TITLE III AND THE CLASSIC TRIANGLE: SHOULD THE IMMUNITY DOCTRINE APPLY TO INTERSPOUSAL ELECTRONIC SURVEILLANCE?

INTRODUCTION

A jealous husband suspects his wife of having an affair with another man. In an attempt to confirm his suspicions, he decides to monitor and record his wife's telephone calls with the use of a hidden electronic device. He successfully intercepts conversations between his wife and "the other man." The recorded conversations subsequently enable him to secure an uncontested divorce. Later, the wife brings an action pursuant to a federal statute which authorizes recovery of civil damages by "any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter" against "any person who intercepts, discloses, or uses...such communications..." Can she recover from her former husband? Or is her suit dismissed for failure to state a cause of action? Can one spouse who invades the other's privacy, and simultaneously that of a third party, be held criminally and civilly liable to the other spouse for such conduct?

The common law supplied a simple mechanism to resolve these questions through the doctrine of interspousal immunity. This doctrine precluded interspousal suits under the assumption that the husband and wife were one person, and were thus disabled from initiating an action against each other. But the common law is not the final word. Title III of the Omnibus Crime Control and Safe Streets Act of 1968 prohibits electronic surveillance by persons other than duly authorized law enforcement of-

2. This hypothetical is suggested by the facts in Simpson v. Simpson, 490 F.2d 803 (5th Cir. 1974), cert. denied, 419 U.S. 897 (1974).
ficers with prior court approval. Several circuit courts of appeals are currently confronted with the issue of whether or not the common law doctrine of interspousal immunity precludes liability under Title III.

Those courts which have considered the applicability of Title III to interspousal wiretapping have reached seemingly inconsistent results. This comment will explore the legislative history of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, and the applicability of the common law doctrine of interspousal immunity. Additionally, it will discuss the current status of the conflicting case law on the subject. Finally, consideration will be given to the role of the constitutional right to privacy in the construction of Title III's provisions.

THE LEGISLATIVE HISTORY OF TITLE III

Title III was designed to protect "the privacy of oral and wire communications, and . . . [to delineate] on a uniform basis the circumstances and conditions under which . . . interception[s] . . . may be authorized." It prohibits all wiretapping and electronic surveillance by persons other than duly authorized law enforcement officers acting pursuant to a court order. Congress intended that Title III curb the widespread use and abuse of electronic surveillance techniques recognizing that "[e]very spoken word relating to each man's personal, marital, religious, political, or commercial concerns can be intercepted by an unseen auditor and turned against the speaker to the auditor's advantage." Prior to the enactment of Title III the status of the law regarding wiretapping and electronic surveillance was considered "intolerable" and was criticized as serving neither the interests of

8. See generally J. CARR, THE LAW OF ELECTRONIC SURVEILLANCE § 3.05 [4][b][iii], at 100 (1977).
privacy nor those of law enforcement.\textsuperscript{13} Congress acted to clarify the resulting confusion with uniform federal statutory provisions. Criminal penalties\textsuperscript{14} and civil remedies\textsuperscript{15} were provided to enforce the prohibitions, and perpetrators were to be denied the fruits of their unlawful activities in both civil and criminal proceedings pursuant to a statutory exclusionary rule.\textsuperscript{16}

Although some interceptions were specifically excluded from liability,\textsuperscript{17} and consent by a participant to the interception has been allowed as a defense to invasion of privacy claims,\textsuperscript{18} Congress did not expressly exclude nonconsensual spousal wiretapping within the marital domicile or elsewhere.\textsuperscript{19} No witness at congressional hearings on Title III spoke in favor of such an exclusion.\textsuperscript{20} On the contrary, members of Congress, including one of the sponsors of Title III, Senator Hruska, indicated their understanding that domestic relations surveillance was prohibited by the Act.\textsuperscript{21} The Senate report on Title III\textsuperscript{22} indicates all unauthorized interception of communications should be prohibited.\textsuperscript{23} Thus, in spite of the fact that over half the states recognize some form of inter-

\begin{enumerate}
\item Id.
\item Id. § 2520.
\item Id. § 2515; Marriage of Lopp, — Ind. —, —, 378 N.E.2d 414, 420 (1978), cert. denied, 47 U.S.L.W. 3475 (1979).
\item Exceptions were provided for interceptions by employees of communications facilities whose normal course of employment would make necessary such interception, personnel of Federal Communications Commission in the normal course of employment, and Government agents to secure information under the powers of the President to protect the Nation against actual or potential attack, or to otherwise protect the national security.
\item Smith v. Cincinnati Post & Times-Star, 475 F.2d 740, 741 (6th Cir. 1973); J. Carr, supra note 8, § 8.05[3] at 499.
\item See generally S. REP. NO. 1097, 90th Cong., 2d Sess., reprinted in [1968] U.S. CODE CONG. & AD. NEWS 2113. The maxim “expressio unius, exclusio alterius,” the expression of one thing is the exclusion of another, may also here apply. A criminal statute which sets forth one exception to liability, or several listed exceptions, impliedly excludes other exceptions. W. LaFave & A. Scott, Jr., HANDBOOK ON CRIMINAL LAW § 10, at 79 (1972).
\item Neither did Congress specifically authorize nonconsensual spousal wiretapping. Mr. Justice Stevens has commented that “[i]f . . . the constitutional protection [right to privacy] is applicable, the focus of inquiry should not be whether Congress has prohibited the intrusion, but whether Congress has expressly authorized it . . . .” United States v. New York Tel. Co., 434 U.S. 159, 186 (1977) (Stevens, J., dissenting) (construing Title III provisions).
\item J. Carr, supra note 8, § 3.05 [4][b][iii] at 101.
\item Id. See also 114 CONG. REC. 11598 (1968).
\item Id. at 2113.
\end{enumerate}
spousal immunity,\textsuperscript{24} it can be inferred from the legislative history that Congress intended to proscribe eavesdropping in domestic disputes.\textsuperscript{25} However, since the existence of the immunity doctrine continues to block attempts by aggrieved spouses to redress the invasion of their privacy under Title III,\textsuperscript{26} an understanding of the history and current rationales for the doctrine is essential in evaluating the validity of its application to Title III provisions, especially in the face of evidence that it was to be disregarded.\textsuperscript{27}

**HISTORICAL BACKGROUND OF THE DOCTRINE AND PRESENT DAY RATIONALES: INTERSPOUSAL IMMUNITY VIS-A-VIS A SPOUSE'S RIGHT TO PRIVACY**

At common law, husband and wife were considered one person, and that person was the husband.\textsuperscript{28} Although the criminal law has always regarded spouses as separate entities,\textsuperscript{29} in civil actions the "unity concept" of single identity provided the basis for the interspousal immunity doctrine.\textsuperscript{30} Since logically a person cannot sue himself, a husband and wife could not sue each other. They were, in the eyes of the law, the same person.\textsuperscript{31}

In 1844 the Married Women's Acts, subsequently adopted by every American jurisdiction, gave a married woman her own separate legal identity and a separate legal estate in her own property.\textsuperscript{32} But many courts have permitted the unity concept—a spectre of a past "social order . . . dead for over a century"—to retain a firm grip on the law in the form of interspousal immunity from tort liability.\textsuperscript{33}

Many courts, however, recognize that the unity concept has its roots in antiquity, where a woman's marriage rendered her a chat-

\textsuperscript{24} For a list of those states, see Comment, *Interspousal Electronic Surveillance*, 7 TOL. L. REV. 185, 190 n.27 (1975).
\textsuperscript{25} J. Carr, supra note 8, § 8.02 [2][a] at 493.
\textsuperscript{26} See, e.g., Simpson v. Simpson, 490 F.2d 803, 806 n.7 (5th Cir. 1974), cert. denied, 419 U.S. 897 (1974).
\textsuperscript{27} See generally J. Carr, supra note 8.
\textsuperscript{28} W. Prosser, supra note 4, at 859 n.3. Dean Prosser noted, "'[b]y marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband.'" (quoting 1 W. Blackstone, Commentaries 442; 2 W. Blackstone, Commentaries 433).
\textsuperscript{29} W. Prosser, supra note 4, at 859.
\textsuperscript{30} Id. at 859-64.
\textsuperscript{32} See note 31 supra.
\textsuperscript{33} W. Prosser, supra note 4, at 861.
tel of her husband,\textsuperscript{34} and have sought to offer more modern rationale for the doctrine. Public policy reasons, such as the preservation of peace and harmony in the home, have often been cited in support of interspousal immunity,\textsuperscript{35} despite the fact that if spouses have gone so far as to consider litigation such harmony has undoubtedly ceased to exist.\textsuperscript{36}

Other arguments put forth in support of retaining the common law immunity rule have been vigorously refuted. For example, although it has been said that an injured spouse has an adequate remedy through the criminal law and divorce proceedings,\textsuperscript{37} neither of these alternatives actually compensates the spouse for his or her injuries, or provides a remedy for nonintentional torts.\textsuperscript{38} It has also been argued that to abrogate the immunity rule would be to open the floodgates for frivolous litigation based on trivial matrimonial disputes.\textsuperscript{39} But it has been noted that as the number of jurisdictions allowing such suits has expanded, "this theoretical problem has not materialized."\textsuperscript{40} A further justification for interspousal immunity has been the potential for collusion and fraud where one or both spouses carries liability insurance, but this justification has been criticized as presupposing that courts and juries are incapable of ferreting out fraudulent claims and distinguishing them from the legitimate ones.\textsuperscript{41} Some courts continue to guard

\textsuperscript{34} Freehe v. Freehe, 81 Wash. 2d 183, —, 500 P.2d 771, 773 (1972). The Supreme Court of Washington held that the rule of interspousal immunity in personal injury cases would be abandoned: "At old common law, with the husband entitled to the chose in action for his own torts and liable to himself for his wife's torts against him, the rule of interspousal disability made sense. Things have changed." \textit{Id.} at —, 500 P.2d at 774. Accord, Rupert v. Stienne, — Nev. —, —, 528 P.2d 1013, 1015 (1974).
\textsuperscript{35} \textit{See} W. PROSSER, supra note 4, at 863.
\textsuperscript{36} \textit{Id.}
\textsuperscript{37} \textit{Id.} at 862.
\textsuperscript{38} Freehe v. Freehe, 81 Wash. 2d 183, —, 500 P.2d 771, 774 (1972). Some jurisdictions differentiate between intentional and nonintentional torts, abrogating the rule on interspousal immunity where intentional torts are involved, and recognizing the rule for nonintentional personal injury actions. \textit{See, e.g.}, Maestas v. Overton, 86 N.M. 609, —, 526 P.2d 203, 204 (1974). And the Supreme Court of Minnesota has "conditionally abrogated" interspousal immunity as an absolute defense in tort actions:

The risks of intentional contact in marriage are such that one spouse should not recover damages from the other without substantial evidence that the injurious contact was plainly excessive or a gross abuse of normal privilege. The risks of negligent conduct are likewise so usual that it would be an unusual case in which the trial court would not instruct the jury as to the injured spouse's peculiar assumption of risk.

\textsuperscript{39} Freehe v. Freehe, 81 Wash. 2d 183, —, 500 P.2d 771, 775 (1972).
\textsuperscript{40} \textit{Id.}
\textsuperscript{41} \textit{Id.}
the rule jealously, even when public policy reasons for doing so are clearly questionable, on the basis that it is the job of the legislature to change the law. The argument that any change in the interspousal immunity rule should come from the legislature ignores the fact that the rule is "of common law origin, court made and court preserved." It is within the power of the courts to modify the rule or discard it altogether, if current conditions so dictate. 

In some jurisdictions, emerging concepts of the right to privacy have overridden the common law doctrine of interspousal immunity. This is illustrated by the case of Markham v. Markham, which centered around the admissibility in divorce litigation of evidence obtained through wiretaps. In Markham, the Florida District Court of Appeals held that a husband had no right to invade his wife's right to privacy by utilizing electronic devices and ruled that the husband's recordings of his wife's intercepted telephone conversations were inadmissible. Deeming it unnecessary to reach the question of whether Title III applied to the facts of the case, the court relied on state law and the Florida Constitution in reaching its decision. In construing applicable state law and examining the scope of the state constitutional right to privacy, the Markham court emphasized changing public policy considerations by noting that "a married woman is no longer her husband's chattel." A wife is an individual, a citizen with rights equivalent to those of her husband. Husband and wife are equal partners in


The nature of the common law requires that each time a rule of law is applied it be carefully scrutinized to make sure that the conditions and needs of the times have not so changed as to make further application of it the instrument of injustice. Dean Pound posed the problem admirably... when he stated: "Law must be stable, and yet it cannot stand still."

Id. at —, 528 P.2d at 1015.


46. 265 So. 2d at 60.

47. Id. at 61-62.

48. Id. at 61.

49. Id. at 62. The court relied on a previous United States Supreme Court decision, Katz v. United States, 389 U.S. 347, 350-51 (1967), quoting, "'[t]he protection of a person's general right to privacy—his right to be let alone by other people—is . . . left largely to the law of the individual States.' " 265 So. 2d at 61.

50. 265 So. 2d at 62.

51. Id.
their marriage, and often make equal economic contributions to the family.\textsuperscript{52} Thus, the court ruled:

A husband has no more right to tap a telephone located in the marital home than has a wife to tap a telephone situated in the husband's office. Spying and prying by one spouse into the private telephone conversations of the other does not contribute to the domestic tranquility or assist in preserving the marital estate.\textsuperscript{53}

However, the dissenting judge in \textit{Markham} would have allowed the wiretappings into evidence for two reasons: first, all interceptions were made within the marital home, and secondly, the husband had paid for all the telephone line installations.\textsuperscript{54} He likewise disagreed with the egalitarian approach in the majority opinion,\textsuperscript{55} together with the expansive reading given the state constitutional right to privacy:

The [state] constitutional right to privacy was never intended to apply to family relationships and must not now be extended to the point of preventing a husband from placing under surveillance a telephone line subscribed to by him and installed in his marital home if such is reasonably necessary in order to prevent harm or injury to his connubial relationship and domestic tranquility.\textsuperscript{56}

The belief that a married woman's right to privacy is thus circumscribed, in deference to the superior rights of the husband, has been adhered to in at least one other jurisdiction,\textsuperscript{57} although it appears to be the minority view.

The \textit{Markham} case serves to illustrate the competing public policy considerations behind retaining the old common law immunity rule, as opposed to recognizing a spouse's individual right to privacy. These are the same policy considerations which surface

\textsuperscript{52} Id.
\textsuperscript{53} Id.
\textsuperscript{54} Id. at 62. (Wigginton, J., dissenting).
\textsuperscript{55} The dissenting judge stated:

The law has traditionally recognized the husband of a marriage to be the head of his household, which carries with it the privilege and duty of protecting it against injury, harm, or the threat thereof. He therefore possesses every legal right to take all steps deemed reasonably necessary to prevent destruction of his family unit, regardless of whether the attempt to damage or destroy his home emanates from an unfaithful wife, an ungrateful child, or a deceitful employee or guest.

\textit{Id.} (Wigginton, J., dissenting).
\textsuperscript{56} Id. (Wigginton, J., dissenting).
\textsuperscript{57} Beaber v. Beaber, 41 Ohio Misc. 95, —, 322 N.E.2d 910, 914-15 (1974), where the court allowed into evidence tape recordings, similar to those at issue in \textit{Markham}, for impeachment purposes in a divorce action. The court stated that both state legislative authority and Congress never contemplated the applicability of the right to privacy to the extent embraced by the majority in \textit{Markham}. \textit{Id.}
in the federal circuit courts of appeals grappling with the direct application of the doctrine to the wire interception provisions of Title III. It is in this light that the differing federal case law on the subject will be discussed.

**INTERSPOUSAL IMMUNITY AND WIRETAPPING IN THE FEDERAL COURTS**

**SIMPSON V. SIMPSON AND UNITED STATES V. JONES**

The Fifth and Sixth Circuit Courts of Appeals have taken differing views of the applicability of Title III provisions to interceptions by the spouse within the marital home. The Fifth Circuit in *Simpson v. Simpson*,58 a civil suit for damages pursuant to 18 U.S.C. § 2520,59 held that there existed no cause of action where the plaintiff's husband had attached a device to telephone lines for tapping and recording telephone conversations within the marital home, and had, by that means, intercepted telephone conversations between his wife and another man.60 The court, careful to limit its holding to interceptions made within the marital home by the spouse alone, without the aid of third parties,61 deemed the issue solely one of statutory construction.62 The court extensively researched the legislative history of Title III to determine congressional intent.63 It concluded that there was no clear indication that Congress intended to intrude into the marital relationship within the marital home, despite the inclusiveness of the “naked language” of the wiretapping provisions,64 especially since such a far-reaching result would extend into areas normally left to the

59. 18 U.S.C. § 2520 (1976) provides:
   Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and (2) be entitled to recover from any such person—
   (a) actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;
   (b) punitive damages; and
   (c) a reasonable attorney's fee and other litigation costs reasonably incurred.
   A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under this chapter or under any other law.

60. 490 F.2d at 804. See notes 1-2 and accompanying text supra.
61. 490 F.2d at 810.
62. Id. at 804.
63. Id. at 807 n.10.
64. Id. at 805.
states. The legislative hearings, said the court, indicated that Congress was primarily concerned with the involvement of private investigators in interspousal wiretapping.

The court deemed a third-party intrusion into the marital home, even if instigated by one spouse, as a much greater offense against a spouse's privacy than personal surveillance conducted solely by the other spouse. Personal surveillance by the other spouse was considered consistent with whatever expectations of privacy spouses have with regard to each other within the marital home.

In concluding that the electronic interception, by a husband of his wife's telephone conversations within the marital home, was not included in the statutory proscription, the Fifth Circuit conceded that "the language and legislative history . . . leaves the question in considerable doubt." However, the court noted that a contrary result would create a federal remedy for marital grievances, an area traditionally left to state law. Furthermore, it would override the interspousal immunity for personal torts accorded by the majority of the states. Thus, some deference to state sovereignty was apparently a factor in the court's decision to dismiss the wife's claim.

65. Id.
66. Id. at 808. Private investigators have been held both criminally and civilly liable for wiretapping activity, even if such activity was instigated by the spouse. See United States v. Rizzo, 583 F.2d 907 (7th Cir. 1978); White v. Weiss, 535 F.2d 1067 (8th Cir. 1976). In Rizzo, the Seventh Circuit Court of Appeals held that there is no implied derivative interspousal immunity in favor of a private investigator who, in violation of § 2511, willfully intercepts any wire communication. The court's decision was based primarily on the congressional intent that private investigators be held criminally liable, as evidenced by the legislative history of Title III. But, despite its holding that no derivative immunity exists, the court successfully sidestepped the basic issue of whether or not interspousal immunity itself existed with regard to § 2511. To date that question remains unanswered in the Seventh Circuit. 583 F.2d at 910.
67. 490 F.2d at 809.
68. Id. at 808-09. See also United States v. Katz, 389 U.S. 347, 360 (1967), and text accompanying notes 87-88 infra. In further support of its decision to dismiss the suit, the Simpson court reasoned that if the husband were found civilly liable, he would be subject to severe criminal penalties as well. It was the opinion of the court that the statutes did not afford the husband adequate notice of potential criminal liability by failing to expressly include spouses in the statutory language. Therefore the court refused to hold the husband civilly liable under § 2520, and thus subject him to criminal prosecution under § 2511 without what the court considered to be fair warning. 490 F.2d at 809.
69. Id. at 810.
70. Id. at 804.
71. Id. at 806 n.7.
72. Id.
73. Id. The existence of a nonmarital intimate relationship between the parties involved in a wiretapping incident does not appear to be a mitigating factor in crimi-
The Sixth Circuit Court of Appeals is in disagreement with the Simpson decision. In United States v. Jones, the defendant testified that he and the prosecutrix had been lovers and that she had led him to believe that he was the father of one of her children. Several months before the wiretapping incident at issue, the prosecutrix told Schrimsher to leave her alone and threatened to turn him over to her grandfather who she said had underworld connections. Worried about his own safety and the well-being of the children, Schrimsher embarked on a course of investigation to determine "where he stood" with the prosecutrix and the truth about the grandfather. He hid under the prosecutrix's house for five days and taped telephone conversations between the prosecutrix and others. The Fifth Circuit held that since Schrimsher had never been married to the prosecutrix and was not a part of her household, and since he had no legal right to be on the premises or tape record her telephone conversations, his conduct was clearly within the scope of § 2511. Schrimsher was subsequently sentenced to three years imprisonment.

The court noted:

In the bill of particulars the Government stated that the residence was owned by the grandmother of Appellee [the husband]; that the telephone number was listed in Appellee's name; that Appellee and his wife separated in July of 1974 and had not lived together as man and wife after that date; that Appellee filed for divorce on September 25, 1974; that on October 7, 1974 his wife was granted a restraining order by the Chancery Court prohibiting Appellee from "coming about" her; that on January 20, 1975 the divorce decree was granted; and that on one or more occasions Appellee had intercepted his wife's telephone conversations outside the curtilage of the residence. Appellee submitted an affidavit with exhibits attached wherein he stated that he paid rent on the premises and the telephone bills during the period in question; that he and his wife continued a sexual relationship even though he had moved out of the house in late July of 1974; that he returned to the house on occasion to babysit; that on October 18, 1974 while babysitting he became suspicious that his wife was involved in an extramarital affair and placed a recording device on the telephone; that the recordings of the intercepted telephone calls confirmed his suspicions; and that he used the recordings to obtain a divorce.

Id. at 663.

Except as otherwise specifically provided in this chapter any person who—

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;

(b) willfully 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—

(i) such device is affixed to, or otherwise transmit a signal through, a wire, cable, or other like connection used in wire communication, or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device
circuit decision in *Simpson*, granted a dismissal. The Sixth Circuit, concluding that Congress had not indicated any intention of excluding spouses from the coverage of section 2511, reversed.\textsuperscript{77}

The *Jones* court stated that it need not ordinarily refer to the legislative history in construing a statute which is clear on its face, because the natural presumption is that “Congress meant what it said.”\textsuperscript{78} But because the *Simpson* court had felt compelled to do so, the Sixth Circuit also conducted an analysis of Title III’s legislative history and concluded that the *Simpson* court’s analysis clearly contradicted the intent of Congress.\textsuperscript{79} The conclusion in *Simpson* that there exists a statutory exception for interspousal wiretaps was considered untenable.\textsuperscript{80}

Although both courts had been privy to the same legislative materials in making their respective decisions, the Sixth Circuit attributed the difference in results to the fact that in *Simpson* the court was distinguishing between unaided surveillance by a spouse and surveillance involving a third party, such as a private investigator, even if instigated by the spouse.\textsuperscript{81} But, in the view of the Sixth Circuit, this was a “distinction without a difference.”\textsuperscript{82}

For purposes of federal wiretap law, it makes no difference whether a wiretap is placed on a telephone by a spouse or by a private detective in the spouse’s employ. The end re-

\begin{itemize}
\item or any component thereof has been sent through the mail or transported in interstate or foreign commerce;
\item or
\item (iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or
\item (v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;
\item (c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;
\item (d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;
\item shall be fined not more than $10,000 or imprisoned not more than five years, or both.
\end{itemize}

\textit{Id.}

\textsuperscript{77} 542 F.2d at 663.

\textsuperscript{78} Id.

\textsuperscript{79} Id. For a discussion of Title III, see notes 5-19 and accompanying text supra.

\textsuperscript{80} 542 F.2d at 667.

\textsuperscript{81} Id. at 670.

\textsuperscript{82} Id.
result is the same—the privacy of the unconsenting parties to the intercepted conversation has been invaded. It is important to recognize that it is not just the privacy of the targeted spouse which is being violated, but that of the other party to the conversation as well.\textsuperscript{83}

Since the language of section 2511(1)(a) defines the offense to include "any person who . . . procures any other person to intercept or endeavor to intercept, any wire or oral communication . . . ,"\textsuperscript{84} the Sixth Circuit felt that Congress also intended to impose criminal liability upon spouses who hired others to perform their illegal surveillances for them.\textsuperscript{85} The court noted that the statute explicitly states that "any person" is subject to punishment "except as otherwise specifically provided," and that if Congress had intended to exclude spouses from such blanket coverage it would have specifically done so.\textsuperscript{86}

Despite the strong language of the court as to the plain unambiguous meaning of section 2511, an undercurrent of doubt, similar to that expressed by the \textit{Simpson} court,\textsuperscript{87} can be detected in the \textit{Jones} opinion. The court took great care to show that its decision could be distinguished on its facts from \textit{Simpson}, even if interspousal immunity was properly applied in the latter case. First, \textit{Jones} involved a criminal prosecution, and therefore, the court reasoned, the interspousal immunity doctrine simply could not apply.\textsuperscript{88} Secondly, in \textit{Simpson} the wiretapping incident took place while the couple was living together as man and wife.\textsuperscript{89} Therefore, even if an implied interspousal exception to the wiretapping statute was correctly recognized in \textit{Simpson}, it could not be applied in a situation such as that in \textit{Jones} where husband and wife were no longer sharing a domicile and the husband, under a restraining order, had no legal right to be on the premises.\textsuperscript{90}

Although \textit{Simpson} is cited for the proposition that the immunity doctrine does apply to Title III,\textsuperscript{91} and \textit{Jones} is cited for the converse,\textsuperscript{92} neither decision seems absolutely certain in its determination. Some courts, perhaps unwilling to follow either case,

\textsuperscript{83} Id. The Sixth Circuit noted that this distinction was seized upon in a subsequent case, Remington v. Remington, 393 F. Supp. 898, 901 (E.D. Pa. 1975).
\textsuperscript{85} 542 F.2d at 670.
\textsuperscript{86} Id. at 671.
\textsuperscript{87} See note 50 and accompanying text supra.
\textsuperscript{88} 542 F.2d at 672.
\textsuperscript{89} Id. at 673.
\textsuperscript{90} Id.
\textsuperscript{91} See, e.g., United States v. Rizzo, 583 F.2d 907, 909 (7th Cir. 1978); Marriage of Lopp, — Ind. —, —, 378 N.E.2d 414, 420 (1978), cert. denied, 47 U.S.L.W. 3475 (1979).
\textsuperscript{92} See note 91 supra.
simply avoid the immunity question altogether, finding an alternative basis for deciding the issue at hand. This is illustrated by Anonymous v. Anonymous, decided by the Second Circuit after both Simpson and Jones.

**Anonymous v. Anonymous and “Mere Marital Disputes”**

The Second Circuit wrestled for the first time with the problem of interspousal immunity and federal wiretapping statutes in Anonymous v. Anonymous, a civil suit for damages by a wife against her ex-husband.

In Anonymous, the husband’s recording activity, accomplished with a commercially available phone-answering device, was likened by the court to the “extension phone exemption” of the wiretapping provisions which did not prohibit mere “listening into” conversations of other family members from an extension phone in the husband’s apartment. Since Congress had explicitly exempted such activity from coverage under Title III, the husband had taped conversations which he permissibly overheard. The court therefore held that the interspousal wiretap in question, used in preparation for divorce and child custody litigation, involved a “mere marital dispute,” a matter traditionally left to the states. Without further explanation, the court held that the wiretap did not rise from the level of “mere marital disputes” to the necessary level of criminal conduct proscribed by section

---

93. See, e.g., United States v. Rizzo, 583 F.2d 907, 909-10 (7th Cir. 1978); Anonymous v. Anonymous, 558 F.2d 677, 679 (2d Cir. 1977).
94. 558 F.2d 677 (2d Cir. 1977).
95. 558 F.2d 677 (2d Cir. 1977).
96. Id. at 677.
97. The husband, separated from his wife, had been prohibited by court order from being in the same room with the children of the marriage, who were temporarily in his custody, while they spoke to their mother on the telephone. He had purchased an automatic telephone answering device in a local retail store and had plugged it into the standard phone jack in his apartment, asserting that his purpose in so doing was to avoid speaking to his wife when she telephoned the children at his apartment. The machine answered the telephone, with a recording of the husband’s voice, and if the wife was heard identifying herself over the machine, one of the children, rather than the husband, would pick up the phone. Although the machine normally shut itself off after 45 seconds, the wife alleged that the husband had instructed their son to turn on the “record” knob whenever she called, thus surreptitiously taping her conversations. If the husband was at home, a loudspeaker arrangement on the machine enabled him to hear the conversations in another room. If he was not at home, he was able to play back the recorded conversations at a later time. Id. at 678.
98. Id. at 677-79.
100. 558 F.2d at 677.
101. Id.
2511 to provide a civil cause of action under section 2520.102

The husband's conduct in Anonymous was also distinguished from previous cases such as Jones, where defendants had been found criminally liable.103 Jones-type defendants had invaded the privacy of innumerable persons, known and unknown, by indiscriminately intercepting all incoming and outgoing calls removing such conduct from the realm of "mere domestic conflicts" involved in Anonymous.104 In holding that the facts before it presented a "purely domestic conflict—a dispute between a wife and her ex-husband . . . a matter clearly to be handled by state courts,"105 the Anonymous court did not condone the husband's activity, and expressly refused to say that a plaintiff could never recover damages from a spouse under Title III provisions.106 The court simply maintained that the facts of the case did not rise to the level of a violation of the federal wiretapping statutes.107 A resolution of the immunity issue was therefore unnecessary to the court's determination.

Although the varied approaches developed by the several circuit courts' determinations in wiretapping cases have allowed courts to sidestep the interspousal immunity issue,108 it is inevitable that the right to privacy issue must be addressed before the issue of interspousal immunity can ultimately be settled.109 Therefore it is essential to understand the role the right to privacy takes—or perhaps should take—in wiretapping cases. Although the federal circuit courts have been inconsistent in their determinations, they have been harmonious in one unfortunate respect. Their decisions have given inadequate attentions to the core concept of Title III—protection of the individual's right to privacy.110

102. Id. Like the court in Simpson (but contrary to the court in Jones) the Second Circuit apparently recognized no separation between civil and criminal liability with regard to spouses who violate federal wiretapping provisions. If one spouse were criminally liable for intercepting the oral or wire communications of the other, that spouse would also be civilly liable, and vice versa. See note 49 supra.
103. 558 F.2d at 679. See also United States v. Schrimsher, 493 F.2d 848, 851 (5th Cir. 1974). For a discussion of Schrimsher, see note 52 supra.
104. 558 F.2d at 679.
105. Id.
106. Id.
107. Id.
108. See text accompanying notes 93-94 supra.
THE CONSTITUTIONAL RIGHT TO PRIVACY AND TITLE III

Although privacy values have long been a part of American legal philosophy,111 *Griswold v. Connecticut*112 was the first Supreme Court decision recognizing the right to privacy as a specific constitutional guarantee.113 This general right to privacy, which is inferred from the Bill of Rights' provisions concerned with privacy,114 has proven to be a dynamic, evolving concept.115 It is in light of this evolving concept of privacy that Title III cases should be approached.

The protection of the right to privacy, specifically that of oral and wire communications, is one of the major purposes of Title III.116 Title III was enacted within three years after *Griswold v. Connecticut*117 and was drafted to conform with the then recent privacy decision of *Katz v. United States*.118 In *Katz* the Supreme

---


"The principle which protects personal writings and other productions of the intellect or of the emotions is the right to privacy, and the law has no new principle to formulate when it extends this protection to personal appearance, sayings, acts, and to personal relation, domestic or otherwise." Warren & Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193, 213 (1890). This article may have provided the basis for the general constitutional right to privacy. J. Nowak, R. Rotunda & J. Young, *supra*, at 623.


112. 381 U.S. 479 (1965). The Court in *Griswold* invalidated state statutes which restricted the right of married persons to use contraceptive devices. *Id.* at 485-86.


114. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 928 (1973). These provisions include "the Fourth Amendment's guarantee against unreasonable searches, the Fifth Amendment's privilege against self-incrimination, and the right, inferred from the First Amendment, to keep one's political associations secret." *Id.*

115. Comment, *A Taxonomy of Privacy: Repose, Sanctuary and Intimate Decision*, 64 CALIF. L. REV. 1447, 1483 (1976). "[T]he same facts of fact may lead to different conclusions of law [that a person does or does not have a right to privacy] as time passes and society's ideas change about how much privacy is reasonable and what kinds of decisions are best left to individual choice." *Id.*


118. 389 U.S. 347 (1967). See S. REP. NO. 1097, 90th Cong., 2d Sess., reprinted in [1968] U.S. CODE CONG. & AD. NEWS 2153. In *Katz*, the Supreme Court held that the government's activities in electronically listening to and recording the defendant's words spoken into a telephone receiver in a telephone booth violated the privacy upon which the defendant justifiably relied while using the telephone booth. Therefore, the electronic eavesdropping accomplished constituted a search and
Court discarded the trespass doctrine of Olmstead v. United States\textsuperscript{119} which had linked the constitutionality of searches and seizures to the presence or absence of a physical intrusion into a constitutionally protected area.\textsuperscript{120} The Court in Katz emphasized that "the Fourth Amendment protects people, not places,"\textsuperscript{121} and what an individual seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.\textsuperscript{122} In his concurring opinion, Mr. Justice Harlan deemed this concept the "constitutionally protected reasonable expectation of privacy,"\textsuperscript{123} and the decision in Katz has come to stand for the proposition that the Constitution protects "a [citizen's] reasonable expectation of privacy."\textsuperscript{124} Legislation modeled on Katz would therefore seem to prohibit the unauthorized invasion of an individual's reasonable expectation of privacy. Title III is designed to protect an individual’s right to privacy with regard to oral and wire communications.\textsuperscript{125} Is that right to be partially forfeited by an individual who enters a marital relationship?\textsuperscript{126}

Recent cases further defining the individual's right to privacy may indicate the answer to this question. In Planned Parenthood v. Danforth,\textsuperscript{127} the Supreme Court held, inter alia, that a spousal consent provision pursuant to a Missouri abortion statute was unconstitutional.\textsuperscript{128} The statutory provision had precluded a married


\textsuperscript{121} 389 U.S. at 351.

\textsuperscript{122} Id.

\textsuperscript{123} Id. at 360 (Harlan, J., concurring).


\textsuperscript{126} See Simpson v. Simpson, 490 F.2d 803, 807-09 (5th Cir. 1974), cert. denied, 419 U.S. 897 (1974), and notes 41-52 and accompanying text supra.

At least one court has kept interspousal wiretapping out of evidence in divorce litigation on the basis that it violates a spouse's right to privacy under the state constitution. Markham v. Markham, 265 So. 2d 59, 62 (Fla. Dist. Ct. App. 1972). See notes 32-40 and accompanying text supra. On the other hand, where one spouse is paying the telephone bills and paid for the initial installation of the lines, it has been argued that such spouse may intercept private conversations of the other, if reasonably necessary to protect the connubial relationship and domestic tranquility. Beaber v. Beaber, 41 Ohio Misc. 95, —, 322 N.E.2d 910, 915 (1974); Markham v. Markham, 265 So. 2d 59, 62 (Fla. Dist. Ct. App. 1972) (Wigginton, J., dissenting).

\textsuperscript{127} 428 U.S. 52 (1976).

\textsuperscript{128} Id. at 71.
woman from procuring an abortion without her husband's consent, whether or not he was the father of the fetus.\textsuperscript{129} Despite the state's position that the state legislature had determined "that a change in the family structure set in motion by mutual consent should be terminated only by mutual consent,"\textsuperscript{130} the Court refused to hold that the state has the constitutional authority to give the husband unilaterally the ability to prohibit the wife from terminating her pregnancy.\textsuperscript{131} In support of its decision, the Court quoted the following language\textsuperscript{132} from \textit{Eisenstadt v. Baird}:\textsuperscript{133}

> The marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the \textit{individual}, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting person as the decision whether to bear or beget a child.\textsuperscript{134}

The Court in \textit{Danforth} further noted that, ideally, the decision to terminate a pregnancy should be concurred in by both the husband and the wife, and that no marriage can be viewed as harmonious or successful if a difference of opinion exists as to such a fundamental issue.\textsuperscript{135} Nevertheless, allowing a husband a veto power exercisable "for any reason whatsoever and for no reason at all"\textsuperscript{136} was not seen as a method of fostering mutuality and trust in a marriage, nor of strengthening the marital relationship and the marriage institution.\textsuperscript{137} Since the wife was the one who physically bore the child and who was the one more directly and immediately

\begin{itemize}
\item \textsuperscript{129} \textit{Mo. Ann. Stat.} § 188.020(3) (Vernon Supp. 1979).
\item \textsuperscript{130} 428 U.S. at 68.
\item \textsuperscript{131} \textit{Id.} at 70. Under Roe v. Wade, 410 U.S. 113, 114 (1973), the state is prohibited from interfering with a woman's decision to terminate her pregnancy in the first trimester. Therefore, "since the State cannot regulate or prescribe abortion during the first stage, when the physician and his patient make that decision, the State cannot delegate authority to any particular person, even the spouse, to prevent abortion during that same period." 428 U.S. at 69. And in Doe v. Bolton, 410 U.S. 179, 189-201 (1973), which was to be read in conjunction with \textit{Wade}, the Court examined procedural requirements of the abortion statute. A number of the provisions were invalidated as procedural restrictions on a woman's ability to obtain an abortion. These provisions were said to unnecessarily restrict the woman's right to privacy, and therefore violated due process.
\item \textsuperscript{132} 428 U.S. at 70 n.11.
\item \textsuperscript{133} 405 U.S. 438 (1972). There a state statute prohibiting distribution of contraceptives to unmarried persons was held invalid as a violation of the equal protection clause of the fourteenth amendment.
\item \textsuperscript{134} \textit{Id.} at 453.
\item \textsuperscript{135} 428 U.S. at 71.
\item \textsuperscript{136} \textit{Id.}
\item \textsuperscript{137} \textit{Id.}
\end{itemize}
affected by the pregnancy, the decision to terminate the pregnancy should belong to her. Such reasoning is consistent with the Court's previous recognition of a woman's individual right to privacy—which specifically includes a woman's right to an abortion—as a fundamental right. As demonstrated in Danforth, this individual right of privacy assumes paramount importance—even as against the joint marital right of privacy.

An analogy may be drawn from these right to privacy decisions to cases involving electronic eavesdropping between spouses. If the marital relationship assumes a position subordinate to the rights of individuals within the marital relationship in the former cases, it can forcefully be argued that an individual's right to privacy should prevail in interspousal wiretapping situations taking place within or without the marital home. Thus the immunity doctrine should not apply. The legislative history of Title III indicates that the act is designed to protect privacy. It is difficult to justify why an individual's right to privacy should be diminished merely on account of marital status, especially in light of such decisions as Danforth and Eisenstadt. Yet, that is exactly what is accomplished when courts apply the immunity doctrine in cases involving interspousal electronic surveillance. If the intent of Congress in enacting Title III was the implied authorization of such invasions by one spouse of the other's privacy, serious questions regarding the constitutionality of the legislation could be raised due to the resulting restriction of a spouse's individual right to privacy.

---

138. Id.
142. See notes 94-100 and accompanying text supra.
144. Cf. Doe v. Bolton, 410 U.S. 179, 189-201 (1973) (procedural requirements of state abortion statutes held invalid as unnecessarily restrictive of a woman's right to privacy and therefore violative of the due process clause of the fourteenth amendment). For a detailed discussion of the individual right to privacy at issue in Bolton, see 410 U.S. at 209-21 (Douglas, J., concurring). See also J. Carr, supra note 8, § 2.05[4] at 49-50, emphasizing the need for strict construction of Title III provisions in order to avoid constitutional difficulties with regard to governmental intrusions:

If Title III as applied is to fulfill the congressional objective of preserving conversational privacy from unjustified electronic surveillance, its provi-
CONCLUSION

Title III was designed to control the rampant use of unauthorized wiretapping. Its purpose was twofold: the protection of privacy and the establishment of uniform legislation to effect that protection. Inconsistent application of the interspousal immunity doctrine to Title III provisions, resulting in full protection of privacy for some individuals but not for others, effectively thwarts Title III's dual purpose.

There are strong public policy reasons for discarding the interspousal immunity doctrine altogether. With regard to Title III, there is no real indication that Congress intended the doctrine to apply at all. Although Congress made certain specific exclusions from liability under the statutes, it did not specifically exclude spouses. The legislative history leaves no doubt that Title III was designed to prohibit private unauthorized electronic surveillance, and that Congress was aware that a major area for use of such surveillance was the preparation of domestic relations litigation.\textsuperscript{145} The discretionary application of an old common law immunity doctrine does not appear to be consistent with the general purpose Congress had in mind when Title III was enacted. Furthermore, interspousal wiretapping seems to go beyond the realm of "mere marital disputes," an area traditionally left to state law when the rights of third parties are simultaneously invaded.

In the legislative history of Title III, statutory reform was called for in light of then recent Supreme Court decisions, including \textit{Katz v. United States}.\textsuperscript{146} Yet there is no mention of a lesser expectation of privacy for spouses subject to electronic surveillance within or without the marital home. Furthermore, the application of the common law doctrine of interspousal immunity raises important questions with regard to the individual spouse's constitutional right to privacy. This right—the right of the individual to privacy—should receive paramount constitutional protection. To subordinate this right to an outmoded common law doctrine which presupposes that a marriage does not consist of two individuals,
but one separate entity, is clearly questionable in light of current Supreme Court decisions redefining the individual right to privacy. Ideally, the federal wiretapping statutes should be uniformly applied in all jurisdictions. Consistent application of the statutory provisions is necessary, especially if fair warning with regard to criminal liability is a concern. As technology advances and more sophisticated methods of invading privacy emerge, the constitutional right to privacy must be carefully protected. Such a fundamental right weighs heavily in the balance vis-à-vis the old common law interspousal immunity doctrine. Judges may discard the immunity doctrine if current conditions so dictate. It appears as though, at least with regard to Title III, that time has come.

Asenath Kepler—'80

---