installed covert video surveillance in a privately operated loan office. The court admitted the videotaped evidence of the illegal lending activities occurring at the private office. The defendants argued that the FBI violated Title III because it does not authorize the use of EVS even with a warrant. The Court concluded that the statute did not prohibit or authorize EVS and upheld the use of the tapes as evidence.[84] Legal commentators have noted the anomaly this creates in the law by essentially requiring less regulation for EVS than for wiretapping.[85] The legal commentaries in *Torres* and *Biasucci* are limited to surveillance of *private* premises, however, and a hospital room is arguably not afforded the same protection as private premises.

There is debate regarding the applicability of Title III to the audio portion of covert video surveillance of MSBP. The Attorney General of Alabama has issued a verbal ruling prohibiting sound recording in MSBP surveillance.[86] Hospital attorneys in other states permit both sound and video recordings under the special circumstances of MSBP.

V. APPLICABILITY OF THE FOURTH AMENDMENT TO COVERT VIDEO SURVEILLANCE OF MSBP

A. Reasonable Expectation of Privacy

It is prudent to examine an individual's reasonable expectation of privacy in a hospital room by applying Justice Harlan's two-pronged test.[87] First, would a parent of a hospitalized child have an "actual (subjective) expectation of privacy?"[88] The parents who have been detected smothering their children on surreptitious video surveillance have presumably not expected the surveillance. Of at least eight mothers confronted with causing symptoms in the child through evidence obtained from covert video surveillance, six expressed outrage at the violation of their privacy. The literature on confrontation

84. *Id.* at 508.

85. Greenfield, *supra* note 25, at 1046; Spinner, *supra* note 81, at 482.

86. Conversation with John R. Huthnance, Assistant Attorney General, State of Alabama (Jan. 4, 1995).

87. American Health Consultants, *supra* note 22, at 40 (discussing the installation of a surveillance camera system in Scottish Rite Children's Medical Center in Atlanta).

88. Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

generally supports the presumption that parents who expect privacy in the hospital room were shocked to realize their behavior had been observed. However, this reaction is consistent with the feelings of almost every defendant whom the courts have found to have had no reasonable expectation of privacy. Furthermore, legal commentators have suggested that the subjective prong of the test may be unrealistic, particularly since it is not specified in the majority opinion in *Katz*.[89]

Society is prepared to recognize as "reasonable"[90] the second prong of the test, which is the most useful in addressing MSBP. The health care community, child protective services, and the courts support the idea that society would not consider an expectation of privacy in a pediatric hospital room to be "reasonable." Hospitals are busy places with a variety of diagnostic forms of surveillance carried out on a routine basis, such as cardiac monitors and telemetry equipment wired to monitors in the nurses station, sleep study rooms with infrared photography equipment, and intercoms that connect patient rooms with the nurses station. In fact, patients expect a certain degree of monitoring and vigilance as part of promoting patient safety. In *Buchanan v. State*,[91] the court held that the defendant did not have a reasonable expectation of privacy in a hospital emergency room since a constant flow of medical personnel walked in and out of the room. Similarly, the court in *Abislaiman* supported the right of a hospital to employ security measures and concluded "any subjective expectation of privacy Abislaiman may have formed while parked in the hospital's lot was simply not one which society is prepared to recognize as reasonable."[92] The court in *Abislaiman* specifically cited *Katz* and *Smith v. Maryland*, favoring the second prong of Harlan's test over the first.[93]

89. *Id.*

90. *Id.* at 347-61. Only Justice Harlan's concurrence utilizes the two-prong test. *See also* Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, MINN. LAW REV. 349, 384 (1974) (asserting that the subjective prong neither adds to or detracts from an individual's expectation of privacy).

91. 432 So.2d 147, 147 (Fla. Dist. Ct. App. 1983).

92. State v. Abislaiman, 437 So.2d 181, 183 (Fla. Dist. Ct. App. 1983).

93. *Id.* at 183-84.

B. Exceptions Recognized Under the Fourth Amendment

In the absence of a Supreme Court ruling specifically on the use of EVS and without any lower court decisions regarding the admissibility of covert video surveillance in MSBP situations, a judicial interpretation in favor of a reasonable expectation of privacy in a hospital room is a possibility. Terry Thomas, a British attorney, discusses the highly intrusive nature of surreptitious video surveillance, even in MSBP situations.[94] Clinicians here and in England also have raised ethical issues regarding the potential invasion of privacy during MSBP surveillance.[95] If the expectation of privacy were found to be reasonable, then either a warrant should be obtained prior to instituting EVS, or the surveillance should be examined to determine whether it meets one of the recognized exceptions to obtaining a warrant.

1. Exigent Circumstances

The case law is supportive of warrantless searches if danger to human life is "imminent."[96] Certainly hospital security and medical personnel would argue that a mother who is suspected of smothering her child poses an "immediate danger" to human life. Ten different studies show that the mortality of victims of MSBP ranges from 5% to 55%, averaging at 12%.[97]

On the other hand, arguments can be made that it takes only a short time longer to obtain a warrant than it does to prepare for covert video surveillance. However, the issue of swift surveillance is not purely one of imminent danger in

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94. *See* Terry Thomas, *Covert Video Surveillance*, 144 NEW L.J., 966, 966-67 (1994) (discussing and criticizing covert video surveillance procedures used to detect MSBP).

95. B. J. Zitelli et al., *Munchausen Syndrome by Proxy and Video Surveillance, Reply to Frost Letter (Letter to the Editor)*, 142 AM. J. DISEASES CHILDHOOD 917, 917-18 (1988).

96. United States v. Costa, 356 F. Supp. 606, 611-12 (D.D.C. 1973) (distinguishing the immediate and imminent danger of a shotgun from the passive danger of narcotics). *See also* Janofsky, *supra* note 36 and accompanying text.

97. *See* Samuels & Southall, *supra* note 18, at 760. Additionally, Randell Alexander, Wilbur Smith, and Richard Stevenson conducted a study of five families where 13 children were affected and more than one sibling was a victim of MSBP. There was a 31% mortality rate that might have been higher had intervention not occurred with some of the children. Randell Alexander et al., *Serial Munchausen Syndrome by Proxy*, 86 PEDIATRICS 581, 584 (1990).

MSBP situations, but also one of obtaining evidence. *Cupp v. Murphy* addresses the concern over the need for evidence in the exigent circumstances reasoning.[98]

2. Private Party

Although *Burdeau v. McDowell*[99] was decided in 1921, it is still valid law regarding the Supreme Court's decision that private parties would not be governed by the exclusionary rule.[100] It is argued by some that medical personnel would qualify as private parties. In *United States v. Black*, the Sixth Circuit Court of Appeals held that medical personnel were considered private parties when they initiated a search of an unconscious defendant's belongings and completed a physical exam revealing drugs and drug paraphernalia.[101] This ruling explains that MSBP surveillance is permitted to fall under the private party exception since the primary concern of hospital personnel engaged in surveillance is the safety of their patients, rather than criminal prosecution. Second, hospital personnel may conduct EVS for diagnostic purposes. A difficult case, such as a pediatric patient who has recurrent apnea (cessation of breathing) with no identifiable medical cause, would justify continuous video monitoring simply as a means of studying all clinical circumstances surrounding the cessation of breathing. It could be argued that physicians would be aided in their diagnosis if they were able to discern through EVS that the infant was always on its stomach when apnea occurred. Furthermore, if the mother is seen placing her hand over the infant's mouth and nose immediately prior to an apnea episode, not only is that information diagnostically useful, but it is also evidence of a crime.

Even though commercially retained security guards, such as those hired by hospitals, generally qualify as private parties

98. Cupp v. Murphy, 412 U.S. 291, 295-96 (1973) (stating that the high probability evidence will be destroyed may justify warrantless search or seizure).

99. 256 U.S. 465 (1921).

100. *See id.* at 475.

101. No. 88-5266, 1988 WL 107375, at *1 (6th Cir. Oct. 14, 1988). Specifically, since the emergency room nurse asked a police officer to search the unconscious defendant's purse for identification or medication, the court held that all of the evidence obtained fell under the private party exception, and the warrantless search could be justified under the emergency exception to the Fourth Amendment. *Id.* at *2.

under *Burdeau*,[102] the Court has held that governmental employees, whether they are police officers or not, are governed by the Fourth Amendment. This case law determination suggests that medical personnel employed by state or federal hospitals, including Veterans Administration hospitals, would not be considered private parties and therefore would not be exempted from the Fourth Amendment requirements.

3. Consent

The Supreme Court's holding in *White* that warrantless electronic surveillance is admissible with the consent of one party could be applicable to cases in which the consenting party is the nurse. Conversations between the alleged perpetrator and the nurse would be admissible,[103] such as when the mother tells the nurse the child has a fever or the mother makes other statements that the video shows are false. Another argument can be made that the infant would impliedly consent to electronic surveillance if it is done in his or her own best interest, thus making all EVS admissible. However, these rationales have not been scrutinized by the courts.

VI. THE APPLICABILITY OF LEGISLATION TO COVERT VIDEO SURVEILLANCE OF MSBP

A. Balancing Test

Greenfield proposes that the Supreme Court balancing test from *Burger* and *Katz* should be combined with Title III's warrant requirements in determining guidelines for EVS. Thus, the severity of the crime and the availability of other evidence should be balanced with any reasonable expectation of privacy interests. Title III identifies other factors to be considered such as the sufficiency of the procedure to maximize confidentiality and to minimize opportunities for abuse.[104] Experts on the procedures used in covert video surveillance of MSBP have proposed a list of safeguards that would satisfy the minimization

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102. *See* Austin A. Anderson, *Admissability of Evidence Located in Searches in Private Persons*, 58 FBI L. ENFORCEMENT BULL., May 1989, at 25, 28 (discussing cases applying the *Burdeau* rule).

103. *See supra* notes 90-93 and accompanying text. *See also* Greenfield, *supra* note 25, at 1068.

104. 18 U.S.C. § 2518(5) (1988 & Supp. 1994).

standard set out in Title III, requiring that interceptions "be conducted in such a way as to minimize the interception of communications not otherwise subject to interception."[105] These safeguards and the arguments against them include:[106]

a. Placing video monitors only on the child so that activities of the parent not related to potential harm to the child remain private.

Experts argue that this proposal is possibly still inadequate, because activities that could harm a child may not occur in the child's presence. For example, the mother may obtain illicit medication from her purse or vomit in the bathroom in order to falsify the child's symptoms outside the view of the EVS.

b. Implementing video recording only, with no sound, in order to minimize surveillance of private conversations, such as telephone conversations with outsiders.

Although sound recordings have been useful in situations where the mother is lying about the child's symptoms, falsification is arguably less imminently harmful to the child than physical symptom production. However, as mentioned above, if falsification causes unnecessary invasive procedures, then it constitutes abuse.

c. Obtaining a search warrant if surveillance is thought to be necessary for longer than forty-eight hours.

Experts have stated that if the video surveillance has primarily a diagnostic purpose, obtaining a search warrant should not be necessary.[107]

1. Private Actor Exception

Section 2515 of Title III clearly supersedes the *Burdeau* decision in the case of electronic audio surveillance.[108] The only exception to Title III's blanket prohibition of electronic surveillance by all actors, public and private, is extended to employees of telephone companies who intercept communications in the

105. *Id.*

106. Conversations with Judith Libow, M.A., Oakland Children's Hospital; Marc Feldman, M.D., University of Alabama; Larry Burbaker, FBI Agent; John Huthnance, Attorney General's Office, Alabama; Kathy Artingstall, Florida Police Officer; and Beatrice Yorker, Georgia State University, in a roundtable discussion held at the Department of Family and Children's Services Conference, Atlanta, Georgia (Jan. 1995).

107. *Id.*

108. 18 U.S.C. § 2515 (1988 & Supp. V 1993) (superseding the rule of *Burdeau* that private parties are immune from the Fourth Amendment).

usual course of business for quality or service checks.[109] It could be argued that sound monitoring in a hospital room is done in the course of business for diagnostic purposes and for safety reasons. Again, this line of reasoning as specifically applied to health care personnel has not been contemplated in the statutory language. Those courts that have considered the need for safety in hospital operations have allowed the use of EVS[110] and warrantless searches.[111]

2. Compelling Need

Greenfield suggests that EVS can only be justified by a "compelling need," such as the commission of a serious crime for which probable cause for arrest would not exist without EVS.[112] The "compelling need" situation would require a warrant, however, unlike the "exigent circumstances" exception to a warrant under Fourth Amendment analysis since

> within the reasonableness balancing analysis, the compelling necessity standard looks at the evidence already gathered at the time of the application and permits EVS only if that existing evidence is insufficient for arrest. On the other hand, the least intrusive means requirement allows a judge to grant an application for EVS only when there are no less intrusive means of gathering the same evidence. In other words, reasonableness looks to sufficiency, whereas the least intrusive means inquiry looks to method. Even if the reasonableness standard is met, the least intrusive means requirement and the other particularity requirements must be satisfied as well.[113]

3. Obtaining a Warrant

If a legal challenge to covert video surveillance is successful in the courts, this change would simply mean that health care personnel would be required to enlist governmental and police involvement by obtaining a warrant authorizing the sur-

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109. *Id.* § 2511 (2)(a)(i) (limiting this exception to monitoring communication in the normal course of business).

110. State v. Abislaiman, 437 So.2d 181, 181-84 (Fla. Dist. Ct. App. 1983) (holding the use of electronic surveillance camera in hospital parking lot to be a reasonably expected security measure).

111. State v. Jennings, 611 P.2d at 1050, 1065 (Idaho 1980).

112. Greenfield, *supra* note 25, at 1072.

113. *Id.* at 1072 n.165.

veillance prior to implementation. Health care providers should follow the four provisions of Title III that govern the standards for authorizing visual electronic surveillance under a search warrant. These are identical to those in *Biasucci* and in *Torres* cited previously in this article.[114]

VII. CONCLUSION

The serious and life-threatening nature of child abuse in cases of MSBP provides a strong countervailing interest when balanced against a parent's or caretaker's right of privacy.[115] There are a growing number of clinical reports in the medical literature that support the efficacy of covert video surveillance in diagnosing MSBP and protecting the child from further harm.[116] A careful analysis of constitutional and legislative requirements for conducting covert video surveillance reveals that, in the absence of express rulings on the issue, there is most likely no reasonable expectation of privacy in a pediatric hospital room. Even if there is a reasonable expectation of privacy in a hospital room, there are several exceptions to the exclusionary rule applicable to MSBP cases, including the consent of one party, exigent circumstances, and the private party exception. If the courts do decide at some future point that parents have legitimate privacy interests outweighing the exigent circumstances caused by fabricating or inducing illness in a child, then hospital personnel should follow the legal requirements for obtaining a search warrant. Appropriate education of magistrates or judges should be done by the hospital staff to alert warrant officers regarding the warning signs of MSBP, so that a medically based suspicion that a child's illness may be manufactured by a parent would be viewed as meeting the probable cause threshold necessary to obtain a warrant to authorize use of EVS.

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114. *See supra* notes 76-84 and accompanying text.

115. *See* Roger W. Byard & Richard H. Burnell, *Covert Video Surveillance in Munchausen Syndrome by Proxy*, 160 MED. J. AUSTL. 352, 356 (Mar. 1994) (arguing that privacy interests are outweighed when balanced against a "potentially" homicidal patient).

116. Martin P. Samuels et al., *Fourteen Cases of Imposed Upper Airway Obstruction*, 67 ARCHIVES DISEASES ON CHILDREN 162, 170 (1992). *See also* Williams & Bevan, *supra* note 5, at 780 (discussing the justifications for and necessity of secret surveillance in MSBP parents).