Kentucky Law Journal

Volume 81 | Issue 1 Article 7

1992

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INTRODUCTION

The interception and disclosure of wire communications is forbidden under Title III of the Omnibus Crime Control and Safe Streets Act of 1968.[1] With a few narrow exceptions expressly provided for under Title III,[2] "any person" who intercepts by wiretap the private telephone conversations of another is subject to both criminal prosecution and civil suit.[3] The statute's plain and clear language encompasses all individuals who intercept the conversations of another through the use of electronic surveillance devices. However, despite the inclusive and unambiguous language of Title III, many courts have refused to apply the Act to wiretapping between spouses or other family members.[4] The Second and

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[1] 18 U.S.C. §§ 2510-21 (1988).

[2] One of the stated exceptions to the prohibition of wiretapping in Title III is the "extension phone exception." Section 2510(5)(a) excludes from the definition of a wiretapping device, "any telephone or telegraph instrument, equipment, or facility, or any component thereof, (i) furnished . . . by a provider of wire or electronic communication services in the ordinary course of its business and being used by the . . . user in the ordinary course of its business . . . ." This exception allows a person to intercept conversations by simply listening on an extension phone within the same household without being subject to liability under Title III.

[3] 18 U.S.C. § 2511(1) (1988). Recently, the Sixth Circuit held in *Fultz v. Gilliam*, 942 F.2d 396, 400 n.4 (6th Cir. 1991), that a separate cause of action arose not only when the conversations were intercepted, but also when they were used in court proceedings or disclosed to someone who had not yet heard the tapes.

[4] *See* Anonymous v. Anonymous, 558 F.2d 677, 679 (2d Cir. 1977) (intrafamilial wiretapping); Simpson v. Simpson, 490 F.2d 803, 808-09 (5th Cir.) (interspousal wiretapping), *cert. denied*, 419 U.S. 897 (1974); Lizza v. Lizza, 631 F. Supp. 529 (E.D.N.Y. 1986) (interspousal wiretapping). *See also* Newcomb v. Ingle, 944 F.2d 1534, 1536 (10th Cir. 1991) (intrafamilial wiretapping), *cert. denied*, 112 S. Ct. 903 (1992).

The court in *Newcomb* perceived no distinction between the extension phone exception to Title III contained in Section 2510(5)(a)(i) of the Act and interception by wiretap. The court held that the interception of a minor child's phone conversations by a custodial parent within the family home, whether by wiretap or extension phone, is permitted under Title III because the extension phone exception evinces the intent of Congress to exclude all domestic relations from Title III. However, the court asserted that interspousal wiretapping is "still qualitatively different" from parent-child wiretapping. *Id.* at 1535. *See also infra* note 80 and accompanying text.

Fifth Circuits have held that an interspousal exception is implicit in the Act due primarily to both the extension phone exception and the legislative history accompanying Title III.[5] More recently, in a case of first impression in the federal courts of appeals, the Tenth Circuit recognized a parental or intrafamilial exception to the Act.[6] The court held that the extension phone exception to Article III clearly demonstrates the intent of Congress "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."[7]

The courts have proffered numerous other justifications for these domestic exceptions to Title III:[8] first, Congress never intended to extend Title III into the areas of marital and domestic affairs;[9] second, the Act's explicit extension phone exception indicates the intent of Congress to exclude domestic affairs from the Act;[10] third, the wiretapping spouse could be subject to unduly harsh criminal and civil sanctions;[11] and finally, the underlying policy of both interspousal tort immunity[12] and parental tort immunity[13] is to avoid conflicts between married persons and family members, and these doctrines supersede the plain language of the Act.

Notwithstanding this reasoning, the Fourth, Sixth and Eighth Circuits, as well as numerous district courts that have addressed the issue, have permitted the clear and manifest language of the statute to prevail, denying the existence of implied exceptions with the following logic:[14] first, the Act clearly applies to "any person,"

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[5] Anonymous v. Anonymous, 558 F.2d at 678-69; *Simpson*, 490 F.2d at 805-09. *See also supra* note 2 and accompanying text (discussing extension phone exception); *infra* notes 42-47, 62-64 and accompanying text (discussing the legislative history of the Act); *see generally* William J. Holt, Comment, *Interspousal Electronic Surveillance Immunity*, 7 U. TOL. L. REV. 185 (1975) (providing a comprehensive analysis of Title III's legislative history).

[6] *Newcomb*, 944 F.2d at 1536.

[7] *Id.* (quoting *Simpson*, 490 F.2d at 809).

[8] *See* Sharon K. Smith, Note, *Interspousal Wiretapping: Should State Law or Federal Statute Govern?: Lizza v. Lizza*, 10 HAMLINE L. REV. 255, 255 nn.2-11 (1987).

[9] *Simpson*, 490 F.2d at 805.

[10] *Id. See also supra* note 2 and accompanying text.

[11] *Simpson*, 490 F.2d at 809.

[12] *Id.* at 808 n.7.

[13] Robert A. Belzer, Comment, *Child v. Parent: Erosion of the Immunity Rule*, 19 HASTINGS L.J. 201, 202 n.13 (1967).

[14] *See* Fultz v. Gilliam, 942 F.2d 396 (6th Cir. 1991); Kempf v. Kempf, 868 F.2d 970 (8th Cir. 1989); Pritchard v. Pritchard, 732 F.2d 372 (4th Cir. 1984); United States v. Jones,

defined as "any individual," with no exception being made for spouses;[15] second, Title III was enacted to combat the evils of electronic surveillance, and is not concerned with marital conflicts;[16] third, the state doctrines of interspousal immunity and parental immunity, quickly becoming relics of times past in most states, are not applicable in the presence of a federal statute;[17] and finally, a probe into the legislative history of the Act reveals a congressional intent to reach all private electronic surveillance[18] and an awareness that this prohibition would encompass domestic relations cases.[19]

Obviously, the circuits are mired in dispute over the legality of interspousal wiretapping under Title III of the Omnibus Crime Act. At the very least, this issue begs for the conclusiveness and permanence that can be granted only by an edict from Congress or the United States Supreme Court. Moreover, with the advent of recent case law espousing an implied parental exception to Title III,[20] the issue of domestic wiretapping demands a decisive decree now more than ever.

At the outset, this Note analyzes the naked language of the Act and its legislative purpose.[21] Next, domestic exception cases are examined in light of the plain meaning and legislative history of the Act.[22] Finally, the cases holding that Title III encompasses all unauthorized private electronic surveillance, including domestic wiretapping, are scrutinized and eventually are shown to represent the correct and logical application of the Act.[23]

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542 F.2d 661 (6th Cir. 1976); Nations v. Nations, 670 F. Supp. 1432 (W.D. Ark. 1987); Flynn v. Flynn, 560 F. Supp. 922 (N.D. Ohio 1983); Heyman v. Heyman, 548 F. Supp. 1041 (N.D. Ill. 1982); Kratz v. Kratz, 477 F. Supp. 463 (E.D. Pa. 1979).

[15] *Kempf*, 868 F.2d at 972 (citing 18 U.S.C. § 2510(6) (1988)); *see also* 18 U.S.C. § 2511(1) (1988).

[16] *Kratz*, 477 F. Supp. at 476.

[17] *See generally* Holt, *supra* note 5, at 191-97 (discussing the waning validity of the interspousal immunity doctrine); Belzer, *supra* note 13, at 206-20 (discussing the erosion of the parental immunity doctrine).

[18] *Jones*, 542 F.2d at 668 n.11 (citing S. REP. No. 1097, 90th Cong., 2d Sess. 1 (1968) *reprinted in* 1968 U.S.C.C.A.N. 2112, 2113).

[19] *Id.* at 668 n.12 (citing *Hearings on Invasions of Privacy Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. 18, 1009, 2261-62, 2365, 2411 (1965-66) [hereinafter *Hearings*]).

[20] *See supra* notes 4-13 and accompanying text.

[21] *See infra* notes 24-37 and accompanying text.

[22] *See infra* notes 38-95 and accompanying text.

[23] *See infra* notes 96-120 and accompanying text.

I. THE PLAIN LANGUAGE AND LEGISLATIVE PURPOSE OF TITLE III

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 is commonly known as the Federal Wiretapping Act. The primary goal of the Act is to "combat organized crime."[24] However, despite this fundamental design, Title III clearly addresses the evils of private electronic surveillance.[25] The Senate Report accompanying the Omnibus Crime Act lists the following as specific aims of Title III: 1) to protect the private nature of oral and wire communications, and 2) to characterize the situations in which the interception of these communications would be authorized.[26] Thus, Congress specifically stated its intent for Title III to combat the invasion of individual privacy by private surveillance techniques, while also providing law enforcement officials with the necessary investigative tool of intercepting conversations in the course of investigating and deterring crime.

The plain language of Title III prohibits the interception and disclosure of wire communications by any person except as otherwise exempted by the Act.[27] Further, the Act provides for criminal penalties in the form of fines and/or imprisonment for not more

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[24] *See* S. REP. No. 1097, 90th Cong., 2d Sess. 70 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2157 [hereinafter SENATE REPORT]; *see also* Simpson v. Simpson, 490 F.2d 803, 806 (5th Cir.), *cert. denied*, 419 U.S. 897 (1974).

[25] *See* United States v. Giordano, 416 U.S. 505, 514 (1974). The Court stated the objective of Title III as follows:

> The purpose of the legislation, which was passed in 1968, was effectively to prohibit, on the pain of criminal and civil penalties, *all interceptions of oral and wire communications, except those specifically provided for in the Act*, most notably those interceptions permitted to law enforcement officers when authorized by court order in connection with the investigation of the serious crimes listed in § 2516.

Id. (emphasis added) (footnote omitted).

[26] SENATE REPORT, *supra* note 24, at 2153.

[27] 18 U.S.C. § 2511 (1988) provides in relevant part:

> Interception and disclosure of wire, oral, or electronic communications prohibited
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> (1) Except as otherwise specifically provided in this chapter any person who
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> (a) intentionally intercepts . . . any wire, oral, or electronic communication;
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> (b) intentionally uses . . . any electronic, mechanical, or other device to intercept any oral communication when
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> (i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication;
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> . . . .

than five years,[28] and civil remedies in the form of "appropriate relief."[29] Typically, when the bare language of a statute is as unambiguous as that contained in Title III, and the plain terms impart the clear intent of Congress to include all individuals unless otherwise exempted, the language is controlling.[30] Nevertheless,

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

(d) intentionally uses . . . the contents of any wire, oral, or electronic communication in violation of this subsection;

shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

[28] *See id.* § 2511(4).

[29] 18 U.S.C. § 2520 (1988) authorizes the recovery of civil damages and provides, in relevant part:

Recovery of civil damages authorized

(a) In General.

Except as provided in section 2511(2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate.

(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.

(c) Computation of Damages.

. . . .

(2) In any other action under this section, the 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.

[30] *See* United States v. Underhill, 813 F.2d 105, 111 (6th Cir. 1987); *see also* United States v. Jones, 542 F.2d 661, 666 (6th Cir. 1976) (finding the language of Title III to be "straightforward and comprehensive"); Patagonia Corp. v. Board of Governors of Fed. Reserve Sys., 517 F.2d 803, 813 (9th Cir. 1975) (finding that the best evidence of legislative intent is the statute itself); Kratz v. Kratz, 477 F. Supp. 463, 469 (E.D. Pa. 1979).

The *Kratz* court stated that legislative history is to be used with caution.

> [T]he use of legislative history as an interpretive tool is a salutary one, for legislative history is at best an imprecise barometer of congressional intent. Hundreds of persons are involved in the writing and ultimate enactment of a statute, and they may have many different opinions as to the meaning of the statute they have created. A statute's legislative history will likely reflect the

most courts that have confronted the issue of domestic wiretapping have probed the legislative history of the Act. In deciphering this legislative history, courts have reached different conclusions as to the goals of Congress with respect to domestic relations under Title III.[31]

Title III was enacted in response to the deficiencies of the Federal Communications Act of 1934,[32] which did not effectively safeguard individual privacy or promote law enforcement.[33] As the Senate Report[34] accompanying the Act stated:

> The tremendous scientific and technological developments that have taken place in the last century have made possible today the widespread use and abuse of electronic surveillance techniques. As a result of these developments, privacy of communication is seriously jeopardized . . . . No longer is it possible, in short, for each man to retreat into his home and be left alone. Every spoken word [relative] 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.[35]

Understandably, Congress was concerned about the prospect of citizens invading each other's privacy through the use of electronic surveillance devices.[36] The courts are currently split on the

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> differences in motive and intent of its framers, and the statements made in congressional hearings, debates and reports, by witnesses and legislators alike, may be susceptible of varying interpretations.

Id. (footnote omitted).

[31] Simpson v. Simpson, 490 F.2d 803 (5th Cir.), *cert. denied*, 419 U.S. 897 (1974), and its progeny have interpreted the legislative history to imply an interspousal wiretapping exception to Title III. *See infra* notes 38-64 and accompanying text. However, United States v. Jones, 542 F.2d at 666, and its progeny have found in the identical legislative history a congressional intent to include spouses under Title III. *See infra* notes 96-120 and accompanying text.

[32] 47 U.S.C. §§ 151-611 (1982 & Supp. V 1987).

[33] SENATE REPORT, *supra* note 24, at 2153.

[34] *Id.* at 2154.

[35] *Jones*, 542 F.2d at 667 (quoting SENATE REPORT, *supra* note 24, at 2154).

[36] *See* Olmstead v. United States, 277 U.S. 438, 475-76 (1928) (Brandeis, J., dissenting), *overruled by* Katz v. United States, 389 U.S. 347 (1967).

> The evil incident to invasion of the privacy of the telephone is far greater than that involved in tampering with the mails. Whenever a telephone line is tapped, the privacy of the persons at both ends of the line is invaded and all conversations between them upon any subject, and although proper, confidential and privileged, may be overheard. Moreover, the tapping of one man's telephone line involves the tapping of the telephone of every other person whom he may call or who may call him.

Id.

question of whether this concern prompted Congress to include interspousal wiretapping within the scope of the Act. Courts that do not recognize the interspousal exception rely predominantly on the Act's unambiguous language and its legislative history. Ironically, the courts that have recognized implied interspousal and intrafamilial exceptions to the Act base their conclusions on the legislative history as well.[37]

II. *SIMPSON v. SIMPSON* AND ITS PROGENY: IMPLIED EXCEPTIONS TO TITLE III

A. The Interspousal Exception

1. *Legislative History*

In *Simpson v. Simpson*,[38] the Fifth Circuit addressed a case of first impression in the federal courts of appeals: whether a spouse can sue another spouse under the Federal Wiretapping Act. The court, relying heavily on the legislative history of the Act,[39] concluded that Congress never intended to meddle in domestic relations.[40] Thus, spouses living within the marital home must be exempted from criminal prosecution or civil action under Title III. In *Simpson*, a husband who questioned his wife's fidelity obtained and attached a wiretapping device to the phone lines within his home. The court admitted that the plain language of Title III encompassed the husband's actions, but opined that Congress did not intend the Act to extend into marital and domestic conflicts, areas customarily regulated by the states.[41] Disturbed by the result called for by the clear language of Title III, the court instead based

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[37] It is interesting to note that no courts adhering to this view recognize the interspousal exception when third parties such as private detectives are involved. *See* United States v. Rizzo, 583 F.2d 907 (7th Cir. 1978), *cert. denied*, 440 U.S. 908 (1979); White v. Weiss, 535 F.2d 1067 (8th Cir. 1976); United States v. Schrimsher, 493 F.2d 848, 850 (5th Cir. 1974) (holding, only months after first recognizing a spousal exception in Simpson v. Simpson, 490 F.2d 803 (5th Cir.), *cert. denied*, 419 U.S. 897 (1974) (discussed *infra* notes 38-52 and accompanying text), that a boyfriend/lover who had intercepted telephone calls was not a part of the household, had no legal right to be on the premises and thus was not entitled to assert the interspousal exception).

[38] 490 F.2d 803.

[39] *Id.* at 807-08. *See infra* note 105 and accompanying text.

[40] *Simpson*, 490 F.2d at 809.

[41] *Id.* at 805.

its conclusion almost entirely on an examination of the legislative history of the Act.[42] In doing so, the court found no "positive intent" on the part of Congress to extend the prohibition of private electronic surveillance into the domestic arena.[43]

Simpson provides an excellent analysis of the legislative history of the Act. The court considered the Senate Report that accompanied Title III, which states that "[t]o assure the privacy of oral and wire communication, Title III prohibits *all* wiretapping and electronic surveillance by persons other than duly authorized law enforcement officers."[44] The court noted that the report indicates the wide berth given the Act, as evidenced by the following excerpt:

> Virtually all concede that the use of wiretapping or electronic surveillance techniques by private unauthorized hands has little justification where communications are intercepted without the consent of one of the participants. . . . All too often the invasion of privacy itself will go unknown. Only by striking at all aspects of the problem can privacy be adequately protected. The prohibition, too, must be enforced with all appropriate sanctions. . . . The perpetrator must be denied the fruits of his unlawful actions in civil and criminal proceedings. Each of these objectives is sought by the proposed legislation.[45]

Faced with this report, the court concluded that the focus of the Act is crime control. Further, it concluded that the report contained no clear indication of the intent of Congress to include interspousal wiretapping under Title III.[46] The court also researched the lengthy legislative hearings on the subject, but again found no adequate illustration of the intended breadth of Title III's prohibition on wiretapping.[47]

Next, the court relied extensively on the presence of the extension phone exception contained in Section 2510 of the Act,[48] and equated the exclusion of family telephone conversations intercepted within the home with a congressional intent to exclude interspousal and intrafamilial wiretapping as well.[49] In fact, the court stated

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[42] *Id.* at 809.

[43] *Id.* at 805.

[44] *Id.* at 806 (quoting SENATE REPORT, *supra* note 24, at 2153) (emphasis added).

[45] *Id.* at 806-07 n.9 (quoting SENATE REPORT, *supra* note 24, at 2156).

[46] *Id.* at 807.

[47] *Id.* at 807-09; *see also* Holt, *supra* note 5, at nn.67-68. The extensive hearings and debate on Title III are cited in full.

[48] 18 U.S.C. § 2510(5)(a) (1988). *See supra* note 2 and accompanying text.

[49] *Simpson*, 490 F.2d at 809.

that the exemption was "indicative of Congress's intention 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."[50] Finally, the court insisted that such a criminal statute be strictly construed to shelter spouses who violate the Act from the harsh criminal penalties of Title III.[51] This combination of the Act's particularly stiff penalties and its inconclusive legislative history led the court to read an interspousal exception into Title III.[52]

The Second Circuit acknowledged an interspousal exception to the Federal Wiretapping Act in *Anonymous v. Anonymous*.[53] A wife and husband were separated and living in different homes. The husband, who had custody of the couple's children, altered his telephone answering machine to enable it to intercept conversations between his wife and daughter.[54] The court concluded that the facts as alleged did not "rise to the level of criminal conduct" required for a cause of action under Title III.[55]

The court in *Anonymous* heavily relied on the *Simpson* court's rationale that the extension phone exception to Title III disclosed a congressional intent to refrain from wading into domestic relations.[56] The court reasoned that if the husband's interception of conversations between his wife and daughter had been through an extension phone in his household, he would clearly not be subject to suit under the Act.[57] Thus, by analogy, the court stated that there was no distinction between overhearing phone calls on an extension phone and intercepting them by way of a recording device. The husband's purposes would have been furthered by either means.[58]

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[50] *Id.*

[51] *Id.*

[52] *Id.* at 809-10.

[53] 558 F.2d 677 (2d Cir. 1977).

[54] *Id.* at 677.

[55] *Id.*

[56] *Id.* at 679.

[57] *Id.* at 678. *See also supra* note 2 and accompanying text. It should be noted that the court also relied on one statement by Professor Herman Schwartz of the ACLU made during the legislative hearings: "I take it nobody wants to to [sic] make it a crime for a father to listen in on his teenage daughter or some such related problem." *Hearings on the Anti-Crime Program: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 90th Cong., 1st Sess. 989 (1967).

[58] *Anonymous*, 558 F.2d at 679. In addition, it is worth noting that the extent to which family members' privacy interests were threatened was equal regardless of which method of interception was employed.

The court held that the facts presented a "purely domestic conflict," because the husband intercepted conversations between family members only.[59] The privacy rights of third parties were not compromised. Thus, such intrafamilial strife was the proper province of the state courts.[60] However, the court did not rule out the possibility that in a dissimilar fact situation, one in which the privacy rights of third parties were violated in addition to the family members' rights, the conduct could very well fall within the bounds of Title III.[61]

Consequently, both the Second and Fifth Circuits ignored the plain and unambiguous language of Title III,[62] and turned instead to the legislative history of the Act and the extension phone exception to find an implied interspousal exception to Title III. Contrary to fundamental rules of statutory construction, these courts postulated that since Congress did not explicitly include spouses within an Act of such import, Congress resolved to exclude them.[63] Further, both courts deduced a congressional intent to exclude all intrafamilial relations from Title III due to the analogy between domestic wiretapping and the extension phone exception.[64]

2. *The Interspousal Tort Immunity Doctrine*

Although falling from favor in recent years, the interspousal tort immunity principle has been tendered as support for an implied interspousal exception to Title III by many courts,[65] including the Fifth Circuit in *Simpson*.[66] This common law doctrine is grounded on the notion that a husband and wife are one entity—the husband.[67] Under this postulate, a woman has no existence without her husband. The majority of jurisdictions still adhering to this antiquated doctrine reason that it is impossible for one spouse to sue the other because a man cannot sue himself.[68] Although every state has enacted what is often referred to as the Married Woman

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[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *See supra* note 27 and accompanying text.

[63] *See Anonymous*, 558 F.2d at 679; *Simpson*, 490 F.2d at 805.

[64] *Anonymous*, 558 F.2d at 679; *Simpson*, 490 F.2d at 809.

[65] *See* Holt, *supra* note 5, at 191-97; Smith, *supra* note 8, at 268-69.

[66] 490 F.2d at 803 n.7.

[67] Holt, *supra* note 5, at 191 n.32. For a catalog of the states still subscribing to the doctrine, see *id.* at 190 n.27.

[68] *Id.* at 192.

Act,[69] which grants women legal identities, most of the states that have traditionally adhered to the interspousal immunity concept refuse to abrogate the doctrine.[70] Because the doctrine was fashioned at common law, those courts have reasoned that the legislature must unambiguously eradicate the doctrine by a legislative enactment in order to supersede it.[71] Finally, those courts have held that judicial intervention into the institution of marriage would threaten its very existence and would merely "take money from one pocket and put it into the other."[72]

Most courts, even those sitting within jurisdictions that have retained the interspousal tort immunity doctrine, have not applied the doctrine when adjudicating alleged violations of Title III relating to domestic disputes.[73] This rejection of a doctrine once well entrenched in the common law of every state is revealed by the fact that only the *Simpson* court felt compelled to rely on the principle.[74] Subsequent decisions that have recognized an interspousal exception to the Act have refused to rely on the interspousal tort immunity doctrine in doing so and have resisted the doctrine's employment as a defense to Title III.[75]

B. The Parental Exception

Recently, in *Newcomb v. Ingle*,[76] the Tenth Circuit adjudicated an issue of first impression in the federal courts of appeals: whether Title III applied in a situation where a child sued his custodial parent for the interception of his phone conversations by way of a wiretap.[77] All previous cases of such domestic nature had focused on disputes between spouses. In *Newcomb*, however, a mother intercepted conversations between her minor son and her ex-husband by use of a wiretap on her own phone. During one such

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[69] *Id.* at 192 n.35.

[70] *Id.* at 191-92.

[71] *Id.* at 192 nn.37-40.

[72] *Id.* at 195 & nn.46-47; Smith, *supra* note 8, at 268.

[73] *See* United States v. Jones, 542 F.2d 661, 672 (6th Cir. 1976) (noting that in criminal proceedings, husbands and wives have always been regarded as individuals); Flynn v. Flynn, 560 F. Supp. 922, 924-25 (N.D. Ohio 1983) (stating that the "clear language" of Title III allows for a suit based on interspousal wiretapping); Kratz v. Kratz, 477 F. Supp. 463, 475 (E.D. Pa. 1979) (stating that a Title III cause of action is mandated by federal law and is superior to the state law doctrine).

[74] Simpson v. Simpson, 490 F.2d 803, 806 n.7 (5th Cir.), *cert. denied*, 419 U.S. 897 (1974).

[75] *See* cases cited *supra* note 4.

[76] 944 F.2d 1534 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 903 (1992).

[77] *Id.* at 1535. The minor had reached the age of majority by the time of the suit.

conversation, the father of the minor child directed him to set fire to his mother's home. The child's mother told a fire investigator of the tapes' existence and eventually turned the tapes over to the county attorney.[78] The child brought suit under Title III against his mother, the county attorney and others.[79]

The court recognized the controversy surrounding the interspousal exception in other courts, but stated that the issue of parental wiretapping is qualitatively different from interspousal wiretapping.[80] Nonetheless, the court followed the rationale of *Simpson*[81] and equated the interception of a child's phone conversations by his parent with the extension phone exemption of Title III.[82] The parent could just as easily have intercepted the conversations at issue by listening on an extension phone in the household, an act for which she would not face liability under Title III.

One issue not raised in *Newcomb*, perhaps because the child-plaintiff had attained majority before bringing suit against his mother,[83] is whether the common law doctrine of parental immunity could render parental wiretapping exempt from Title III. If a minor child chose to sue one or more of his parents under the Act, presumably courts would be faced with the dilemma addressed in *Simpson*: whether state law tort immunity doctrines are preempted by Title III.[84]

The only circuit to rule that the interspousal tort immunity doctrine survives Title III has been the Fifth Circuit in *Simpson*.[85] The child-versus-parent scenario presents an even more fragile balance: a plaintiff who sues his or her spouse under the Act will in all probability seek a divorce, thereby severing all ties with his or her former mate. In contrast, a child and his or her parent will almost always have a continuing bond with one another—nothing analogous to a "divorce" is likely. Thus, although it is not clear how the courts will rule on the parental immunity issue, it is clear that interspousal wiretapping is indeed "qualitatively different" from parent-child wiretapping.[86]

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[78] *Id.*

[79] *Id.* Other allegations included violations of the plaintiff's rights under the First, Fourth, Fifth, Sixth, and Fourteenth amendments.

[80] *Id.* at 1535-36.

[81] 490 F.2d 803, 809 (5th Cir.), *cert. denied*, 419 U.S. 897 (1974).

[82] *Newcomb*, 944 F.2d at 1536.

[83] *Id.* at 1535.

[84] *Simpson*, 490 F.2d at 806 n.7.

[85] *Id.*

[86] *Newcomb*, 944 F.2d at 1535.

Parental immunity is essentially an American rule that was fashioned in the nineteenth century by a handful of courts.[87] Beginning with the landmark case of *Hewellette v. George,*[88] a majority of jurisdictions adopted the rule that parents are not liable for torts committed against their children.[89] However, the underlying rationale of the rule is flawed, as children are not prohibited from recovering from their parents in contract or property disputes.[90] Notwithstanding this fact, most jurisdictions have retained the rule, justifying it on the need to maintain the status of parental authority and to further family harmony.[91] Nevertheless, like interspousal immunity, parental immunity has been severely eroded over the years.[92] Several exceptions to the rule have been forged, and many courts have simply abrogated the doctrine altogether.[93] In any event, the courts following the *Jones* rationale, which found the interspousal tort immunity doctrine inapplicable,[94] could easily discard the parental tort immunity doctrine on the same grounds. But, as previously stated, these courts may adopt a different philosophy when confronted with the child-versus-parent quandary.

Newcomb's recognition of a parental exception to Title III marks the first court of appeals decision in more than a decade to acknowledge an implied domestic exception to the Act. The contemporary trend among courts has been to interpret the unambiguous language of the statute, as well as its accompanying legislative history, to include *all* persons, including spouses. However, these courts have not yet faced the novel issue presented to the Tenth Circuit in *Newcomb*—the policy of preventing suits between children and their parents.

Presumably, the courts that have denied the existence of implied exceptions to Title III would also refuse to recognize a parental exception based on the plain language of the Act. However, while the legislative history evinces a congressional awareness of interspousal wiretapping,[95] it does not address parental wiretap-

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[87] Belzer, *supra* note 13, at 201-02.

[88] 9 So. 885 (Miss. 1891).

[89] Belzer, *supra* note 13, at 202.

[90] *Id.* at 203.

[91] *Id.* at 204.

[92] *Id.* at 206-18. Several exceptions to the rule have been adopted, including the willful or malicious tort exception and the emancipation exception. *Id.* at 206-09.

[93] *Id.* at 221-22.

[94] United States v. Jones, 542 F.2d 661, 672-73 (6th Cir. 1976).

[95] *See supra* note 19 and accompanying text.

ping. Notwithstanding this fact, the courts that have properly denounced implied exceptions to Title III have based their decrees essentially on the plain and clear language of the Act, not on its legislative history. Even conceding the relevance of the legislative history, Congress was primarily concerned with eliminating *all* private electronic surveillance except for the stated exceptions, thereby precluding the existence of either a parental or an interspousal exception.

III. *UNITED STATES v. JONES* AND ITS PROGENY: NO INTERSPOUSAL EXCEPTION TO TITLE III

United States v. Jones[96] was the first court of appeals decision to challenge the *Simpson* court's recognition of an implied interspousal exception to the Federal Wiretapping Act. The court's analysis of the issue was two-fold: 1) the clear and plain language of the Act mandates that *any* person is subject to a Title III action and no exception is recognized in the Act for spouses;[97] and 2) the legislative history of the Act evinces an intent to include spouses, notwithstanding the contrary interpretation by the *Simpson* court.[98]

The court adhered to the rules of statutory construction in finding that Congress would have explicitly provided for an interspousal exception to the "blanket prohibition" of unauthorized wiretaps in Title III if it had intended to create one.[99] The court also explored the legislative history of the Act *in toto* and concluded that Congress was well aware of the fact that wiretaps are frequently used to investigate domestic affairs.[100] In the Senate Report that accompanied the Act,[101] the court found an unequivocal congressional intent to create a flat ban on all unauthorized electronic surveillance.[102] Although the primary target of the Act was organized crime, the court noted that the report clearly establishes that the purpose of Title III was to prohibit all unauthorized electronic surveillance:

> Title III has as its dual purpose (1) protecting the privacy of wire and oral communications, and (2) delineating on a uniform

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[96] 542 F.2d 661 (6th Cir. 1976).

[97] *Id.* at 673.

[98] *Id.* at 666.

[99] *Id.* at 671.

[100] *Id.*

[101] *Id.* at 668-69 (citing SENATE REPORT, *supra* note 24, at 2113, 2153-54). *See supra* notes 24-35, 39-43 and accompanying text.

[102] *Jones*, 542 F.2d at 669.

> basis the circumstances and conditions under which the interception of wire and oral communications may be authorized. To assure the privacy of oral and wire communications, *Title III prohibits all wiretapping and electronic surveillance by persons other than duly authorized law enforcement officers* . . . .[103]

The court also found a congressional awareness that Title III prohibited private surveillance in the marital realm reflected in the comments of the Act's Senate sponsors: "A broad prohibition is imposed on private use of electronic surveillance, particularly in domestic relations and industrial espionage situations."[104]

After delving into the lengthy legislative hearings on Title III, the *Jones* court concluded that Congress intended to include spouses within the purview of the Federal Wiretapping Act.[105] The court found further support for that interpretation in the fact that Senator Long, chairman of the Subcommittee on Administrative Practice and Procedure of the Senate Commission on the Judiciary, and chief sponsor of the Act, identified three major areas in which private electronic surveillance was widespread:

> The three large areas of snooping in this field are (1) industrial, (2) *divorce cases*, and (3) politics. So far, we have heard no real justification for continuance of snooping in these three areas. If any justification exists, we will probably hear about it in the next few weeks . . . .[106]

After carefully analyzing other pertinent excerpts from the legislative hearings, the court found that Title III established an across-the-board prohibition on private wiretapping, and that a paramount area of concern was electronic surveillance in marital relations.[107] Thus, the court interpreted the legislative history to evince a congressional intent to prohibit all private wiretapping with the enactment of Title III. Of particular significance is the fact that the *Simpson* court probed the identical legislative history, which

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[103] *Id.* at 668 (quoting SENATE REPORT, *supra* note 24, at 2153).

[104] *Id.* at 669 (quoting SENATE REPORT, *supra* note 24, at 2274).

[105] *Id.* Starting in 1965, Congress held numerous hearings on the problem of private electronic surveillance. These hearings were the precursor to the Omnibus Crime Control and Safe Streets Act of 1968. *See* Simpson v. Simpson, 490 F.2d 803, 807 n.10 (5th Cir.), *cert. denied*, 419 U.S. 897 (1974), for a list of all pertinent hearings.

[106] *Jones*, 542 F.2d at 668 n.12 (emphasis added) (quoting *Hearings*, *supra* note 19, at 2261). The subcommittee also heard testimony from two private investigators who stated that electronic surveillance had become a common tool in domestic relations investigations. *Id.*

[107] *Id.* at 669 n.16. *See also* Holt, *supra* note 5, at 202-05.

the court admitted unambiguously bans all private surveillance, and then dismissed this clear legislative directive in order to fashion a contrary holding.[108] The basis of the *Simpson* court's analysis is inherently flawed. The question is not whether a congressional intent can be found to *include* interspousal wiretapping, but whether Congress intended to *exclude* such conduct from Title III.

While the *Jones* court refused to embrace the common law interspousal tort immunity doctrine, it did not explicitly reject the doctrine either. Instead, the court sidestepped the issue by correctly declaring that spouses have always been viewed as separate individuals in the eyes of the criminal law, and thus there is no interspousal immunity under the Act.[109]

Although expressing no opinion as to the *Simpson* court's holding that the extension phone exception is indistinguishable from actual wiretapping inside the family home, the court voiced doubt that the two methods were identical.[110] In reality, there are palpable differences between an extension phone and a wiretap in the interception of private conversations.[111] The extension phone interception requires a live eavesdropper. Factors such as time, hunger, sleep and carelessness restrict the effectiveness of human interception. On the other hand, electronic surveillance demands an insignificant amount of human intervention.[112] The sophistication and the low maintenance of the wiretap reduce detection and provide continual interception of private conversations.[113] Thus, the extension phone is of limited use as an eavesdropping device in comparison to an electronic surveillance device.

Most of the circuits that have recently addressed the dilemma of interspousal wiretapping under Title III have followed the *Jones* rationale. In *Pritchard v. Pritchard,*[114] the Fourth Circuit held that an analysis of the legislative history of the Act was unnecessary "[i]n light of the clarity and lack of ambiguity of the statutory

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[108] *Jones*, 542 F.2d at 667; *Simpson*, 490 F.2d at 806. Both courts quote the Senate Report, which states: "No longer is it possible, in short, for each man to retreat into his home and be left alone." SENATE REPORT, *supra* note 24, at 2154. In spite of this language, the *Simpson* court concluded that there was no evidence in the legislative history of the Act manifesting an intent to include interspousal wiretapping. *Simpson*, 490 F.2d at 805-06.

[109] *Jones*, 542 F.2d at 672. *Jones* involved a criminal prosecution under Title III. In contrast, *Simpson* involved a civil action for damages under the Act.

[110] *Id.* at 673 n.24.

[111] Holt, *supra* note 5, at 205-06.

[112] *Id.*

[113] *Id.*

[114] 732 F.2d 372 (4th Cir. 1984).

language."[115] The court was presented with a factual setting similar to that found in *Simpson*. A wife intercepted the telephone conversations of her husband by way of a wiretap in the family home.[116] The court concurred with the *Jones* rationale that the plain language of the statute, as well as the legislative history of the Act, precluded the existence of an interspousal exception to Title III: "We find that Title III prohibits all wiretapping activities unless specifically excepted."[117]

Likewise, the recent decision by the Eighth Circuit in *Kempf v. Kempf*[118] sharply criticized the *Simpson* decision and relied instead on the clear language of the Act that defines "any person" as "any individual."[119] Additionally, the court weighed the legislative history of the Act, finding that there was no indication that Congress intended to create an interspousal exception to Title III.[120]

The plain language of the Act clearly includes all persons, and its legislative history manifests a congressional awareness of interspousal wiretapping as well as the desire to prohibit all private electronic surveillance. Whether Congress is aware of electronic surveillance in the parental-child sphere is less clear. The legislative history does not specifically address parental wiretapping, but does manifest a congressional intent to prohibit private electronic surveillance across the board. Absent a clear legislative pronouncement to the contrary, the statutory language must prevail.

CONCLUSION

The circuits remain split on the issue of interspousal wiretapping under the Federal Wiretapping Act, and neither Congress nor the United States Supreme Court has clarified the issue.[121] This ambivalence may be due primarily to the recent trend of interpreting Title III as a comprehensive enactment to prohibit all electronic surveillance. Both Congress and the Supreme Court may well consider this all-inclusive application of Title III as the most appropriate implementation of the Act.

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[115] *Id.* at 373 (citation omitted).

[116] *Id.* at 372.

[117] *Id.* at 374.

[118] 868 F.2d 970 (8th Cir. 1989).

[119] *Id.* at 972-73.

[120] *Id.* at 973. The court officially adopted the reasoning of Pritchard v. Pritchard, 732 F.2d 372 (4th Cir. 1984).

[121] Congressional amendments to the original Act have been trivial in nature and have not in any way addressed the issues of interspousal or parental wiretapping.

However, the Tenth Circuit's ruling in *Newcomb v. Ingle*[122] has again obscured the issue of implied domestic exceptions to Title III. It is likely that the *Simpson* court and other courts subscribing to its interpretation of the Act would recognize an implied parental exception to Title III. Those courts could utilize the same approach that led them to recognize an interspousal exception to the Act to carve out a parental exception: if there is no evidence that Congress intended to proscribe such wiretapping under the Act, it should be exempted.

Presumably, courts following the *Jones* rationale as applied to interspousal wiretapping would apply the same rules of statutory construction in applying Title III to the parental wiretapping question. The parental tort immunity rule would not apply for the same reasons that the interspousal tort immunity doctrine was discarded: the principles are out-of-date, and a valid federal statute is not superseded by a state law postulate. However, the policies of family harmony and parental authority that underlie the parental immunity doctrine carry more weight than the interspousal immunity policy of preserving marriages. Spouses involved as adversaries in the civil or criminal arena will almost certainly seek divorce. On the other hand, children generally do not "divorce" their parents.[123] Further, although the plain language of the statute obviously includes parents as well as spouses, the legislative history reveals a congressional awareness of interspousal wiretapping, but not parental wiretapping. Thus, much of the legislative history indicating a congressional awareness of marital wiretapping would be of no use to a court searching for an implied parental exception to Title III. A court would have to rely solely on the legislative history that evinces an intent to prohibit *all* electronic surveillance.

Nonetheless, the courts that follow the *Jones* line of reasoning should not succumb to these substantial policy arguments in order to maintain family harmony. *Simpson* and its offspring have been rightfully castigated by subsequent courts for their disregard of the plain language of Title III and their faulty interpretation of the legislative history of the Act. The current trend has been to conform to fundamental rules of statutory construction in examining violations of Title III. It is undisputed that the plain language of

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[122] 944 F.2d 1534 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 903 (1992).

[123] *But see* Joseph R. Carrieri, *'Gregory K': A Termination of Parental Rights Case*, N.Y. L.J., Oct. 8, 1992, Outside Counsel section, at 1 (discussing recent Florida case in which a 12-year-old boy successfully "divorced" his mother).

the statute is all-encompassing, and although the legislative history of the Act has been fiercely disputed, it proves that Congress was well aware of the evils of electronic surveillance in the private sphere.

Accordingly, the courts look to Congress to resolve the dispute surrounding the issues of parental and interspousal immunity under the Act. In the past, congressional inaction has forced courts to look instead to laborious legislative hearings and debates for answers. The recent recognition of a parental exception to Title III has revived the controversy surrounding the interspousal wiretapping issue, and now more than ever Congress must respond.

However, if a congressional response is not forthcoming, the rationale of *Jones* must control. The plain and clear language of the Act unambiguously provides that "any person" is within the reach of Title III. Barring any express exceptions granted by Congress, the explicit language is dispositive of both interspousal and parental wiretapping immunity under the Federal Wiretapping Act: neither exists. Further, both the Senate Report that accompanied the Act and other legislative history manifest a congressional intent to prohibit *all* private electronic surveillance. This unequivocal "blanket prohibition" of private wiretapping must be honored.

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