

1989

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Recommended Citation

Cori D. Stephens, *All's Fair: No Remedy Under Title III for Interspousal Surveillance*, 57 Fordham L. Rev. 1035 (1989).

Available at: <https://ir.lawnet.fordham.edu/flr/vol57/iss6/13>

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NOTES

ALL'S FAIR: NO REMEDY UNDER TITLE III FOR INTERSPOUSAL SURVEILLANCE

INTRODUCTION

The domestic relations doctrine¹ embodies the concept that domestic relations is governed by state law to the exclusion of federal law.² Consequently, divorce, child custody proceedings and other domestic disputes are adjudicated under state, not federal law.³

Domestic disputes involving non-consensual interspousal surveillance, however, implicate areas of both state and federal law.⁴ Interspousal surveillance typically occurs when an individual records telephone conversations of his spouse without the spouse's knowledge or consent, often in an attempt to gain evidence for use in a divorce or child custody proceeding. The spouses may be living together or separately, and the surveillance may be performed by the spouse personally or by a third party at the request of the spouse.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (the "Act") prohibits the non-consensual interception of wire, oral or electronic communications of another⁵ by any person.⁶ The federal statute provides both criminal punishment for violators and civil remedies to victims.⁷ Courts have struggled with the question of whether the federal statute should apply to interspousal surveillance.⁸ While the language of Title III suggests a blanket prohibition of any non-consensual surveillance,⁹ the application of the federal statute to interspousal surveillance would intrude upon the historical role of the state as the governing body of family law and the sole arbiter of domestic disputes.¹⁰

1. The domestic relations doctrine was first outlined in *In re Burrus*, 136 U.S. 586, 593-94 (1890); *Barber v. Barber*, 62 U.S. (21 How.) 582, 584 (1858). In response to a child custody suit brought in federal court, the Supreme Court declined to permit federal jurisdiction because "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." *In re Burrus* 136 U.S. at 593-4. See *infra* notes 117-21 and accompanying text.

2. See *In re Burrus*, 136 U.S. at 593-94.

3. See *infra* notes 118-19 and accompanying text.

4. *Hearings on Invasions of Privacy, Before the Subcomm. on Admin. Practice & Procedure of the Senate Judiciary Comm.*, 89th Cong., 1st Sess., pt. 5, 2261 (1966).

5. See 18 U.S.C. § 2511 (1982 & Supp. V 1987).

6. See *id.*

7. See 18 U.S.C. §§ 2511(4)(5), 2520 (1982 & Supp. V 1987).

8. Four prominent cases exemplify the division of authority between the circuits. *Anonymous v. Anonymous*, 558 F.2d 677 (2d Cir. 1977), and *Simpson v. Simpson*, 490 F.2d 803 (5th Cir.), *cert. denied*, 419 U.S. 897 (1974), hold that Title III does not apply to interspousal surveillance. On the other hand, *Pritchard v. Pritchard*, 732 F.2d 372 (4th Cir. 1984) and *United States v. Jones*, 542 F.2d 661 (6th Cir. 1976), favor the application of the statute to interspousal surveillance.

9. See *infra* notes 12-14 and accompanying text.

10. See *infra* notes 117-21 and accompanying text.

This Note examines whether Title III of the Act should apply to interspousal surveillance. Part I discusses the plain meaning of Title III and explains the need to look to legislative history when determining congressional intent. Part II analyzes the meaning of the statute in light of its legislative history. Part III discusses the states' exclusive role in the area of family law. This Note concludes that Title III should not provide a federal remedy for interspousal surveillance.

I. STATUTORY ANALYSIS

On its face,¹¹ Title III prohibits non-consensual surveillance by any "person" who attempts to intercept the wire, oral, or electronic communication of another,¹² unless specifically excepted from the statute.¹³ The statute appears to encompass almost any type of non-consensual interception, including interspousal surveillance. The word "person" is not a term of art; it is undefined in the statute and appears to have its ordinary meaning. The statute's language defining both the type of surveillance prohibited and the plaintiff and defendant class is inclusive in nature. This broad language has persuaded many courts to find that Title III applies to interspousal surveillance.¹⁴

Despite Title III's inclusive language, Congress exempted certain sur-

11. In order to determine whether Title III of the Act applies to interspousal surveillance, courts must interpret the meaning of the statute. When construing a statute, courts first look to its plain meaning. W. LaFare & A. Scott, *Criminal Law* § 2.2, at 75-76 (2d ed. 1986). The plain meaning rule dictates that, "[w]here the language [of a statute] is plain and admits of no more than one meaning[,] the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion." *Id.* at 76 (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)). This form of statutory interpretation is limited to the plain language of the statute and dispenses with the use of outside materials such as legislative history. *Id.*

12. Title III provides:

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

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

(b) intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; . . . shall be punished . . . or shall be subject to suit.

18 U.S.C. § 2511(1)(a),(b) (1982 & Supp. V 1987).

13. See 18 U.S.C. § 2511(2) (1982 & Supp. V 1987).

14. See *Kempf v. Kempf*, No. 88-1257, slip op. at 4 (8th Cir. Feb. 21, 1989) ("[t]he remedy clearly applies to any 'person' defined as 'any individual'"); *United States v. Jones*, 542 F.2d 661, 666 (6th Cir. 1976). The statute's language was interpreted as "'effectively . . . prohibit[ing] . . . all interceptions of wire and oral communications, except those specifically provided for in the Act.'" *Id.* (quoting *United States v. Giordano*, 416 U.S. 505, 514 (1974)); see also *Pritchard v. Pritchard*, 732 F.2d 372, 374 (4th Cir. 1984) (statute prohibits all wiretapping unless specifically excepted); *Heyman v. Heyman*, 548 F. Supp. 1041, 1045 (N.D. Ill. 1982) (same); *Gill v. Willer*, 482 F. Supp. 776, 778 (W.D.N.Y. 1980) (same).

veillance from criminal and civil liability. For example, Section 2511(2) exempts switchboard operators and employees of the Federal Communications Commission from prosecution and civil liability, provided they are acting within the scope of their employment.¹⁵ The statute also provides an exception for interception via an extension telephone.¹⁶ Neither the outlined exceptions in section 2511(2) nor the telephone extension exception specifically exempts or even addresses interspousal surveillance.

Some courts assert that the delineation of exceptions within the statute demonstrates the legislators' careful consideration of what circumstances the statute should cover.¹⁷ Had Congress intended the statute not to apply to interspousal surveillance, Congress would have included a specific exception to that effect.¹⁸

Similarly, some proponents of a broad interpretation of the statute argue that the specificity of language concerning criminal penalties and civil remedies in the statute mandate the application of Title III to interspousal surveillance.¹⁹ The statute clearly outlines the criminal and civil consequences of non-consensual surveillance. If prosecuted, the errant eavesdropper may be fined and imprisoned up to five years for his of-

15. The following individuals and circumstances are exempt from the statute:

- (1) switchboard operators and employees of providers of wire or electronic communication service "in the normal course of their employment," 18 U.S.C. § 2511(2) (1982 & Supp. V 1987), and to provide assistance to persons authorized by law,
- (2) employees of the Federal Communications Commission,
- (3) a person acting under color of law,
- (4) consented interception, and
- (5) government foreign intelligence activities.

18 U.S.C. § 2511(2) (1982 & Supp. V 1987).

16. The statute prohibits unpermitted surveillance through the use of any "electronic, mechanical, or other device" except an extension telephone used in the ordinary course of the user's business. See 18 U.S.C. § 2511(1) (1982 & Supp. V 1987). "Electronic, mechanical, or other device" is defined as:

any device or apparatus which can be used to intercept a wire, oral, or electronic communication other than—

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business or furnished by such subscriber or user for connection to the facilities of such service and used in the ordinary course of its business; or (ii) being used by a provider of wire or electronic communication service in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties.

18 U.S.C. § 2510(5)(a) (1982 & Supp. V 1987).

17. See *Jones*, 542 F.2d at 671; *Heyman*, 548 F. Supp. at 1045; *Kratz v. Kratz*, 477 F. Supp. 463, 467 (E.D. Pa. 1979); *Remington v. Remington*, 393 F. Supp. 898, 901 (E.D. Pa. 1975).

18. See *Jones*, 542 F. Supp. at 671; *Kratz*, 477 F. Supp. at 467; *Remington*, 393 F. Supp. at 901.

19. See *Pritchard v. Pritchard*, 732 F.2d 372, 373 (4th Cir. 1984); *Heyman v. Heyman*, 548 F. Supp. 1041, 1045 (N.D. Ill. 1982).

fense.²⁰ In a civil case, the relief provided may be a preliminary or mandatory injunction against future surveillance and actual and punitive damages.²¹ The eavesdropper in a civil case faces minimum damages of \$10,000 with possible punitive damages and attorney's fees.²²

The statutory provision for a civil remedy for non-consensual electronic surveillance indicates that the statute was designed to prohibit specific types of surveillance activity between private parties. Several courts that apply a plain meaning interpretation to the statute conclude that Title III applies to interspousal surveillance because of this provision for a civil remedy.²³ The availability of a civil remedy, however, does not mandate application of Title III to surveillance activity between a husband and wife.

Regardless of the clarity of the language, a court may consult legislative history to discover congressional intent regarding the meaning and application of the statute.²⁴ When the literal reading of a statute conflicts with a "clear contrary evidence of legislative intent,"²⁵ the legislative intent will govern the interpretation of the statute.

Ambiguity in a statute also justifies the use of legislative history when construing a statute.²⁶ Courts exercise a great deal of discretion in deter-

20. See 18 U.S.C. § 2511(4) (1982 & Supp. V 1987).

21. 18 U.S.C. § 2520(b) (1982 & Supp. V 1987) provides:

(b) Relief.

In an action under this section, appropriate relief includes—

(1) such preliminary and other equitable or declaratory relief as may be appropriate;

(2) damages under subsection (c) and punitive damages in appropriate cases; and

(3) a reasonable attorney's fee and other litigation costs reasonably incurred.

22. Damages are computed as follows:

[T]he court may assess as damages whichever is the greater of—

(A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or

(B) statutory damages of whichever is the greater of \$100 a day for each day of violation or \$10,000.

18 U.S.C. § 2520(c)(2) (1982 & Supp. V 1987).

23. See *Pritchard*, 732 F.2d at 374; *Heyman*, 548 F. Supp. at 1045; *Gill v. Willer*, 482 F. Supp. 776, 778 (W.D.N.Y. 1980).

24. A court need not restrict its analysis to the language of the statute but rather may "use available aids to construction no matter how clear the statute may appear at first inspection." *Brigham v. United States*, 539 F.2d 1312, 1316 n.8 (3d Cir. 1976); see *United States v. American Trucking Ass'ns*, 310 U.S. 534, 543-44 (1940) ("When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'") (footnotes omitted). A court is permitted to look beyond the language of the statute in determining its meaning and application. See *id.*

25. *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974).

26. *W. LaFave & A. Scott*, *supra* note 12, § 2.2(d), at 78 (legislative history may resolve ambiguity in interpreting statutes).

mining whether a statute is ambiguous.²⁷ For example, in deciding whether to apply an unclear criminal statute to a given situation, courts will often determine that the statute is ambiguous in that context.²⁸ When a court finds that a statute is ambiguous, the court looks to the legislative history to discover congressional intent.²⁹

Although the language of Title III appears clear,³⁰ some courts have found the statute to be ambiguous on the specific issue of interspousal surveillance.³¹ Because the domestic relations doctrine³² suggests the possible prohibition of interspousal surveillance is an issue to be resolved under state law, Title III should not be applied in this factual context.³³ Such an application would lead to an unusual result—a federal remedy for a domestic dispute.³⁴ Thus, it is necessary to examine the legislative history of the statute.

II. LEGISLATIVE HISTORY

The legislative history of Title III offers conflicting evidence on whether the statute should apply to interspousal surveillance. While portions of the legislative history suggest a broad prohibition of non-consensual surveillance, the legislative purpose indicates that the statute was enacted more particularly to combat crime.

A. Major Purpose of the Act—Crime Control

As stated in the Senate report accompanying the legislation, the primary goal of the Omnibus Crime Control and Safe Streets Act of 1968 was “to assist State and local governments in reducing the incidence of

27. *See id.*

28. *See id.*

29. *See id.*

30. *See Pritchard v. Pritchard*, 732 F.2d 372, 374 (4th Cir. 1984); *Heyman v. Heyman*, 548 F. Supp. 1041, 1045 (N.D. Ill. 1982); *Gill v. Willer*, 482 F. Supp. 776, 778 (W.D.N.Y. 1980).

31. *See Simpson v. Simpson*, 490 F.2d 803, 805 (5th Cir.), *cert. denied*, 419 U.S. 897 (1974). The court stated that while “[t]he naked language . . . reaches this case . . . we are of the opinion that Congress did not intend such a far reaching result” After an extensive study of the statute’s legislative history, the court concluded that Congress did not demonstrate a “positive intent” or even an “awareness” that they would be prohibiting interspousal surveillance. *See id.*; *see also Lizza v. Lizza*, 631 F. Supp. 529, 533 (E.D.N.Y. 1986) (“Absent a signal, either in the statute itself or in the legislative history, that Congress intended that the Act’s criminal and civil proscriptions and liabilities extend to [interspousal surveillance within the home], this Court must decline to impute such an intent.”)

32. *See supra* note 1.

33. *Anonymous v. Anonymous*, 558 F.2d 677, 679 (2d Cir. 1977); *Simpson*, 490 F.2d at 805-06; *Lizza*, 631 F. Supp. at 532.

34. *See Simpson*, 490 F.2d at 805. The *Simpson* court stated that Title III’s application to interspousal surveillance would “[extend] into areas normally left to the states, those of the marital home and domestic conflicts.” *Id.* While the court noted that Congress did have the authority to regulate electronic surveillance, a “federal remedy for parties aggrieved by the personal acts of their spouses” would be a “novelty.” *Id.* at 805 & n.6, 806.

crime, to increase the effectiveness, fairness, and coordination of law enforcement and criminal justice systems at all levels of government.”³⁵ In its discussion of the statute, the report stated, “[t]he major purpose of title III is to combat organized crime.”³⁶ Title III is designed to provide general protection for the privacy of wire and oral communications while “delineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized.”³⁷ The specific guidelines contained in Title III were designed to remove the confusion in the law governing surveillance by law enforcement officials.³⁸

Congress intended Title III to provide wiretapping and electronic surveillance methods to supplement law enforcement efforts against organized crime.³⁹ Four sections are devoted to outlining proper procedures, authorization and reporting requirements for the interception and disclosure of communications.⁴⁰

35. This statement of legislative purpose introduced the Senate report which accompanied House Report 5037 (the predecessor to the Act). *See* S. Rep. No. 1097, 90th Cong., 2d Sess. 1, *reprinted in* 1968 U.S. Code Cong. & Admin. News 2112, 2112.

36. *Id.* at 1, *reprinted in* 1968 U.S. Code Cong. & Admin. News at 2157.

37. *Id.* at 66, *reprinted in* 1968 U.S. Code Cong. & Admin. News at 2153. The Senate Report also notes explicit exceptions for the President of the United States in the interest of national security and employees of both the Federal Communications Commission and communications common carriers in the normal course of their employment. *Id.* at 66-67, *reprinted in* 1968 U.S. Code Cong. & Admin. News at 2153-54.

38. The report noted that “[b]oth proponents and opponents of wiretapping and electronic surveillance agree that the present state of the law [pertaining to electronic surveillance by law enforcement officials] is extremely unsatisfactory and that the Congress should act to clarify the resulting confusion.” *Id.* at 67, *reprinted in* 1968 U.S. Code Cong. & Admin. News at 2154; *see* *Briggs v. American Air Filter Co.*, 630 F.2d 414, 418 (5th Cir. 1980); *Simpson v. Simpson*, 490 F.2d 803, 806 (5th Cir.), *cert. denied*, 419 U.S. 897 (1974).

39. *See generally* S. Rep. No. 1097, 90th Cong., 2d Sess. 186-88, *reprinted in* 1968 U.S. Code Cong. & Admin. News 2112, 2245-46 (Sen. Birch Bayh discussed Title III as a tool to combat organized crime); *id.* at 209-19, *reprinted in* 1968 U.S. Code Cong. & Admin. News at 2259-68 (Sen. Hugh Scott indicated that the legislation demonstrated an intent to mount an effective fight against organized crime); *id.* at 224-39, *reprinted in* 1968 U.S. Code Cong. & Admin. News at 2273-88 (Sens. Everett McKinley Dirksen, Roman L. Hruska, Hugh Scott, and Strom Thurmond found Title III a major contribution to organized crime fighting efforts).

40. The four sections enacted primarily for the use of law enforcement officials are entitled as follows:

“Authorization for interception of wire, oral, or electronic communications,” 18 U.S.C. § 2516 (Supp. V 1987), “Authorization for disclosure and use of intercepted wire, oral, or electronic communications,” 18 U.S.C. § 2517 (Supp. V 1987), “Procedure for interception of wire, oral, and electronic communications,” 18 U.S.C. § 2518 (Supp. V 1987), and “Reports concerning intercepted wire, oral, or electronic communications.” 18 U.S.C. § 2519 (Supp. V 1987).

The remaining sections pertain to statutory definitions, *see* 18 U.S.C. § 2510 (Supp. V 1987), a description of the prohibited interceptions, *see* 18 U.S.C. § 2511 (Supp. V 1987), prohibition of the manufacture, distribution, possession and advertising of intercepting devices prohibited, *see* 18 U.S.C. § 2512 (Supp. V 1987), confiscation of intercepting devices, *see* 18 U.S.C. § 2513 (Supp. V 1987), and civil damages, 18 U.S.C. § 2520 (Supp. V 1987).

A statute's purpose helps to define the statute's applicable scope. Because Title III was enacted primarily to control crime and outline procedures for surveillance by law enforcement officials, the application of the statute to interspousal surveillance would be an inappropriate extension of the statute beyond its intended scope.⁴¹

B. Rule of Construction: Construing a Criminal Statute Favorably Toward the Defendant

Certain statutes with civil characteristics nevertheless may be properly classified as criminal.⁴² Statutes imposing fines for certain conduct fall within this category.⁴³ The statutory penalty may be recovered by the state, an informer, or, as in the case of Title III, an injured party.⁴⁴ Statutes with these and other similar provisions have been held to be criminal or quasi-criminal.⁴⁵

Title III is properly classified as a criminal statute.⁴⁶ It was enacted primarily to combat crime,⁴⁷ and the statute provides criminal penalties for prohibited surveillance.⁴⁸ Additionally, the statute imposes a fine for the prohibited behavior to be recouped by the injured party.⁴⁹ The fact that the penalty is couched in civil terms does not change the criminal nature of the statute.

Criminal statutes must be construed in favor of the defendant⁵⁰ for two

41. See *Perfit v. Perfit*, 693 F. Supp. 851, 855-56 (C.D. Cal. 1988); *Lizza v. Lizza*, 631 F. Supp. 529, 532-33 (E.D.N.Y. 1986).

42. See *W. LaFave & A. Scott*, *supra* note 12, § 2.2(d), at 77-78 & n.23 (penal statutes "may include some statutes which might properly be called civil . . . [such as] a statute providing for a money penalty for certain conduct")

43. See *id.* at 78.

44. See *id.* § 1.7, at 42.

45. For a discussion of various tests used in determining whether a statute is criminal, see Comment, *Statutory Penalties—A Legal Hybrid*, 51 Harv. L. Rev. 1092, 1096-98 (1938).

46. Courts have classified Title III as a criminal statute. In *Simpson v. Simpson*, 490 F.2d 803 (5th. Cir.), *cert. denied*, 419 U.S. 897 (1974), the court noted that "not only does Title III have the primary goal of controlling crime, but . . . it also prescribes criminal sanctions for its violators. . . . We are thus bound by the principle that criminal statutes must be strictly construed to avoid ensnaring behavior that is not clearly proscribed." *Id.* at 809. In *Robinson v. Robinson*, 499 So. 2d 152, 155 (La. Ct. App. 1986), the court referred to Title III as "the federal criminal wiretap act" and concluded that interspousal surveillance "does not rise to the level of criminal conduct proscribed by the federal statute."

47. See *Simpson*, 490 F.2d at 809; *Robinson*, 499 So. 2d at 155. See *supra* notes 35-40 and accompanying text.

48. See 18 U.S.C. § 2511(4) (1982 & Supp. V 1987).

49. See 18 U.S.C. § 2520(a) (Supp. V 1987).

50. See *W. LaFave & A. Scott*, *supra* note 12, § 2.2(d), at 77. Courts will construe a criminal statute liberally in the defendant's favor when determining whether or not a statute applies. See *Federal Communications Comm'n v. American Broadcasting Co.*, 347 U.S. 284, 296 (1954) (in holding certain F.C.C. regulations invalid, the court made reference to "the well-established principle that penal statutes are to be construed strictly"); *Simpson v. Simpson*, 490 F.2d 803, 809 (5th Cir.), *cert. denied*, 419 U.S. 897 (1974); see also *Bell v. United States*, 349 U.S. 81, 83 (1955) ("When Congress leaves to

reasons. First, strict construction gives criminals notice of the prohibited behavior and the severity of the punishment.⁵¹ Second, the legislature, not the courts, is empowered to determine what constitutes criminal behavior.⁵² A broad judicial interpretation of the statute may wrongly usurp this power. Because Title III of the Act is a criminal statute, the defendant should receive the benefit of narrow construction.

Application of this criminal rule of construction to Title III requires courts to interpret the statute narrowly. Because of the statute's conflicting legislative history⁵³ and the presumption that domestic relations issues are within the domain of state law,⁵⁴ narrow construction that operates to exclude individuals not clearly intended to be covered by the statute would place the intercepting spouse beyond the reach of the statute.

Similarly, another rule of construction favors a narrow interpretation. This rule requires statutes with severe penalties to be construed more narrowly than those with lighter penalties.⁵⁵ Because the civil eavesdropper faces minimum damages of \$10,000 and possible punitive damages and attorney's fees under the statute,⁵⁶ Title III should not be extended to interspousal surveillance, but should be construed narrowly.

C. *Private Surveillance and Civil Recovery*

Despite Congress' predominant concern with crime control, the statute provides a civil remedy for non-consensual electronic surveillance as well.⁵⁷ The availability of a private remedy indicates that the statute was intended to prohibit non-consensual surveillance between private parties in some cases.⁵⁸

The Senate Report identified common "uses and abuses" of electronic surveillance beyond law enforcement activities.⁵⁹ The report noted the growing use of electronic surveillance in a business context, such as trade secret theft and labor/management spying in employment disputes, as

the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity.").

51. See W. LaFave & A. Scott, *supra* note 12, § 2.2(d), at 78.

52. See *id.* Although a statute need not state expressly to whom it applies, it does not necessarily apply to all but those specifically excepted. That is, an implied exception may still exist.

53. See *infra* notes 57-85 and accompanying text.

54. See *infra* notes 117-21 and accompanying text.

55. See W. LaFave & A. Scott, *supra* note 12, § 2.2(d), at 79.

56. See 18 U.S.C. § 2520(b), (c)(2)(B) (Supp. V 1987).

57. See 18 U.S.C. § 2520(b) (Supp. V 1987).

58. See *Remington v. Remington*, 393 F. Supp. 898, 901 (E.D. Pa. 1975). The *Remington* court distinguished between surveillance actually performed by the spouse and surveillance performed by private detectives, law firms and "other unknown persons." *Id.*

59. See S. Rep. No. 1097, 90th Cong., 2d Sess. 67, *reprinted in* 1968 U.S. Code Cong. & Admin. News 2112, 2154.

well as surveillance of private individuals.⁶⁰ The Senate Report also referred to a broad intent behind the statute. The report described Title III as a prohibition of "all wiretapping and electronic surveillance by persons other than duly authorized law enforcement officers engaged in the investigation or prevention of specified types of serious crimes, and only after authorization of a court order obtained after a showing and finding of probable cause."⁶¹ This statement has been cited to support the contention that interspousal surveillance is prohibited as well.⁶²

Although congressional discussions focused primarily upon police surveillance activity and crime control, the statute's legislative history indicates that Congress was aware of the use of wiretapping in domestic disputes.⁶³ Professor G. Robert Blakey, instrumental in the creation of Title III, testified that two primary uses of private electronic surveillance are commercial espionage and domestic relations investigations.⁶⁴ In addition, Senator Edward V. Long⁶⁵ identified three major uses of private wiretapping: industrial, political, and divorce cases.⁶⁶ Testimony at the Senate hearing from private investigators⁶⁷ and a district attorney⁶⁸ described the use of electronic surveillance in domestic disputes.

The reference to electronic surveillance employed in marital disputes has convinced a number of courts that the legislators deliberately chose not to except spying spouses from the statutory prohibition on non-consensual surveillance.⁶⁹ In many cases, however, courts have chosen to apply the statute to interspousal surveillance only in limited circum-

60. *See id.* In noting the growing use of electronic surveillance in these contexts, the Report refers to "tremendous scientific and technological developments" fostering sophisticated surveillance, suggesting that more mundane answering machines and tape recorders commonly used in interspousal surveillance may be beyond the scope of the statutory prohibition. *See id.*

61. *Id.* at 66, reprinted in 1968 U.S. Code Cong. & Admin. News at 2153.

62. *See* United States v. Jones, 542 F.2d 661, 668 (6th Cir. 1976).

63. *See infra* notes 64-68 and accompanying text.

64. *See Right of Privacy Act of 1967: Hearings Before the Subcomm. on Admin. Practice & Procedure of the Senate Judiciary Comm.*, 90th Cong., 1st Sess., pt. 2, at 413 (1967).

65. Senator Edward V. Long was the Chairman of the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee during the Senate hearings on Title III. *See Hearings on Invasions of Privacy, Before the Subcomm. on Admin. Practice & Procedure of the Senate Judiciary Comm.*, 89th Cong., 1st Sess., pt. 5, 2261 (1966).

66. *See id.*

67. Additional testimony from two private investigators, Bernard Spindel and John W. Leon, that electronic surveillance was commonly used in domestic relations investigations. *See id.* at 2262 (Spindel), 2411 (Leon).

68. Richard Gerstein, District Attorney of Dade County, Florida, testified that "it is routine procedure in marital disagreements and other civil disputes for private detective agencies, generally with full knowledge of the lawyers, to tap telephones." *Id.* at 1009.

69. *See, e.g.,* Kempf v. Kempf, No. 88-1257, slip op. at 5 (8th Cir. Feb. 21, 1989); Nations v. Nations, 670 F. Supp. 1432, 1434-35 (W.D. Ark. 1987); Gill v. Willer, 482 F. Supp. 776, 778 (W.D.N.Y. 1980); Kratz v. Kratz, 477 F. Supp. 463, 467-68 (E.D. Pa. 1979).

stances,⁷⁰ depending upon whether the surveillance was performed by a third person and whether the couple was living together at the time of the surveillance.⁷¹

Some courts focus on the party conducting the surveillance.⁷² The courts relying on legislative history conclude that Congress intended to prohibit surveillance performed by a third party rather than the spouse.⁷³ Another view is that there is no distinction between spousal and third party surveillance;⁷⁴ the focus is instead upon the communication itself. The communication is protected regardless of the relationship of the interceptor to the person communicating.⁷⁵ Generally, these courts found that interspousal surveillance constitutes a claim under the statute.⁷⁶

Still other courts base their decisions on a second factual distinction: the living arrangements of the married couple. Under this analysis, civil liability for interspousal surveillance depends upon whether the spouses share a residence. These courts treat the marital home as a surveillance safety zone for spouses.⁷⁷ They rely upon certain parts of the legislative

70. See *Perfit v. Perfit*, 693 F. Supp. 851, 855-56 (C.D. Cal. 1988) (interception via the attachment of a recording device to the telephone within the home—directed verdict for defendant); *Baumrind v. Ewing* 276 S.C. 350, 353, 279 S.E.2d 359, 360, *cert. denied*, 454 U.S. 1092 (1981) (no third party surveillance involved—held no liability).

71. See *Perfit*, 693 F. Supp. at 855-56; *Baumrind*, 276 S.C. at 353, 279 S.E.2d at 360.

72. See *White v. Weiss*, 535 F.2d 1067, 1071 (8th Cir. 1976); *Remington v. Remington*, 393 F. Supp. 898, 901 (E.D. Pa. 1975).

73. See *White*, 535 F.2d at 1071 (“no sound rationale or legal basis in the statute or in its legislative history to insulate a private detective from the reach of . . . civil penalties”); *Baumrind*, 276 S.C. at 353, 279 S.E.2d at 360 (wiretap by spouse and not private detective; therefore no liability).

The court in *Simpson v. Simpson* noted that the limited amount of legislative history on the issue of surveillance in domestic disputes appeared to be directed at private investigators. 490 F.2d 803, 808 (5th Cir.), *cert. denied*, 419 U.S. 897 (1974). The *Simpson* court expressed its view that a qualitative difference exists between a third party surveillance and a spousal surveillance, although the court did not address whether the statute would apply in these circumstances. The court stated that “a third-party intrusion into the marital home, even if instigated by one spouse, is an offense against a spouse’s privacy of a much greater magnitude than is personal surveillance by the other spouse.” *Id.* at 809.

Some courts have concluded that liability turned upon whether the intercepting party was a spouse or a third party. The court in *Remington v. Remington*, 393 F. Supp. 898 (E.D. Pa. 1975) stated that:

[w]hile Congress apparently did not intend to provide a Federal remedy for persons aggrieved by the personal acts of their spouses committed within the marital home, the Court is unable to conclude as a matter of law that the gross invasion of an individual’s privacy by private detective agencies, law firms and other unknown persons, whether instigated by a spouse or not, is not included within the statutory proscription.

Id. at 901. *Accord White*, 535 F.2d at 1071 (citing *Remington*).

74. See *Pritchard v. Pritchard*, 732 F.2d 372, 374 (4th Cir. 1984); *Kratz v. Kratz*, 477 F. Supp. 463, 471-72 (E.D. Pa. 1979).

75. See *Kratz*, 477 F. Supp. at 471.

76. See *Pritchard*, 732 F.2d at 374, *Kratz*, 477 F. Supp. at 472. These courts do not specify a rationale for their conclusions.

77. See *Perfit v. Perfit*, 693 F. Supp. 851, 855 (C.D. Cal. 1988) (no liability because “the interception took place entirely within the marital home where both parties resided”); *Lizza v. Lizza*, 631 F. Supp. 529, 533 (E.D.N.Y. 1986) (neither a third party

history which suggest the distinction between married couples living together and those living apart.⁷⁸ This distinction has not been adopted unanimously.⁷⁹

Some evidence in the statute's legislative history indicates that the legislators did not intend the statute to apply to intrafamily surveillance regardless of the couple's living situation. An often cited example is testimony from Professor Herman Schwartz, who warned of the danger of overinclusiveness that could result from the broadly worded statute.⁸⁰ Professor Schwartz noted that Title III was not designed to prohibit a father from listening to his teenage daughter's conversation on an extension telephone.⁸¹

Read literally, the statement expresses only a concern of a legislative intrusion into an area of parental privilege. However, courts have found this statement to be an express indication of Congress' intent not to interfere in domestic situations generally.⁸² This statement provided a basis for several decisions not to apply the statute to interspousal surveillance.⁸³

Proponents of the application of Title III to interspousal surveillance argue that the marriage in these cases has deteriorated to a point where it

conversant nor a spouse has a claim under Title III because "[a] husband's wiretapping of his own phone falls outside the purview of the Act")

78. At a meeting of the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, Senator Long read from an article concerning electronic surveillance by Arthur Whitman entitled, "Is Big Brother Taping You?" See *Hearings on Invasions of Privacy Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess., pt. 1, at 17 (1965) (from tape recording). The article noted that "[s]o little is sacred in (divorce actions) that bugs routinely are discovered under the beds of estranged husbands and wives." *Id.* at 18. The reference to estranged spouses suggests that legislators distinguished between spouses living apart and those living together in the marital home. The court in *Simpson v. Simpson*, 490 F.2d 803 (5th Cir.), *cert. denied*, 419 U.S. 897 (1974), viewed this statement as support for Congressional intent not to prohibit interspousal surveillance. *Id.* at 808 & n.14.

79. In *Anonymous v. Anonymous*, 558 F.2d 677, 679 (2d Cir. 1977), the court was not troubled by the fact that the husband and wife were not living together at the time of the surveillance, holding that the dispute was nevertheless a domestic one not "[rising] to the level" of a statutory violation. *Id.* at 679. The relationship of the parties was crucial in determining whether the surveillance was prohibited, not the place in which the surveillance occurred. In *United States v. Jones*, 542 F.2d 661, 673 (6th Cir. 1976), the court was also unconvinced by the exception to surveillance within the marital home. "Marital home" is a term used by the courts to describe a husband and wife sharing a residence. The court held that the statute applied to married individuals who were not living together, but indicated its disagreement with the shared residence distinction. See *id.*; Comment, *Interspousal Electronic Surveillance Immunity*, 7 U. Tol. L. Rev. 185, 204-05 & n.85 (1975).

80. See *Right of Privacy Act of 1967: Hearings Before the Subcomm. on Admin. Practice & Procedure of the Senate Judiciary Comm.*, 90th Cong., 1st Sess., pt. 2, 395 (1967).

81. See *id.*

82. See *Anonymous*, 558 F.2d at 678-79; *Simpson v. Simpson*, 490 F.2d 803, 809 (5th Cir.), *cert. denied*, 419 U.S. 897 (1974).

83. See *Anonymous*, 558 F.2d at 679; *Simpson*, 490 F.2d at 809 n.17. *Contra* *Kratz v. Kratz*, 477 F. Supp. 463, 474-75 (E.D. Pa. 1979).

is no longer a relationship and the spouse should therefore be treated no differently than a third party.⁸⁴ This argument fails to recognize marriage as a binding legal relationship which exists regardless of the degree of domestic tranquility between a husband and wife. The marriage creates lowered expectations of privacy between spouses which are easily distinguished from those expectations of privacy vis-a-vis a third party.⁸⁵

D. *The Telephone Extension Exception*

The telephone extension exception provides an example of statutory language which, in the context of its legislative history, supports the argument that the statute should not be applied to interspousal surveillance.⁸⁶ Two aspects of the telephone extension exception provide a rationale for finding interspousal surveillance beyond the scope of the statute: the "telephone" clause⁸⁷ and the use "by the subscriber or user in the ordinary course of its business" clause.⁸⁸

The telephone clause excepts from the statute "any telephone or telegraph instrument, equipment or facility, or any component thereof . . . furnished to the subscriber or user."⁸⁹ Surveillance via an extension telephone is therefore beyond the purview of the statute, provided it satisfies the ordinary course of business requirement.⁹⁰

Courts in the Second and Fifth Circuits have interpreted this portion of the telephone extension exception as a blanket exception to any non-consensual surveillance by another family member.⁹¹ If surveillance via an extension telephone is permitted, surveillances which occur in a similar context should also be permitted. An ordinary tape recorder or answering machine, the devices most often used in interspousal surveillance, have limited surveillance utility.⁹² The conversation recorded with the use of one of these devices is considered to be no differ-

84. See Comment, *supra* note 79, at 195-97 (1975).

85. See *infra* notes 108-14 and accompanying text.

86. See *Simpson*, 490 F.2d at 809; *Perfit v. Perfit*, 693 F. Supp. 851, 856 (C.D. Cal. 1988).

87. 18 U.S.C. § 2510(5)(a) (1982 & Supp. V 1987).

88. *Id.* The term "business" in this clause does not have its common meaning. For different interpretations among the courts, see *infra* notes 95-97 and accompanying text.

89. 18 U.S.C. § 2510(5) (a) (1982 & Supp. V 1987).

90. See *id.*; *infra* notes 95-107 and accompanying text.

91. See *Anonymous v. Anonymous*, 558 F.2d 677, 679 (2d Cir. 1977); *Simpson v. Simpson*, 490 F.2d 803, 809 (5th Cir.), *cert. denied*, 419 U.S. 897 (1974). *But see* *Campiti v. Walonis*, 611 F.2d 387, 392 (1st Cir. 1979) (statute's application "should not turn on the type of equipment that is used, but whether the privacy of telephone conversations has been invaded in a manner offensive to the words and intent of the Act").

One author criticizes the use of the telephone extension exception as a basis for exempting interspousal surveillance from Title III. See Comment, *Criminal Law—Private Eavesdropping—Second Circuit Finds Marital Dispute Implicitly Exempted From the Federal Wiretapping Act. Anonymous v. Anonymous*, 27 Buffalo L. Rev. 139, 150-152 (1977).

92. These devices are commonly found in the home. Their general function is innocuous, and is easily distinguished from the sophisticated surveillance technology used by professional spies.

ent from that which could be overheard on an extension telephone.⁹³

Following this rationale, the court in *Simpson v. Simpson* found no "convincing distinction" between the surveillance achieved by the extension telephone and that achieved by an answering machine or tape recorder.⁹⁴

The statute provides an exception for the interception only if the telephone extension is used in the ordinary course of the user's business.⁹⁵ Some courts have interpreted this clause to mean that it was necessary to look to the purpose and extent of the defendant's interception to determine whether the surveillance was in violation of the statute.⁹⁶ Other courts have concluded that the location of the surveillance and the marital status of the parties governs the application of the statute.⁹⁷

The legislative history surrounding the development of the telephone extension exception is illuminating. A previous draft of the bill⁹⁸ was revised to include the requirement that the user must be using the extension telephone in the ordinary course of business.⁹⁹ The revision was made partly in response to the objections of some that an extension telephone could indeed be used in a manner offensive to the spirit of the statute.¹⁰⁰

93. See *Perfit v. Perfit*, 693 F. Supp. 851, 856 (C.D. Cal. 1988).

94. 490 F.2d 803, 809 (5th Cir.), cert. denied, 419 U.S. 897 (1974). But see *supra* note 79, at 205 ("There are two vital distinctions between an extension phone and a wiretap as they are used to intercept private conversations—the degree of human supervision and the potential product."). The author argues that human weaknesses such as hunger and sleep limit the continuity of surveillance available with the use of a recording device. See *id.* at 205. In addition, the likelihood of detection inhibits the extension telephone eavesdropper, thus affecting the final product. *Id.* at 205-06.

95. See 18 U.S.C. § 2510(5)(a)(i) (1982 & Supp. V 1987).

96. See, e.g., *Briggs v. American Air Filter Co.*, 630 F.2d 414, 419-20 (5th Cir. 1980) (an employer listening to an employee's conversation during the working day for a business purpose was not within the scope of the statute); *Remington v. Remington*, 393 F. Supp. 898, 900 (E.D. Pa. 1975) (defendant spouse was liable due to the egregious nature of the interception: constant surveillance for an extended period of time); *United States v. Christman*, 375 F. Supp. 1354, 1355 (N.D. Cal. 1974) (in a criminal context, employer not guilty for monitoring employee's conversations when there had been allegations of business improprieties).

97. See *Simpson*, 490 F.2d at 809-10; *Lizza v. Lizza*, 631 F. Supp. 529, 532-33 (E.D.N.Y. 1986).

98. The previous draft read: "an extension telephone instrument furnished to the subscriber or user by a communications common carrier in the ordinary course of its business . . ." H.R. 5470, 90th Cong., 1st Sess., § 2515(d)(1) (1967), reprinted in *Hearings on the Anti-Crime Program Before the Subcomm. No. 5 of House Comm. on the Judiciary*, 90th Cong., 1st Sess. 892, 894 (1967).

99. See 18 U.S.C. § 2510(5)(a)(i) (1982 & Supp. V 1987).

100. Professor Herman Schwartz commented on the possible intrusive uses of an extension telephone:

- 1) an eavesdropper breaks in to the home or office without anyone's knowledge, and eavesdrops on an extension;
- 2) the police or other individual coerce a person into letting them listen in on an extension phone;
- 3) the police or other individual obtain permission to listen in on an extension phone from a person not a party to the conversation without proper authority.

If the spousal surveillance takes place within the marital home, some courts find that the ordinary course of business requirement is met.¹⁰¹ These courts have employed the following rationale: the legislative history surrounding the development of the telephone extension exception indicates that the ordinary course of business clause was intended to prohibit intruders—not family members—from surveillance activity.¹⁰² Family members are excluded from the statutory prohibition because of the familial relationship between the interceptor and the intercepted party.¹⁰³ Courts recognize that the act of surveillance is really an extension of a domestic dispute.¹⁰⁴ Since interspousal surveillance is rooted in a domestic dispute, the act occurs in the course of family activity.¹⁰⁵

This interpretation of the ordinary course of business clause does not suggest that a married individual is likely to eavesdrop on his spouse as a matter of course. Rather, the rationale is rooted in two factors: the lower expectation of privacy between a husband and wife¹⁰⁶ and a perceived congressional intent not to interfere in surveillance between family members.¹⁰⁷

Within the home, family members have a diminished expectation of

See Right of Privacy Act of 1967: Hearings Before the Subcomm. on Admin. Practice & Procedure of the Senate Judiciary Comm., 90th Cong., 1st Sess. 395 (1967). Professor Schwartz's comments illustrate the type of surveillance the legislators wanted to prohibit, namely those surveillances performed by a non-family member who either forcibly enters and eavesdrops or coerces someone else to do so.

101. *See Simpson v. Simpson*, 490 F.2d 803, 809 (5th Cir.), *cert. denied*, 419 U.S. 897 (1974). The *Simpson* court stated that the telephone extension exception is "indicative of Congress['] intent to abjure from deciding a very intimate question of familial relations, that of the extent of privacy family members may expect within the home vis-a-vis each other." *Id.* In *United States v. Schrimsher*, 493 F.2d 848 (5th Cir. 1974), the court relied upon the *Simpson* court's analysis to determine behavior which falls within the statute because the defendant was neither married to complainant nor "a part of [complainant's] household." *Id.* at 850-51; *see also* *Perfit v. Perfit*, 693 F. Supp. 851, 855-56 (C.D. Cal. 1988), (agreeing with the *Simpson* analysis).

102. *See Simpson*, 490 F.2d at 809 n.17. Professor Herman Schwartz expressed his concern that the previous version of the telephone extension exception would permit intruders to eavesdrop. The bill was revised in response to these objections. *See supra* notes 82-83, 98-100 and accompanying text.

103. *See Simpson*, 490 F.2d at 809.

104. *See, e.g., Schrimsher*, 493 F.2d at 850-51 (statute inapplicable because the disagreement does not extend beyond the marital home of the parties and no third parties are involved); *Perfit*, 693 F. Supp. at 855-56 (an "interspousal domestic conflict"); *London v. London*, 420 F. Supp. 944, 946 (S.D.N.Y. 1976) (in holding no liability under the statute, the court stated that "[w]hat is important is that the *locus in quo* of the interception be a family home which the husband shares with some family member whose conversations are recorded").

105. For an analogy in a business context, see *United States v. Christman*, 375 F. Supp. 1354 (N.D. Cal. 1974).

106. *See Simpson v. Simpson*, 490 F.2d 803, 809 (5th Cir.), *cert. denied*, 419 U.S. 897 (1974). The court referred to the "very intimate question of familial relations" and the "extent of privacy family members [have] vis-a-vis each other." *Id.*

107. *See Anonymous v. Anonymous*, 558 F.2d 677, 679 (2d Cir. 1977); *Simpson*, 490 F.2d at 809 & n.17.

privacy as to one another.¹⁰⁸ Even during marital discord, a married individual sharing a residence with his spouse will have less privacy merely because of the presence of the other spouse.¹⁰⁹ A lower expectation of privacy is consonant with the general proximity of spouses and other family members within the marital home. While this proximity does not give a married individual an unfettered right to intercept his spouse's communications, the unique nature of the marital relationship and the resulting lowered expectation of privacy takes it beyond the purview of the statute.¹¹⁰

The statute itself limits prohibited surveillance of oral communications to those instances where the oral communication is made by a person "exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation."¹¹¹ However, this expectation requirement is limited to oral communications, and does not extend to electronic communications such as telephone interception.¹¹²

Logically, the same expectation of privacy requirement should apply to interspousal telephone surveillance. The telephone conversation commonly takes place in the marital home. This location increases the likelihood that the other spouse will overhear the conversation unless precautions are taken.

Courts have read the telephone extension exception as an indication of congressional intent not to determine the extent of privacy family members may expect between one another within the home.¹¹³ Congress recognized that the inevitable marital or other family dispute was generally too private a matter to be prohibited by federal law.¹¹⁴

In summary, the legislative history offers inconclusive evidence on congressional intent regarding interspousal surveillance. Even when read

108. See *Baumrind v. Ewing*, 276 S.C. 350, 353, 279 S.E.2d 359, 360, cert. denied, 454 U.S. 1092 (1981). The couple shared a home at the time of the interspousal surveillance. The court stated that "the expectations of privacy of both [the wife] and [the third party] should reasonably be more restricted in conversations which could easily be overheard within the marital home. Had the Baumrinds been living separate and apart, the conversants' expectations of privacy would be greater." *Id.*; see also *Right of Privacy Act of 1967: Hearings Before the Subcomm. on Admin. Practice & Procedure of the Senate Judiciary Comm.*, 90th Cong., 1st Sess. 395 (1967) (father/daughter extension telephone surveillance was not intended to be prohibited).

109. Even spouses who are not communicating cannot avoid each other if they are sharing a residence.

110. See *Simpson*, 490 F.2d at 809; *Baumrind*, 276 S.C. at 353, 279 S.E.2d at 360.

111. 18 U.S.C. § 2510(2) (1982 & Supp. V 1987). Oral communication is defined as "any oral communication uttered by a person." *Id.*

112. See 18 U.S.C. § 2510(2) (1982 & Supp. V 1987); *Kratz v. Kratz*, 477 F. Supp. 463, 473 (E.D. Pa. 1979); Fishman, *The Interception of Communications Without a Court Order: Title III, Consent and the Expectation of Privacy*, 51 St. John's L. Rev. 41, 61-66 (1976).

113. See *Simpson v. Simpson*, 490 F.2d 803, 809 (5th Cir.), cert. denied, 419 U.S. 897 (1974).

114. See *Anonymous v. Anonymous*, 558 F.2d 677, 679 (2d Cir. 1977).

most broadly, the legislative history provides questionable support for the application of Title III to interspousal surveillance. This insubstantial support is insufficient to overcome the strong presumption created by the domestic relations doctrine that domestic disputes are matters for state law determination.¹¹⁵

III. STATE'S ROLE IN ADJUDICATING DOMESTIC DISPUTES

Among the most persuasive arguments for declining to apply Title III to interspousal surveillance is the domestic relations doctrine. The domestic relations doctrine provides that the state courts are the appropriate forum for interspousal litigation.¹¹⁶

Marriage, divorce and family law have historically been within the exclusive province of the state.¹¹⁷ Over 100 years ago, the Supreme Court declined to exercise jurisdiction over divorce and alimony proceedings.¹¹⁸ This self-imposed limitation on federal court power was extended to domestic relations cases generally.¹¹⁹

The exclusive role of the states in regulating the area of domestic rela-

115. See *infra* notes 117-21 and accompanying text.

116. Some state courts discourage marital litigation through the doctrine of interspousal immunity, a state doctrine which bars interspousal tort claims. See *Alfree v. Alfree*, 410 A.2d 161 (Del. 1979), *appeal dismissed*, 446 U.S. 931 (1980); *Hill v. Hill*, 415 So. 2d 20 (Fla. 1982); *Peters v. Peters*, 63 Haw. 653, 634 P.2d 586 (1981); *Bonkowsky v. Bonkowsky*, 69 Ohio St. 2d 152, 431 N.E.2d 998, *cert. denied*, 457 U.S. 1135 (1982). Nevertheless, the doctrine appears to be a dying one. For a list of states which have abrogated the doctrine, see H. Clark, *The Law of Domestic Relations in the United States* § 10.1, at 372 (2d ed. 1988).

Because interspousal immunity cannot bar the appropriate application of a federal statute, the doctrine is not a basis for declining to apply Title III to interspousal surveillance. *Heyman v. Heyman*, 548 F. Supp. 1041, 1045 (N.D. Ill. 1982); *Kratz v. Kratz*, 477 F. Supp. 463, 475 (E.D. Pa. 1979).

117. See *In re Burrus*, 136 U.S. 586, 593-4 (1890) (domestic relations exception to federal diversity jurisdiction in the area of custody of minors and visitation rights because domestic relations are a matter of state, not federal, law).

118. See *Barber v. Barber*, 62 U.S. (21 How.) 582, 584 (1859) (the Court "disclaim[ed] altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony"). In *Barber*, a former husband left the state to avoid state court attempts to enforce his alimony obligation. While the Supreme Court disclaimed any general jurisdiction over divorce proceedings, the Court held that a wife may sue in equity in federal court to enforce the alimony obligation. *Id.* at 599-600.

119. See *In re Burrus*, 136 U.S. at 593-94; *Gullo v. Hirst*, 332 F.2d 178, 179 (4th Cir. 1964); *Delavigne v. Delavigne*, 402 F. Supp. 363, 366 (D. Md. 1975), *aff'd*, 530 F.2d 598 (4th Cir. 1976); see also *Anonymous v. Anonymous*, 558 F.2d 677, 679 (2d Cir. 1977) (referring to the instant surveillance as a "purely domestic conflict . . . a matter clearly to be handled by the state courts"); *Lizza v. Lizza*, 631 F. Supp. 529, 532-33 (E.D.N.Y. 1986) ("The Act is a far reaching one which, if read to cover circumstances such as that presented by the instant case, would have serious ramifications as to the degree of federal control over actions by family members within their own homes."). For examples of decisions declining federal jurisdiction in child custody cases, see *Gargallo v. Gargallo*, 472 F.2d 1219, 1220 (6th Cir.), *cert. denied*, 414 U.S. 805 (1973); *Hernstadt v. Hernstadt*, 373 F.2d 316, 317 (2d Cir. 1967).

tions underscores the state interest in family matters.¹²⁰ This state interest is exemplified in Supreme Court recognition of a state right to regulate marriage and divorce.¹²¹

One reason underlying the domestic relations exception is the special competence that state courts have in interpreting their own complex and individualized marriage, divorce and other domestic relations laws.¹²² Although the application of Title III to interspousal surveillance implicates only interpretation of the federal statute and not the individualized state domestic relations laws, such surveillance becomes a domestic relations issue precisely because it involves a dispute over the relationship between the spouses. Both the Fifth and Second Circuits have adopted this view.¹²³

Thus, a federal remedy under Title III would intrude upon an area of law historically governed by the states.¹²⁴ Because of this special state interest in adjudicating domestic disputes, some courts have concluded that federal law was not intended to apply to interspousal surveillance.¹²⁵

As a result of their traditional role, state courts have developed a proficiency and expertise in the area that cannot be matched in the federal courts.¹²⁶ While competent in the application and interpretation of federal statutes, the federal courts have limited experience in the area of

120. See *Cherry v. Cherry*, 438 F. Supp. 88, 90 (D. Md. 1977) (stating that "this rule respects the special interests of the states in domestic relations matters").

121. In *Pennoy v. Neff*, 95 U.S. 714 (1877), *overruled on other grounds*, *International Shoe Company v. Washington*, 326 U.S. 310 (1945), the Supreme Court declared "[t]he State . . . has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved." *Id.* at 734-35; *accord Simms v. Simms*, 175 U.S. 162, 167 (1899). More recently, the Supreme Court has held that a state may restrict a married couple's ability to obtain a divorce by attaching a residency requirement. See *Sosna v. Iowa*, 419 U.S. 393, 409 (1975). The requirement "additionally furthers the State's parallel interests both in avoiding officious intermeddling in matters in which another State has a paramount interest, and in minimizing the susceptibility of its own divorce decrees to collateral attack." *Id.* at 407.

122. See *Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel*, 490 F.2d 509, 515 (2d Cir. 1973) (while federal district court jurisdiction was not plain error, "decision requires exploration of a difficult field of New York law with which, because of its proximity to the exception for matrimonial actions, federal judges are more than ordinarily unfamiliar"); see also Note, *Application of Federal Abstention Doctrines to the Domestic Relations Exception to Federal Diversity Jurisdiction*, 5 Duke L.J. 1095, 1099 (1983) (state competence and expertise, the need for ongoing supervision of divorce and alimony decrees, and the possibility of incompatible state and federal decrees make federal court abstention appropriate in domestic relations cases).

123. See *Simpson v. Simpson*, 490 F.2d 803, 805 (5th Cir.), *cert. denied*, 419 U.S. 897 (1974) (Title III's application to interspousal surveillance would reach into areas of law normally left to the states); *Anonymous v. Anonymous*, 558 F.2d 677, 669 (2d Cir. 1973) (interspousal surveillance is "purely a domestic conflict").

124. For a discussion of the history and present application of the domestic relations doctrine, see *Cherry*, 438 F. Supp. at 89-90.

125. See *Perfit v. Perfit*, 693 F. Supp. 851, 855-56 (C.D. Cal. 1988); *Lizza v. Lizza*, 631 F. Supp. 529, 532 (E.D.N.Y. 1986).

126. See *Nouse v. Nouse*, 450 F. Supp. 97, 103 (D. Md. 1978); *Cherry v. Cherry*, 438 F. Supp. 88, 90 (D. Md. 1977).

domestic law, risking protracted litigation and administrative delays.¹²⁷

The domestic relations doctrine creates a heavy presumption in favor of exclusive state regulation and adjudication of interspousal surveillance and other domestic issues. Because interspousal surveillance arises from a domestic dispute, courts have determined that federal law is an inappropriate means of prohibiting the action.¹²⁸

CONCLUSION

Title III should not be applied to interspousal surveillance. The historical and practical underpinnings of the domestic relations doctrine create a strong presumption that state law governs interspousal surveillance to the exclusion of Title III. Only a positive expression of congressional intent to apply Title III to interspousal surveillance can overcome this heavy presumption that federal law should not apply to a domestic conflict. Given the inconclusive legislative history and the absence of an express indication of congressional intent to apply Title III between spouses, Title III should not be read to provide a federal remedy for interspousal surveillance.

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127. See *Cherry*, 438 F. Supp. at 90; see also Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel, 490 F.2d 509, 516 (2d Cir. 1973) ("we do not believe that the Supreme Court today would demand that federal judges waste their time exploring a thicket of state decisional law") (footnote omitted).

128. See *Anonymous v. Anonymous*, 558 F.2d 677, 679 (2d Cir. 1977); *Robinson v. Robinson*, 499 So. 2d 152, 155 (La. Ct. App. 1986).