COMMENT

TO CATCH A SNOOPING SPOUSE: REEVALUATING THE ROOTS OF THE SPOUSAL WIRETAP EXCEPTION IN THE DIGITAL AGE

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INTRODUCTION

Marriage is, and continues to be, a reactive institution. Although the origins of marriage date back over 6000 years,[1] the marital relationship is continuously shaped by widely held social, economic, and legal views regarding the rights available to those party to the union. As these views change over time, the way partners interact with one another privately and publicly also changes.

While the modern institution of marriage looks quite different in our nation than it did fifty years ago because of Supreme Court decisions championing marriage equality,[2] there is one specific group whose position within the spousal relationship also begs focus: women. Women were long subject to subservient positions in their marital relationships; even with the passage of the Nineteenth Amendment,[3] the newfound political equality between men and women did not automatically lead to the dissolution of female subordination. Overt social and legal subordination of women was the norm until the latter half of the twentieth century when the 1960s women's rights movement began.[4] The culprit for this treatment was common-law American coverture, where a female's legal status was absorbed into her husband's upon marriage, including her ability to sue or own property.[5] As a result, women were legally and financially beholden to their spouses.

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1 The ancient Mesopotamians used marriage to create progeny and maintain social status. Joshua J. Mark, *Love, Sex, and Marriage in Ancient Mesopotamia*, WORLD HISTORY ENCYC. (May 16, 2014), https://www.ancient.eu/article/688/love-sex-and-marriage-in-ancient-mesopotamia [https://perma.cc/G4C8-ANKR].

2 *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 2 (1967) (holding prohibitions on interracial marriage unconstitutional); Obergefell v. Hodges, 576 U.S. 644, 675 (2015) (holding prohibitions on same-sex marriage unconstitutional).

3 U.S. CONST. amend. XIX. The Nineteenth Amendment reflected the success of the decades-long women's suffrage movement beginning in the mid-nineteenth century. *See 19th Amendment to the U.S. Constitution: Women's Right to Vote (1920)*, OURDOCUMENTS.GOV, https://www.ourdocuments.gov/doc.php?flash=false&doc=63 [https://perma.cc/GU4R-RMPL] ("Beginning in the mid-19th century, several generations of woman suffrage supporters lectured, wrote, marched, lobbied, and practiced civil disobedience to achieve what many Americans considered a radical change of the Constitution.").

4 *See* Linda Napikoski, *The Women's Movement and Feminine Activism in the 1960s*, THOUGHTCO., https://www.thoughtco.com/1960s-feminist-activities-3529000 [https://perma.cc/WN6C-KUUL] (describing the "series of changes to the status quo" achieved through the feminist movement of the 1960s). The Women's Rights Movement solidified a movement towards social and political equity between men and women in the United States. For more on the Women's Rights Movement, see ELIZABETH C. LARSON, CONG. RSCH. SERV., R45805, WOMEN'S SUFFRAGE: FACT SHEET (2021).

5 *See* discussion *infra* subsection II.A.1.

Coverture laws began to fade in the late nineteenth century, but some states held on to remnants of the coverture legal structure well into the twentieth.[6] Following the legal dissolution of coverture in the United States, and seemingly unrelated, was the criminalization of wiretapping in 1968 with the Federal Wiretap Act,[7] which codified Congress' recognition of developments in surveillance technology becoming generally accessible to non-law-enforcement personnel. Although the language of the Wiretap Act granted explicit exemptions for certain wiretappers, a handful of lower federal court cases decided in subsequent years offered another exemption: one for spouses.[8] This exemption allowed for one spouse to intercept the private communications of the other and avoid both criminal and civil liability under the Wiretap Act. This federal common law doctrine, known as the "spousal exception" to the Federal Wiretap Act, still stands as good law in two Circuit Courts of Appeals: the Fifth and the Second.[9]

The spousal wiretap exception reflects longstanding assumptions about the marital relationship held at the time the Federal Wiretap Act was enacted. I first argue that coverture influenced early decisions regarding the spousal wiretap exception, which effectively allowed a husband to own his wife's private communications and use them however he chose, including to her own detriment in family court proceedings. The notion that a wife's private communications are her husband's property echoes common-law coverture, which held that upon marriage, a wife's legal identity and her personal property come under her husband's control. Therefore, a spousal wiretap exception reflects the antiquated notion of marital unity: that a wife does not have a right to her own personal communications. In effect, the spousal exception allows a husband to legally use the wife's private communications as evidence in contentious court proceedings, just as husbands could use their wives' property as their own under coverture.

Similarly, the law of individual privacy has changed drastically since the spousal wiretap exception decisions. In the mid-twentieth century, constitutional privacy law shifted from recognizing privacy only within the marital relationship to recognizing that individuals retained privacy even after marriage.[10] Due to coverture's lingering impacts, marital privacy initially remained a unified right, and individual privacy was seen as being reserved for unmarried

6 *See infra* notes 94–99 and accompanying text (discussing the fall of coverture in the United States).

7 18 U.S.C §§ 2510–22.

8 *See* discussion *infra* Section I.B.

9 *See infra* notes 34–49 and accompanying text.

10 *See* discussion *infra* subsection II.B.1.

individuals.[11] The spousal exception to the Wiretap Act flouts modern privacy law, which preserves individual autonomy regardless of relationship status.[12]

In short, the spousal exception is hopelessly outdated and ignores the developed legal landscape of gender, marital, and privacy law in the United States. We now see that marriage has evolved from an institution built on the notion that husbands are their wives' keepers to a partnership in which each spouse retains a certain level of autonomy over their private affairs. Policy considerations also counsel against a spousal wiretap exception, especially in the digital age. Allowing for such an exception incentivizes spouses to preemptively prepare for divorce or child support proceedings, encouraging criminal conduct and eroding the foundations of trust characteristic of the modern marriage relationship. With the development of widely accessible spyware and surveillance software, savvy spouses can access the private dealings of their partners at the click of a button,[13] making this incentive cheap with a potentially high payoff.

With the spousal wiretap exception still available as a defense in certain jurisdictions, the dangers of allowing this behavior to go unchecked are clear. Codified protection from spousal surveillance at the state level is of the utmost importance in preserving spousal privacy and omitting the use of such evidence in family law proceedings.[14]

Part I of this work will first introduce the Wiretap Act and its origins as a method of protecting private communications from illegal monitoring and will then outline the common law spousal wiretap exception that emerged following the enactment of the Wiretap Act. To underscore the outdated origins of the exception, Part II will discuss how the institution of marriage and legal conceptions of privacy devolved in twentieth-century United States from structures based on coverture and marital unity to those based on constitutionally mandated sex equality and individual privacy rights.[15] Part

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11 *Id*.

12 *See* discussion *infra* subsection II.B.1.

13 *See* discussion *infra* Section III.B.

14 The use of wiretap evidence in family law proceedings is of concern to a large number of family law attorneys. *See, e.g.*, *Does Wiretapping Your Spouse Break the Law?*, KRUSCH L., PLLC (July 30, 2019), https://www.kruschlaw.com/blog/2019/july/does-wiretapping-your-spouse-break-the-law- [https://perma.cc/38V8-V9DV] (cautioning against spousal wiretapping for legal proceedings); *Recording Conversations or Phone Calls in Divorce or Custody Cases*, LAW & MEDIATION OFF. OF DARREN M. SHAPIRO, ESQ., https://www.darrenshapiro.com/recording-conversations-or-phone-calls-in-divorce-or-child-custo.html [https://perma.cc/W88J-3RAW] (same). For those individuals who have not yet obtained an attorney in their family law proceeding and aren't actively being told not to wiretap their spouse, it may seem logical to obtain the evidence first and then ask if it's allowed in court later—after the true damage is already done.

15 This work focuses largely on the male and female spousal relationship, as it connects more broadly to the historical views of what unions were legally and socially accepted moving into the late twentieth century. However, it is of note that the consequences of approving a spousal wiretap

III will then explain how the contemporary social and technological landscape surrounding the spousal relationship renders the spousal wiretap exception particularly damaging and obsolete. The Comment concludes by recommending that state legislatures eliminate the exception through legislation explicitly codifying its extinction.

I. THE SPOUSAL WIRETAP EXCEPTION

The Federal Wiretap Act's enactment inadvertently created an issue that remains severely underexplored by legal scholars. Although the Act does not explicitly grant an exemption for wiretapping in domestic relationships by a spouse, some Circuits have read one into the text. This Part examines the statute's history and language, and then discusses the origins and modern caselaw surrounding this spousal wiretap exception.

A. *The Wiretap Act*

When Congress enacted the Federal Wiretap Act in 1968, wiretapping had long been used as a law enforcement tool.[16] Growing concerns over official abuses of power and the increasing availability of private wiretapping catalyzed newfound Congressional focus on the issue.[17] In passing the Act, Congress intended to combat wiretapping "by government agencies and private individuals without the consent of the parties or legal sanction."[18]

1. Legislative History

The legislative commentary on the Wiretap Act indicates that Congress intended the term "private individuals" to reach even the confines of the marital home. Congressional findings accompanying the Act's enactment explain that the Wiretap Act "safeguard[s] the privacy of innocent persons" by prohibiting the unauthorized interception of "wire and oral communications."[19] Although

exception would reach any marital relationship, regardless of sexual orientation. The following arguments merely serve the purpose of illuminating the sexist foundations of the historical spousal wiretap exception and the reasons behind why it should not be used as an affirmative defense moving forward. They are similarly applicable to same-sex marriage.

16 *See* April White, *A Brief History of Surveillance in America*, SMITHSONIAN MAG., Apr. 2018, https://www.smithsonianmag.com/history/brief-history-surveillance-america-180968399 [https://perma.cc/7DZ6-X2UP] (pointing to Prohibition as the beginning of wiretapping for law enforcement needs).

17 *Id.*

18 *Title III of The Omnibus Crime Control and Safe Streets Act of 1968 (Wiretap Act)*, BUREAU JUST. ASSISTANCE, https://bja.ojp.gov/program/it/privacy-civil-liberties/authorities/statutes/1284 [https://perma.cc/3HAN-8F7J].

19 Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 801(b)-(d), 82 Stat. 197, 213 (1968).

the final legislative text does not include any mention of wiretapping within the marital relationship, Scott Glick's in-depth look at the Act's legislative history demonstrates that Congress considered marital communications as covered by the Act.[20] In his work, Glick identified a legislative hearing for the Right of Privacy Act of 1967,[21] a workshopped precursor to the Wiretap Act, where then-professor Robert Blakey testified that private surveillance falls into two major camps: "commercial espionage and domestic relations investigations."[22] Glick identifies Blakey's testimony as foundational to the surviving Wiretap Act, catalyzing the legislative shift in focus to provide for a prohibition against domestic surveillance in the Act.[23] According to Glick, the Wiretap Act "was specifically designed to close the gap caused by the [Right of Privacy Act of 1967's] failure to prohibit electronic surveillance in domestic relations situations."[24] This legislative background bolsters the Wiretap Act's prohibition on private electronic surveillance, including surveillance conducted by a snooping spouse. However, despite the evidence, some federal courts remained skeptical that lawmakers intended to regulate wiretapping in marital relationships through the Wiretap Act.

2. Language of the Act

The Federal Wiretap Act, codified at 18 U.S.C. §§ 2510–22, forbids the intentional interception, use, and disclosure of real-time "wire, oral or electronic communication[s]" by "any person."[25] For the statute to apply, a communication must be intercepted using an electronic or mechanical device while still in transit to its destination.[26] Congress may have attempted to discourage private individuals from wiretapping communications for legal gain and incentivize law enforcement to follow the proper wiretap procedure by enacting § 2515, which explicitly provided that the illegally intercepted contents of a wiretap may not be used as evidence.[27] Violations of the Act are

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20 Scott J. Glick, *Is Your Spouse Taping Your Telephone Calls?: Title III and Interspousal Electronic Surveillance*, 41 CATH. U. L. REV. 845, 856-63 (1992) (assessing the legislative background of the Wiretap Act).

21 113 Cong. Rec. 2910-12 (1967) (statement of Mr. Long of Miss.).

22 *Right of Privacy Act of 1967: Hearings on S.928 Before the Subcomm. on Admin. Prac. & Proc. of the Comm. on the Judiciary*, 90th Cong. 441 (1967); *see also* Glick, *supra* note 20, at 858 (identifying Blakey as a key voice on the prevalence of marital surveillance during legislative hearings surrounding wiretapping).

23 Glick, *supra* note 20, at 859-60.

24 *Id.* at 860.

25 18 U.S.C. § 2511(1)(a); 18 U.S.C. § 2511(1)(c)-(d).

26 18 U.S.C. § 2511(1)(b).

27 18 U.S.C. § 2515.

punished criminally, but the statute also provides for a civil cause of action for wiretap victims.[28]

The Wiretap Act's enumerated exceptions do not include spousal communications. Indeed, the specified exceptions for individuals are for switchboard operators and officers, employees, and agents of electronic communication service providers.[29] The only other means of avoiding civil or criminal liability under the federal statute is if one of the parties to the wiretap consents.[30] Therefore, it is difficult to see how a stealthy wiretapper can avoid liability under the statute simply because they are intimately involved with the person they are wiretapping. Even so, the suggestion of potential liability for spouses under the Act was seen as abhorrent in certain jurisdictions, sparking the creation of the spousal wiretap exception.

B. *The Spousal Wiretap Exception*

In opinions from the 1970s, shortly after the Federal Wiretap Act's enactment and at a critical turning point for marital law and women's rights in the United States, the Fifth and Second Circuits permitted spousal spying under the Wiretap Act, reasoning that the special sanctity of the marriage relationship afforded spouses a right to each other's communications.[31] Although the statute seems to state clearly that *any* unauthorized and unconsented interception of communications is illegal under the statute,[32] spousal spying is, unfortunately, not a rare occurrence, and the reasons for doing so may boil down to a lack of trust in the relationship.[33] In certain jurisdictions, this lack of trust (and the consequences flowing from it) remain unactionable in federal courts, regardless of the language of the Federal Wiretap Act.

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28 18 U.S.C. § 2520.

29 18 U.S.C. § 2511(2)(a)(i).

30 18 U.S.C. § 2511(2)(c).

31 *See infra* notes 34–49 and accompanying text (discussing the judicial foundations of the exception).

32 *See supra* subsection I.A.2.

33 *See, e.g.*, Stefanie Smith, *Survey Shows the Person You Trust the Most May be Spying on You*, AVAST (Sept. 3, 2014), https://blog.avast.com/2014/09/03/survey-shows-the-person-you-trust-the-most-may-be-spying-on-you [https://perma.cc/K4SH-JZR9] (discussing a survey in which one in five men and one in four women out of 13,132 respondents admitted to checking their partner's smartphone because they believed that their partner may be unfaithful).

1. Origins

The Fifth[34] and Second Circuits[35] found spouses immune from civil and criminal liability under the Wiretap Act when they conducted surveillance on their partner.

The classic case in support of a marital exception to the Wiretap Act is *Simpson v. Simpson*.[36] In *Simpson,* a husband concerned about his wife's potential infidelity attached a wiretap device to his marital home's telephone and intercepted compromising conversations between his wife and another man.[37] The husband played the recorded tapes to neighbors, family, and an attorney, who subsequently advised the wife to agree to an uncontested divorce.[38] After analyzing the legislative history, the court concluded that "because Congress ha[d] not, in the statute, committee reports, legislative hearings, or reported debates indicated either its positive intent to reach so far or an awareness that it might be doing so," the Act should not reach into the confines of the spousal relationship.[39] Put simply, because Congress didn't mention the Act reaching the marital home, it could not be judicially extended to do so.[40] The court further noted that if the spouse had instead used a third-party investigator to conduct the wiretap, they would not be privy to the spousal exemption.[41] To the Fifth Circuit, then, the zone of privacy one has in their spousal relationship, secluded from their spouse, is narrower than the zone of privacy protected from third-party intrusion.[42]

A similar Second Circuit case, *Anonymous v. Anonymous*, remains good law.[43] In *Anonymous*, the plaintiff's ex-husband recorded telephone conversations between the plaintiff and the couple's children using the answering machine's

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34 Simpson v. Simpson, 490 F.2d 803, 810 (5th Cir. 1974).

35 Anonymous v. Anonymous, 558 F.2d 677, 677 (2d Cir. 1977).

36 490 F.2d 803.

37 *Id.* at 804.

38 *Id.*

39 *Id.* at 805.

40 *Id.* at 806 ("[W]e have found no direct indications that Congress intended so much, and only several scattered suggestions that it was aware that the statute's inclusive language might reach this case.").

41 *Id.* at 809 ("[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.").

42 To note, *Simpson* has technically been overturned by *Glazner v. Glazner* in the Eleventh Circuit, as the ruling in *Simpson* came before the Eleventh and Fifth Circuits split in 1981. However, there have been no further mentions of spousal wiretapping in the "new" 5th Circuit, so the precedent remains binding in that jurisdiction. *See* Glazner v. Glazner, 347 F.3d 1212, 1216 (11th Cir. 2003) ("Therefore, we hold that no exception for interspousal wiretapping exists in Title III. Accordingly, we overrule *Simpson*."). For more background on how precedent is handled in the Fifth and Eleventh Circuit split, see generally Thomas E. Baker, *A Postscript on Precedent in the Divided Fifth Circuit,* 36 SW. L.J. 725, 727 (1982).

43 Anonymous v. Anonymous, 558 F.2d 677 (2d Cir. 1977).

call recording feature.[44] These calls were then offered as evidence in preparation for divorce proceedings.[45] The court reasoned that the husband's actions in this case "present[ed] a purely domestic conflict [sic] [and] dispute between a wife and her ex-husband over the custody of their children—a matter clearly to be handled by the state courts."[46] Only when conduct exceeded that of a "marital dispute" and became the "criminal conduct" that the Wiretap Act sought to prohibit could a spousal surveillance issue fall under the purview of the Act.[47] Indeed, the court was hesitant to make it a crime "for a father to listen in on conversations between his wife and eight year old daughter, from his own phone, in his own home."[48] Here, the court's test centered on the criminality of the conduct, a question of certain judicial discretion not given any parameters. In qualifying its decision, however, the court concluded that there was no blanket exception for spousal surveillance—an important point that undermines the potential for a broad acceptance of spousal immunity under the Wiretap Act.[49]

2. Current Standing Case Law

Lizza v. Lizza, a federal district court case, further supports a spousal exception to the Wiretap Act.[50] Like *Simpson*, *Lizza* involved an electronic wiretap device, designed to pick up telephone conversations, affixed to the marital phone.[51] The recordings obtained from the telephone communications were prepared for a future divorce proceeding.[52] The court followed *Simpson* and *Anonymous*, holding that extending the Wiretap Act to reach spousal phone-tapping "would have serious ramifications as to the degree of federal control over actions by family members within their own homes."[53] Like in *Simpson,* the court reasoned that because there was no clear legislative intent for the Act to apply to spousal surveillance, the Act couldn't "extend to a decision by a spouse to record conversations on [one's] own residence's telephone."[54]

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44 *Id.* at 678.

45 *Id.* at 677.

46 *Id.* at 679.

47 *Id.* at 677 ("The issue becomes at what point interspousal wiretaps leave the province of mere marital disputes, a matter left to the states, and rise to the level of criminal conduct proscribed by the federal wiretap statutes.").

48 *Id.* at 679.

49 *Id.* at 677 ("Congress was not unaware of the growing incidence of interspousal wiretaps, and did not intend to blanketly except them from the Act's coverage.").

50 631 F. Supp. 529, 530 (E.D.N.Y. 1986).

51 *Id.* at 530.

52 *Id.*

53 *Id.* at 533.

54 *Id.*

Conversely, the Fourth,[55] Sixth,[56] and Tenth[57] Circuits each expressly disclaim the existence of a spousal exception to the federal Wiretap Act. Each of the following cases involved a phone wiretapping device placed by either the husband or wife, similar to that of both *Simpson* and *Anonymous*.[58] In *Pritchard,* the Fourth Circuit court noted that "an analysis of the legislative history would not appear to be necessary" given the Act's clear and unambiguous statutory language.[59] The court concluded that without a specific exception written into the statute, spousal surveillance is not permitted under the Act.[60] Similarly, the Sixth Circuit in *Jones* recognized the "unambiguous language of the [Wiretap Act]" but chose to conduct its own look at the Act's legislative history.[61] Although viewing "many of the same materials" reviewed by the *Simpson* court, the court in *Jones* determined "that 18 U.S.C. § 2511(1)(a) establishes a broad prohibition on all private electronic surveillance and that a principal area of congressional concern was electronic surveillance for the purposes of marital litigation."[62] Finally, the Tenth Circuit in *Thompson* reiterated that the clear language of the statute does not allow for a spousal exception because the Act refers to "any person," so "no interspousal exception to Title III liability" exists.[63]

A recent case in the Sixth Circuit, *Luis v. Zang*,[64] presents additional support for eliminating the spousal wiretap exception because it illuminates the unique issue of spousal surveillance in the digital age.[65] Prior to the circuit court's decision in *Luis,* the paramour of the husband defendant's (now ex) wife brought suit in district court against both the husband and the creator of the surveillance software he used to intercept electronic communications

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55 Pritchard v. Pritchard, 732 F.2d 372 (4th Cir. 1984).

56 United States v. Jones, 542 F.2d 661 (6th Cir. 1976).

57 Thompson v. Dulaney, 970 F.2d 744 (10th Cir. 1992).

58 *See Pritchard,* 732 F.2d at 372 ("[Plaintiff] alleges that his former wife . . . intercepted and used his telephone conversations by attaching a wiretapping device to the family phone. Plaintiff claims that his conversations were recorded without his knowledge or consent."); *Jones*, 542 F.2d at 663 ("[O]n one or more occasions Appellee had intercepted his wife's telephone conversations outside the curtilage of the residence."); *Thompson*, 970 F.2d at 746 ("[Plaintiff] discovered that [defendant] had taped several of his telephone conversations with the couple's minor children who had been living with [the defendant].").

59 *Pritchard*, 732 F.2d at 373.

60 *Id.* at 374 ("Title III prohibits all wiretapping activities unless specifically excepted. There is no express exception for instances of willful, unconsented to electronic surveillance between spouses.").

61 *Jones*, 542 F.2d at 666-69 (identifying legislator comments, expert testimony, and the Bill's senate report as the basis for the court's conclusions).

62 *Id.* at 669-70.

63 *Thompson*, 970 F.2d at 748.

64 833 F.3d 619 (6th Cir. 2016).

65 The age of digital spousal surveillance presents newfound concerns of layperson access to powerful surveillance software and the potential interception of private information outside of communications with a third party. *See* discussion *infra* Section III.B.

on the wife's computer, alleging violations of the Wiretap Act.[66] In addition to using the surveillance software to spy on his wife, the defendant husband used the intercepted communications as leverage in his divorce proceeding.[67] Though the plaintiff settled with the husband prior to the appellate decision, the appellate court used its platform to subtly disregard a potential spousal exception to the Wiretap Act, opining that the plaintiff had a cause of action under § 2511(a) because the husband, though not actively monitoring the communications in real-time *himself*, intercepted his wife's real-time communications with the surveillance software.[68] The court's decision nodded to the fact that the defendant's position as spouse during the wiretapping did not necessarily shield him from liability under the Act.[69] Instead, his actions were regarded as those of a private individual to whom the Act fully applied. Therefore, this recent look at technologically advanced spousal surveillance, and the majority of Circuit courts that reject any spousal exception to the Wiretap Act, provides further support for doing away with a spousal exception entirely.

Notwithstanding modern case law, the spousal wiretap exception still stands as good law in the Fifth and Second Circuits. Until those cases are overturned, spouses in those jurisdictions have no recourse under the Federal Wiretap Act. The Act indicates that spouses were not meant to be exempt from its language,[70] and the theoretical foundations for the exception, outlined in *Simpson* and *Anonymous*, are flawed. Furthermore, the spousal wiretap exception set forth in these cases is wholly incompatible with constitutional, legal, and social developments since the 1970s.

II. AN ANCIENT EXCEPTION

The constantly evolving areas of marital and privacy rights demand focus in this Comment's discussion of how the spousal wiretap exception is no longer good law. The marital rights discussion identifies two distinct ideological shifts emerging concurrently with the spousal wiretap exception:

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66 *Luis*, 833 F.3d at 623.

67 *See id.* at 624 ("[The husband] then used these communications as leverage to help his attorney secure favorable terms for a divorce from [his wife] in 2010.").

68 *See id.* at 633 ("Any potential delay in access to the communications for a [software] user therefore does not preclude a finding that [the software creator] itself acquire[d] the communications in a manner contemporaneous with their transmission.").

69 *See id.* at 639 ("[E]ven if a jury ultimately concludes that only [the husband] (and not [the software creator]) intercepted [plaintiff's] communications in violation of § 2511, [the software creator] might still be liable because it 'engaged in' that violation (see § 2520) by manufacturing, marketing, selling, and actively operating the device that was used by [the husband] to conduct the intercept.").

70 *See* United States v. Jones, 542 F.2d 661, 671 (1976) ("If Congress had intended to create another exception to Title III's blanket prohibition of unauthorized wiretaps they would have included a specific exception for interspousal wiretaps in the statute.").

one being a shift from sex-inequality to sex-equality, and the other a shift away from marital unity to marital individualism. Both of these concepts are also present in the subsequent discussion of privacy rights.

A. *United States' Evolution of Rights Within the Marital Relationship*

In the early days of the Republic, marriage was viewed as an institution through which publicly defined duties could be prescribed and rewards could be redeemed when the union was consummated.[71] Consent on both sides of the "marriage contract" was imperative.[72] This consent gave way to the "benefits" of being in an acknowledged partnership: a husband would provide for the wife and, in return, a wife owed her service and labor to him.[73] A particular model of marriage, consistent with societal views at the Nation's founding, is described by Nancy Cott in her work, *Public Vows: A History of Marriage and the Nation*.[74] Marriage, meant to be a lasting and committed union between man and woman, rested upon principles of "Christian religion and the English common law in its expectations for the husband to be the family head and economic provider, his wife the dependent partner."[75] Although secularism took precedence in the new nation, the religious foundations of marriage remained prominent.[76] This meant that the vision of a male head of household *also* remained prominent, resulting in a structure that encouraged dependent wives.[77]

This structural division between husband and wife was meant to reflect the differences that purportedly existed between men and women. While men were "[superior] in reason and judgment," women were malleable beings whose manners and social cues could be taught.[78] This alleged superiority in matters involving intellectual prudence painted husbands as being better equipped for things such as managing property and handling legal disputes.[79] In essence, because the wives weren't capable of handling these "superior" matters, it was their marital duty to give up control over these matters to their husbands.

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71 *See* NANCY COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 2, 10-11 (2002) ("Marriage prescribes duties and dispenses privileges.").

72 *Id.* at 10-11.

73 *Id.* at 12.

74 *Id.*

75 *Id.* at 3.

76 *See id.* at 6 (explaining that, although the United States does not recognize a national religion, a Christian conception of marriage was "adopted in and filtered through legislation").

77 *See id.* at 7 ("A man's headship of a family, his taking the responsibility for dependent wife and children, qualified him to be a participating member of a state.").

78 *Id.* at 19, 20; *see also* Joan Hoff, *American Women and the Lingering Implications of Coverture*, 44 SOC. SCI. J. 41, 44 (2007) (noting the patriarchal notion that women are biologically inferior and cannot handle "public tasks of importance").

79 *See infra* notes 84–85 and accompanying text.

Notions of marital unity, emphasized through common law coverture and interspousal tort immunity, perpetuated female subordination.[80] Seen as "less than" their husbands, society deemed women unworthy of retaining autonomy over their possessions, their legal rights, and their bodies. The following discussions of these legal areas indicate that female subordination remained a prominent societal force at the time the spousal wiretap exception was created. Considering the changes in constitutional law that dispel female subordination, the spousal wiretap exception is repugnant to established legal standards of gender equality.

It should also be noted that historically, courts (including the court in *Simpson*) used the domestic relations doctrine, a federal common law recognition of state prominence in the areas of marriage, divorce, and the like,[81] to disclaim federal involvement in marital disputes. However, federal courts can give deference to constitutional domestic relations doctrine while recognizing that Congress meant to encompass spousal wiretapping in the Wiretap Act. This work also addresses the domestic relations argument in turn.[82]

1. Coverture

The common law doctrine of coverture enforced the societal notion that a woman was incapable of existing as an entity outside of the "cover" of her husband. In his first volume of *Commentaries on the Laws of England*, William Blackstone explained that "[b]y marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs everything . . . ."[83] Under coverture, the marital union triggered a transfer of the woman's personal property to the husband, where he was "permitted to dispose of it at any time."[84] In addition, once married, women lacked the ability to sue another individual or be sued herself—legal actions

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80 *See, e.g.*, Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2144 (1996) ("The household remained patriarchal in form, 'a little commonwealth' in which the master ruled the members (wife, children, servants, etc.) and represented them in the larger commonwealth."); *see also id.* at 2145 ("[F]or most of the [nineteenth] century, Americans understood marriage as a relationship organized in terms of authority *and* affect."). For an excellent account of how historic notions of marriage were focused on patriarchal authority and lingered well into the twentieth century, see generally Lenore J. Weitzman, *To Love, Honor, and Obey? Traditional Legal Marriage and Alternative Family Forms*, 24 THE FAM. COORDINATOR 531, 532 (1975).

81 *See* discussion *infra* subsection II.A.3 (outlining the origins of the domestic relations doctrine).

82 *See* discussion *infra* subsection II.A.3 (discussing the domestic relations exception).

83 1 WILLIAM BLACKSTONE, COMMENTARIES *625-26.

84 Hazem Alshaikhmubarak, R. Richard Geddes & Shoshana A. Grossbard, *Single Motherhood and the Abolition of Coverture in the United States*, 16 J. EMPIRICAL LEGAL STUD. 94, 96 (2019).

against a wife or for a wife needed to go through the husband.[85] In essence, without property to claim and money in her name, a wife was rendered powerless in marriage. Marriage became an economic bargain, a "preeminent" feature of "daily community life."[86] If a woman remained unmarried, social stigma[87] and a dearth of financial support could result in unfavorable prospects. If married to a husband who mismanaged the property that he absorbed from her at the start of the marital relationship, she could lose everything she originally had to her name, reinforcing the dependency that coverture sought to maintain within the union between man and wife.

In the early years of the United States, the States implicitly adopted coverture through an embrace of English common law.[88] On the state court level, judges decided property rights cases and contract disputes where the wives were under coverture's "disability."[89] The federal courts operated under a similar impression that coverture was a common law disabling force for women.[90] Notably, Supreme Court Justice Joseph Story in *Shanks v. Dupont*

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85 *See* Allison Anna Tait, *The Beginning of the End of Coverture: A Reappraisal of the Married Woman's Separate Estate*, 26 YALE J.L. & FEMINISM 165, 167 (2014) (stating that the "legal existence" of a woman was "suspended" during her marriage).

86 COTT, *supra* note 71, at 12.

87 Unmarried women in the late 19th century were considered a "threat to men and the family." Ruth Freeman and Patricia Klaus, *Blessed or Not? The New Spinster in England and the United States in the Late Nineteenth and Early Twentieth Centuries*, 9 J. FAM. HIST. 394, 395 (1984).

88 *See, e.g.*, N.Y. CONST. of 1777, art. XXXV ("[S]uch parts of the common law of England, and of the statute law of England and Great Britain, and of the acts of the legislature of the colony of New-York, as together did form the law of the said colony . . . shall be and continue the law of this State . . . ."). Other colonies, such as Pennsylvania and Virginia, also enacted similar statutes that remain in force. *See* VA. CODE ANN. § 1-200 (2021) ("The common law of England, insofar as it is not repugnant to the principles of the Bill of Rights and Constitution of this Commonwealth, shall continue in full force within the same, and be the rule of decision, except as altered by the General Assembly."); 1 PA. CONS. STAT. § 1503(a) (2021) ("The common law and such of the statutes of England as were in force in the Province of Pennsylvania on May 14, 1776 and . . . shall be deemed to have been in force in this Commonwealth from and after February 10, 1777.").

89 *See, e.g.*, Archer v. Griffith, 390 S.W.2d 735, 739 (Tex. 1964) ("Petitioner argues that the contract in the present case is now binding on respondent because she adopted the same by executing the deed after her disabilities of coverture were removed."); Banfield v. Addington, 140 So. 893, 900 (Fla. 1932) ("The statutes by enabling the married woman to engage in the employment or occupation 'separate from her husband,' to that extent removed her common-law disability of coverture and rendered her liable as though she were not married for torts committed in the conduct of such employment or occupation."); Jackson *ex dem.* Swartwout v. Johnson, 5 Cow. 74, 74 (N.Y. Sup. Ct. 1825) (holding that the statute of limitations should not run against the owner of property that was reassigned to her husband while she was "under disability" coverture until "the removal of her disabilit[y]").

90 *See, e.g.*, Stanley v. Schwalby, 162 U.S. 255, 273 (1986) (referring to a wife as being "under the disability of coverture" in a proceeding on adverse possession); MacGreal v. Taylor, 167 U.S. 688, 697 (1897) ("Mrs. Sims labored under the disability of coverture when she made the deed . . . ."); Teas v. Kimball, 257 F.2d 817, 824 (5th Cir. 1958) ("[A] married woman who has not had her disabilities of coverture removed pursuant to Art. 4626, Vernon's Ann.Civ.Stat., is incapable of entering into a mercantile partnership."); Decker v. Kedly, 148 F. 681, 681 (9th Cir. 1906) ("It is true

acknowledged that after becoming a *sub potestate viri*,[91] any subsequent acts of a woman were no longer considered "free."[92] Indeed, the common law presumed "that the wife was 'acting by her husband's compulsion' . . . [and] could not commit any voluntary act . . . ."[93] Wives were, in a sense, reduced to pieces of property owned by their husbands.

State statutory alterations of the common law were necessary to dismantle coverture in the United States. Legislators recognized the vulnerability that married women faced under the common law.[94] Coverture structures in the United States weakened with the passage of the Married Women's Property Acts and Married Women's Earning Acts which afforded "married women the right to own and control real and personal property" and "the right to own their earnings from work outside the home," respectively.[95] The last of these acts were passed in Arizona in 1973.[96]

Both state and federal courts played a similar role in the fall of coverture. State court jurisprudence followed a trajectory similar to the statutory dismantling.[97] Additionally, the Supreme Court echoed sentiments against coverture in the 1966 case *United States v. Yazell*, noting that "[t]he institution of coverture is peculiar and obsolete."[98] However, a concurrence by Justice Blackmun (joined by Justices Burger, Harlan, and Stewart) in the 1971

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that the statutes of Alaska, as do those of many of the states, remove certain disabilities which at common law attend the wife during her coverture . . . .").

91 *Sub potestate viri* is short for the Latin phrase *Uxor non est sui juris sed sub potestate viri*, meaning "[a] wife is not in her own right . . . but under the power of her husband." *Uxor non est sui juris sed sub potestate viri*, BLACK'S LAW DICTIONARY (7th ed. 1999).

92 28 U.S. 242, 258 (1830) ("It is the only free act of her life stated upon the record, for from thence she continued sub potestate viri . . . ."). For a clearer look at Justice Story's take on the position of the wife within the marriage relationship, see Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518, 696-97 (1819).

93 Kristin A. Collins, *Federalism's Fallacy: The Early Tradition of Federal Family Law and the Invention of States' Rights*, 26 CARDOZO L. REV. 1761, 1779 (2005).

94 *See* Bernie D. Jones, *Revisiting the Married Women's Property Acts: Recapturing Protection in the Face of Equality*, 22 AM. UNIV. J. GENDER SOC. POL'Y & L. 91, 92 (2013) (discussing that legislators understood that a husband's right to his wife's property created risk that a husband's debts could be seized).

95 Alshaikhmubarak et al., *supra* note 84, at 96. *See also* Allison Anna Tait, *The Return of Coverture*, 114 MICH. L. REV. FIRST IMPRESSIONS 99, 101 (2015) ("[Coverture] governed married women in . . . America until at least the middle of the nineteenth century, when states began to enact Married Women's Property Acts, legislation that is generally thought to have ended coverture."). The first of these acts were passed in New York and Maryland in the mid-nineteenth century. *See* Alshaikhmubarak et al., *supra* note 84, at 97.

96 Alshaikhmubarak et al., *supra* note 84, at 97.

97 *See* Clouston v. Remlinger Oldsmobile Cadillac, Inc., 258 N.E.2d 230, 235 (Ohio 1970) (rejecting an argument that a wife and husband couldn't separately seek damages for a single negligence action on the basis of coverture, which the judge recognized as degrading women to "chattel with no personality, no property and no legally recognized feelings or rights"); *see also* Whyman v. Johnston, 163 P. 76, 77 (Colo. 1917) (stating that the idea of a marriage as "one legal personality" was "fiction").

98 382 U.S. 341, 351 (1966).

Supreme Court case *Perez v. Campbell* recognized the force of an Arizona property law perpetuating principles of coverture without a similar disapproving tone.[99] This accurately reflected judicial attitudes at the time—although coverture's legal roots were being pulled from the ground, the social sentiment would still linger in the minds of Americans because, in many jurisdictions, this legal treatment of women was considered a progressive concept.

The deep-seated prejudice against married women as independent individuals persisted despite legal developments to the contrary. It was not until the early 1970s that the U.S. Supreme Court eliminated formal sex-based distinctions between husbands and wives as a matter of constitutional law. In *Frontiero v. Richardson*, a plurality of the Supreme Court applied strict scrutiny to a law that made it more difficult for military servicewomen to claim spouses as dependents and gain access to certain benefits and allowances that would be available to the wives of servicemen.[100] In holding that the law did not survive strict scrutiny, the Court noted, and rebuked, the notion that "discrimination [on the basis of sex] was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage."[101] The Court similarly rejected statutes that based availability of benefits on gender classifications in *Weinberger v. Wiesenfeld*[102] and *Califano v. Goldfarb*,[103] solidifying the Court's movement away from effecting female subordination. As a result, at least as a matter of formal law, coverture dissolved, placing wives and husbands on an equal legal footing.

However, the spousal wiretap cases decided concurrently flouted these new constitutional sex equality doctrines. Read in light of the constitutional sex equality principle, it seems clear that a spousal wiretap exception perpetuates sex inequality by granting a husband access to his wife's personal communications under the outdated doctrine of marital unity. Although a skeptic may argue that the spousal wiretap exception is facially gender-neutral, as the cases do not qualify the defense's availability on being male or female, the practical effects favored husbands in (a) asserting the defense and (b) bringing action against their wives.[104] Women at the time were legally able to operate outside the cover of their husbands, but this constitutionally

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99 402 U.S. 637, 669 (1971) (Blackmun, J., concurring) (writing approvingly that the personality of the husband and wife in the community is under the authority of the husband).

100 411 U.S. 677, 678-83 (1973).

101 *Id.* at 684.

102 420 U.S. 636, 638-39 (1975).

103 430 U.S. 199, 202 (1977).

104 There is at least one case from the 1980s discussing the spousal wiretap exception that involves a wife wiretapping her husband. *See* Pritchard v. Pritchard, 732 F.2d 372, 372 (4th Cir. 1984) ("[Plaintiff] alleges that his former wife . . . intercepted and used his telephone conversations . . . ."). However, this is one case among many involving a husband wiretapping his wife, indicating that men were more poised to take advantage of the spousal wiretap defense.

mandated equality[105] focused on the interactions between the wife and the outside world—not between the wife and her *husband*. "[I]n all states, the common law still disabled a wife from dealing with her husband on such terms."[106] Therefore, historic coverture was simply reinforced under the guise of preserving the marital relationship, as the husband was more equipped to take advantage of the defense.[107]

2. Interspousal Tort Immunity

One significant legal consequence of coverture was the development of interspousal tort immunity. Connected to the tenant of coverture that women did not have standing to sue on their own behalf,[108] the doctrine of interspousal tort immunity directs that spouses are not able to pursue "civil causes of action against each other for personal injuries."[109] The doctrine, much like coverture, was not created statutorily. Instead, it was evoked as a common law rule that many judges used to simply deny relief to women who sued their husbands in tort.[110] Some judges defended their use of the interspousal tort immunity rule, suggesting that procedural disabilities perpetuated by coverture were to blame, as the rule rendered a wife unable to bring a suit on her own behalf.[111] Similarly, even if damages *were* awarded after a successful suit, the award would immediately become the property of the husband—another facet of coverture.[112] Wives with genuine causes of action were stuck between a rock and a hard place—they were forced to endure potentially violent or malicious conduct by their husbands because the only way out of the relationship was through them.

Seven jurisdictions in the United States eliminated interspousal tort immunity at the beginning of the twentieth century and by 1970 it was the minority rule, remaining in only a handful of jurisdictions.[113] The enactment of the aforementioned Married Women's Property Acts and Married Women's Earning Acts paved the way for the gradual abolishment of

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105 *See supra* notes 100–103 and accompanying text.

106 Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1117 (1997).

107 Reva Siegel generally coined this concept "preservation-through-transformation," where a body of law is altered just enough to be "differentiated from its contested predecessor" in a way that does not seriously disadvantage those that benefitted from the prior regime. *Id.* at 1119.

108 *See supra* note 85 and accompanying text.

109 *See generally* Carl Tobias, *Interspousal Tort Immunity in America*, 23 GA. L. REV. 359, 359 (1989) (explaining the connection between coverture and interspousal tort immunity).

110 *Id.* at 385 ("Most judges simply announced . . . the existence of a substantive common-law rule of interspousal tort immunity, although there technically was no rule as such.").

111 *Id.*

112 *Id.*

113 *Id.* at 359.

interspousal tort immunity throughout the rest of the nation, as these pieces of legislation granted women the power to maintain civil actions against anyone "in her own name, for damages," as a result of injuries against "her person or character."[114] However, this abolishment was not quick to take hold. Some early judicial determinations of legislative intent refused to find an implied grant of action by one spouse against another.[115] Absent a "clear" directive that the doctrine was to be abrogated, judges were hesitant to stray from the common law.[116] Instead, legislation was construed in light of the common law—meaning that even though wives were granted control over their property and earnings by the married women's statutes and could bring suit on causes of action surrounding those areas of the law, it did not automatically follow that women had a right of action in *all* areas of the law, including tort law, against their husbands.[117]

Outside of their analysis on legislative intent, judges were hesitant to do away with interspousal tort immunity on other grounds. First, they claimed that wives already had available remedies for tortious actions by the husband: divorce law and criminal law.[118] Of course, divorce law only provides a means of dissolving the relationship and potentially receiving maintenance or alimony payments (and, if applicable, child support), but it cannot directly compensate for an injury like civil actions in tort can.[119] Monetary damages are generally not awarded as part of the recovery in divorce proceedings, which means that tortious actions against one partner cannot directly be remedied.[120] Finally, the decision to pursue a criminal charge on behalf of a

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114 *Id.* at 373, 383.

115 *See, e.g.*, Main v. Main, 46 Ill. App. 106, 108-09 (1892) (holding that although wives could now maintain an action regarding property or contracts, departing from the common law of interspousal tort immunity for reasons of violence by a husband against a wife would "not [be] desirable . . ."); Bandfield v. Bandfield, 75 N.W. 287, 288 (Mich. 1898) ("The result of plaintiff's contention [that the interspousal tort immunity doctrine is invalid] would be another step to destroy the sacred relation of man and wife, and to open the door to lawsuits between them for every real and fancied wrong,—suits which the common law has refused on the ground of public policy."), *overruled in part by* Hosko v. Hosko, 187 N.W.2d 236 (Mich. 1971).

116 *See* Flogel v. Flogel, 133 N.W.2d 907, 912 (Iowa 1965) ("The amendment gives no indication of any legislative intent to abrogate the interspousal immunity rule. If it is to be done we are committed to the proposition the legislature must do so in such clear language as to leave no doubt in the mind of anyone.").

117 Tobias, *supra* note 109, at 387-88.

118 *Cf.* Freehe v. Freehe, 500 P.2d 771, 773-76 (Wash. 1972) (identifying several common arguments in support of interspousal tort immunity before rejecting all of them), *overruled by* Brown v. Brown, 675 P.2d 1207 (Wash. 1984).

119 *See* 4 A.L.R. Fed. 5th § 2[a] ("[T]he purpose of divorce actions is to dissolve the marital relationship and effect the legal separation of husband and wife, while a tort action is brought to recover damages for injuries suffered as the result of a civil wrong.").

120 One justification for keeping marital tort proceedings and divorce proceedings from being joined in one action is the need to keep requests for damages prohibited in divorce proceedings. *See id.*

victim spouse remains with the prosecutor,[121] and charges against spouses are often dropped or dismissed.[122] For a spouse looking for vindication, then, not having control over a criminal charge makes it an unsuitable replacement for an action in tort.

Judges also justified interspousal tort immunity as promoting a strong, harmonious union between man and wife through the common law. The Supreme Court of Nevada noted that the doctrine, when in full force, was thought to "foster[] domestic tranquility."[123] Essentially, allowing spouses to sue each other for torts committed within the marital relationship would erode the basic principles of marital unity.[124]

In addition, judges reasoned that the doctrine served to "prevent[] fraud and collusion" by the wife independently and in conjunction with another.[125] However, the court in the Arizona case of *Burns v. Burns* pointed out that intentional torts are not covered by insurance, so if a wife was seeking recovery for a violent or mal-intended tort committed by her husband, insurance would not be a factor in the overall remedy determination and could not be a genuine justification for the doctrine.[126] A final policy argument offered by the courts suggested that allowing for interspousal tort actions would create an overflow of baseless suits in the judicial system, as petty arguments are common in relationships.[127] However, some courts denying the application of the interspousal tort immunity doctrine in the mid-twentieth century argued that "[t]here is nothing in the experience of the dozens or more jurisdictions . . . [that] do permit spouses to sue one another which

121 ABA CRIMINAL JUSTICE STANDARDS PROSECUTION FUNCTION § 3-4.2 (4th ed. 2017) ("While the decision to arrest is often the responsibility of law enforcement personnel, the decision to institute formal criminal proceedings is the responsibility of the prosecutor.").

122 The outcomes in violent domestic violence cases can serve as a general comparative group for non-violent spouse-on-spouse crime. *See, e.g.*, Sarah Buduson, *Case Dismissed: Why Domestic Violence Offenders Often Get Away With It*, NEWS 5 CLEVELAND, https://www.news5cleveland.com/news/local-news/investigations/case-dismissed-why-domestic-violence-offenders-often-get-away-with-it [https://perma.cc/WYJ6-MHBU] (finding that 66% of domestic violence cases in Cleveland were dismissed in 2018); Claire Lowe, *Why 80 Percent of New Jersey's Domestic Violence Cases Are Dismissed*, PRESS OF ATL. CITY (Apr. 11, 2017), https://pressofatlanticcity.com/news/crime/why-80-percent-of-new-jerseys-domestic-violence-cases-are-dismissed/article_d9878dce-e162-5f98-8d6a-95eee8cb8884.html [https://perma.cc/TZR8-54R4] ("Eight in 10 municipal domestic violence cases in the state are dismissed, according to 2015 New Jersey Courts data.").

123 Rupert v. Stienne, 528 P.2d 1013, 1015 (Nev. 1974).

124 *See* Fischer v. Fischer, 477 S.W.2d 513, 514 (Tenn. 1972) ("While modern attitudes toward marriage and the home and family and woman's liberation tend to disparage the relationship and its unity, in our opinion the rule is for the best good of the marital relationship.").

125 *Rupert*, 528 P.2d at 1015; *see also* Burns v. Burns, 526 P.2d 717, 719 (Ariz. 1974) ("[T]here would be a danger of fraud or collusion where the tort is covered by insurance . . . .").

126 *Burns*, 526 P.2d at 720.

127 Freehe v. Freehe, 500 P.2d 771, 775 (Wash. 1972).

would indicate that court calendars have become cluttered with trivial matrimonial disputes."[128]

Interspousal tort immunity, though now a minority rule in the United States, displays how deeply tenets of coverture ran even after married women's laws began to dismantle the common law system. With courts well into the 1970s and beyond deciding that wives could not bring personal tort actions against their husbands, it was clear that prejudice against women as independent legal entities remained prominent in the minds of many judges and other legal decisionmakers.

This discussion illuminates the stage that had previously been set for the spousal wiretap exception. Although the gradual dismantling of legal paternalism had begun, there were still legal minds that begged to differ on whether a cause of action was even available for a spouse subjected to a wiretap by their partner. As a result, the foundations of common law doctrines such as coverture and interspousal tort immunity were interwoven into the spousal wiretap exception. Now that both doctrines are legally and socially obsolete, the foundations of the spousal wiretap exception have eroded as well.

3. The Domestic Relations Exception

The domestic relations doctrine reflects coverture's insistence on marital unity and unwillingness to allow for federal intrusion into the marital home. However, it is not a catch-all doctrine that applies to all domestic relations issues, namely, spousal wiretapping.

The court in *Simpson* stated its view of the domestic relations doctrine: spousal surveillance touches on "the marital home and domestic conflicts," two areas that typically fall under the purview of the states.[129] The court's reasoning seemed to be that a federal statute could not regulate conduct within the marital home because only the states had the power to regulate domestic relations, therefore making it impossible for the statute's reach to encompass spouses.[130] I illuminate below why this facet of the court's reasoning fails to pass muster in light of the domestic relations exception.

In the 1888 Supreme Court decision *Maynard v. Hill*, the Court affirmed the legislature's control over the marital institution.[131] The legislatures referred to in the opinion were those of the states, not of the federal

128 Goode v. Martinis, 361 P.2d 941, 944 (Wash. 1961).

129 Simpson v. Simpson, 490 F.2d 803, 805 (5th Cir. 1974).

130 *Id.*

131 125 U.S. 190, 205 (1888) ("Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature.").

government.[132] This recognition of power mirrored the simultaneous development of the doctrine of domestic relations, which proscribed the federal courts from hearing certain cases that traditionally fell under the state police powers.[133] Derived from the Tenth Amendment, the powers were granted to the states to "police" areas not enumerated as federal government powers in the Constitution, known as the "reserved powers."[134] The police powers encompass issues regarding "the public health, the public morals, or the public safety,"[135] including marriage.[136]

The domestic relations doctrine originally flowed directly from this grant of police power to the States over marriage. In *Barber v. Barber,* the Court made clear that divorce is not an area of federal jurisdiction.[137] Scholar Michael Ashley Stein identifies *Barber* as the origin of the domestic relations exception.[138] Under this exception, matters primarily involving "declarations of status such as marriage, divorce, alimony, custody, and their attendant obligations" (what Stein refers to as "core" cases) are perceived to lack federal court jurisdiction because of accepted state prominence in familial disputes.[139] According to Stein, "non-primary core" cases, in contrast, involve matters where a domestic dispute is part of the matter but is not at the core of the case, and are often litigated in federal courts.[140] Proponents of extending the domestic relations exception to non-primary core cases cite "special state interest and expertise, disdain toward family law, and federal docket congestion."[141] In contrast, those who seek to maintain federal jurisdiction

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132 *Id.* at 206-07 ("This power has been exercised from the earliest period by the legislatures of the province, and by that of the State . . . .").

133 Bradley G. Silverman, *Federal Questions and the Domestic-Relations Exception*, 125 YALE L.J. 1364, 1366 (2016) ("Under the domestic-relations exception to federal jurisdiction, federal courts lack the power to hear certain cases involving family-law questions that fall within the traditional authority of the states.").

134 U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

135 Chicago, Burlington & Quincy Ry. v. Illinois *ex rel.* Grimwood, 200 U.S. 561, 592 (1906).

136 Loving v. Virginia, 388 U.S. 1, 7 (1967) ("[M]arriage is a social relation subject to the State's police power . . . .").

137 Barber v. Barber, 62 U.S. 582, 582 (1858) ("This court disclaims altogether any jurisdiction in the courts of the United States upon the subject of divorce . . . .").

138 Michael Ashley Stein, *The Domestic Relations Exception to Federal Jurisdiction: Rethinking an Unsettled Federal Courts Doctrine*, 36 B.C. L. REV. 669, 672 (1995).

139 *Id.* at 669 & n.3.

140 *Id.* at 705 (stating the principle that non-primary core cases fall under the purview of federal jurisdiction); *see also, e.g.*, *Barber*, 62 U.S. at 584 (specifying that the case is deciding questions of domicile and proper venue, not questions of "the general rights, obligations, or disabilities, of either [husband or wife], when they have been separated by a divorce").

141 Stein, *supra* note 138, at 705. While these policy considerations are associated with maintaining federal diversity jurisdiction over these matters, they are generally applicable to general federal jurisdiction over domestic disputes as well. *See, e.g.,* Silverman, *supra* note 133, at 1391-92 ("[A]pplying the [domestic relations] exception to federal questions preserves the autonomy of

over these types of cases highlight "the growing national nature of family law."[142] A growing number of legal scholars advocate for the latter.[143]

I argue that spousal wiretapping falls into the "non-primary core" category because domestic disputes are not at the core of these matters; instead, marital status is secondary to the act of wiretapping. Where marriage is of secondary concern to the broader national issue of wiretapping, it is difficult to argue that cases involving both areas should only be left to the states to regulate because they typically handle domestic relations. Spousal wiretapping is a clear example of how family law no longer touches only the marital residence and now has far-reaching implications. When a spouse conducts surveillance on their partner for the purpose of gathering evidence, they are inevitably reaching into the communications of a (potentially diverse) third party[144] and using interstate commerce-affecting consumer software or machinery,[145] two key considerations that weigh against exempting spousal wiretapping from federal regulation. The federal nature of wiretapping prevails over concerns regarding the marital relationship.

It may be argued that the existence of a marital relationship is integral to the spousal exception analysis and therefore must be a primary core concern. However, marriage is not a central component of the Wiretap Act's statutory framework. Any particular circumstances of the wiretap (for example, whether the tapper is the spouse of the tappee) outside of (1) an individual (2) using some means to intercept (3) real-time communications[146] generally are not relevant to establishing liability under the Wiretap Act. Because a federal law is implicated by the *main act* of wiretapping, the fact that the individual conducting the wiretap was the spouse of the victim automatically falls to the wayside as it is not what brings the action within federal jurisdiction. Applying the non-primary core framework to the spousal wiretap issue, then, *Simpson*'s argument that the federal government should not be read to regulate spousal wiretapping fails.

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states to define public policy respecting the family . . . [as they] have greater expertise and competence [in this area] . . . .").

142 Stein, *supra* note 138, at 705.

143 *See, e.g.*, Emily J. Sack, *The Domestic Relations Exception, Domestic Violence, and Equal Access to Federal Courts*, 84 WASH. U. L. REV. 1441, 1489 (2006) (rejecting the policy rationales for the domestic relations exception); Steven G. Calabresi & Genna L. Sinel, *The Same-Sex Marriage Cases and Federal Jurisdiction: On Third-Party Standing and Why the Domestic Relations Exception to Federal Jurisdiction Should Be Overruled*, 70 U. MIA. L. REV. 708, 713 (2016) (concluding that the Supreme Court should eliminate the domestic relations exception).

144 *See, e.g.*, Luis v. Zang, 833 F.3d 619, 623 (6th Cir. 2016)(explaining that the plaintiff, whose privacy had been violated, lived in Florida while the married couple lived in Ohio).

145 *See, e.g.*, Internet Spyware (I-SPY) Prevention Act of 2005, H.R. 744, 109th Cong. § 4(b) (2005) (emphasizing that the use of spyware implicates interstate commerce).

146 *See supra* notes 25–30 and accompanying text.

Of course, this is not to say that states should have no say in the matter. In fact, states do create their own wiretap laws and may have an even more important role to play in the legwork of ensuring that spouses are deterred from conducting these wiretaps altogether.

B. *Evolution of Privacy Law*

Like sex equality law, the modern doctrine of individual privacy renders a spousal wiretap exception obsolete. Since the early 1970s, courts have clarified that privacy rights adhere to individuals and have undermined the doctrine of marital unity.

Privacy rights in the United States generally derive from constitutional law, tort law, and federal data privacy statutes.[147] These areas differ significantly in that tort law is largely left up to the states to enact and enforce,[148] while constitutional law is, generally, central to the federal judiciary. Additionally, federal privacy statutes are Congress' means of regulating how personal data is handled in various sectors.[149] Statutory privacy rights are not exclusively related to data collection. Indeed, the language of the federal Wiretap Act is a clear example of how Congress works to protect individual privacy from the infringement of another party attempting to illegally access communications.[150]

Both constitutional and statutory law support a right to individual privacy that marriage does not eliminate.

1. Constitutional and Spousal

Constitutional privacy law is distinctly rooted in notions of personal autonomy and liberty. Building from landmark spatial privacy cases, such as

147 *See* Yvonne F. Lindgren, *Personal Autonomy: Towards a New Taxonomy for Privacy Law*, 31 WOMEN'S RTS. L. REP. 447, 450 (2010) (explaining the sources of privacy law in the United States).

148 *See* DAN B. DOBBS, THE LAW OF TORTS 39 (2000) ("The common law of torts is almost exclusively state law.").

149 As the focus of this work is on the Federal Wiretap Act, a full dive into the other federal privacy laws passed by Congress will not be conducted. However, for more information on these laws, see Andy Green, *Complete Guide to Privacy Laws in the US*, VARONIS, https://www.varonis.com/blog/us-privacy-laws [https://perma.cc/U9NW-NHPZ] ("The US . . . has vertically focused data federal privacy laws for finance . . . healthcare . . . [and] children's data . . . ."). There is no comprehensive federal privacy law as of yet. Both the Republican and Democratic parties have introduced their versions of data privacy laws. *See generally* Consumer Data Privacy and Security Act of 2020, S. 3456, 116th Cong. (2020) (outlining the bill introduced by Senator Moran regarding consumer data privacy); Consumer Online Privacy Rights Act, S. 2968, 116th Cong. (2019) (laying out provisions introduced by Senator Cantewell concerning consumer privacy rights).

150 *See* discussion *supra* subsection I.A.2.

Katz v. United States[151] and *Kyllo v. United States*,[152] the Court solidified the doctrine of constitutional privacy rights in *Griswold v Connecticut*.[153] *Griswold* was one of the earliest Supreme Court decisions to engage in a discussion of marital privacy. In its holding, the Court discussed the "zones of privacy" created by the First Amendment's right of association, the Third Amendment's "prohibition against the quartering of soldiers" during times of peace, the Fourth Amendment's protection against unlawful search and seizures, the Fifth Amendment's Self-Incrimination Clause, and the Ninth Amendment's statement emphasizing that the Constitution's enumerated rights "shall not be construed to deny or disparage others retained by the people."[154] Taken together, the penumbra of these rights provided the basis for a right to marital contraception: in *Griswold*, the Court struck down a Connecticut law that banned married couples from using contraceptives within their own home.[155] *Griswold*, decided in 1965 before the advent of modern constitutional sex equality law, emphasizes the sanctity of the marital union and treats spouses as being of one whole, echoing elements of coverture.[156]

The decision fortifying an *individual* right to privacy, on the other hand, came in 1972, when the Court expanded the right to obtain contraceptive devices to unmarried persons with its holding in *Eisenstadt v. Baird*.[157] Through this holding, the Court expanded the individual right to privacy articulated in the earlier spatial privacy cases and applied it to the context of intimate relationships.[158] Eisenstadt recognized parity between a married couple's right to privacy and that of an unmarried individual.[159] Justice Brennan declared:

> [T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to

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151 389 U.S. 347, 359 (1967) (acknowledging the right "to know that he will remain free from unreasonable searches and seizures").

152 533 U.S. 27, 40 (2001) (reinforcing the notion of a Fourth Amendment right to privacy within the home from both physical and technological intrusion).

153 381 U.S. 479, 485-86 (1965) ("The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees.").

154 *Griswold*, 381 U.S. at 484 (internal quotations omitted) (quoting U.S. CONST. amend. IX).

155 *Id.* at 485.

156 *See id.* at 480-81 (discussing the third-party standing on behalf of the "married people" at issue and the fact that the advice was given to "married persons").

157 405 U.S. 438, 453 (1972).

158 *See id.* at 439 ("If under Griswold, the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible, since the constitutionally protected right of privacy inheres in the individual, not the married couple.") (citation omitted).

159 *See id.* at 450 (noting that the need for prescribed contraceptives is as great for unmarried people as it is for married people).

> be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[160]

From this point onward, personal rights to privacy clearly did not wholly depend on marriage.

In light of these cases, we see that the Court first solidified the right to privacy in marriage as a reflection of marital unity, then backtracked and emphasized that individuals retain their personal privacy even when married. Though these concurrent cases were seemingly unrelated at the time, taken together we see that the spousal wiretap cases and the individual privacy cases are wholly inconsistent with each other. Therefore, the spousal wiretap exception is further dispelled.

2. Tort

The demise of interspousal tort immunity similarly signaled the downfall of the marital unity doctrine, allowing wives to sue their husbands over breaches of personal autonomy. In his analysis of privacy torts, William Prosser offered four distinct categories of tort privacy law: intrusion upon one's seclusion, disclosure of one's private facts publicly, placement of a person "in a false light in the public eye," and appropriation of one's "name or likeness."[161] Most pertinent to our discussion is intrusion upon one's seclusion, codified in the Restatement (Second) of Torts as enforcing a right of action against "[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, [making him] subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."[162]

The phrases "physically or otherwise" and "private affairs or concerns" directly tie spousal wiretapping to notions of personal autonomy and individual privacy. Indeed, phone wiretapping was the only available option at the time of the Wiretap Act's enactment, but electronic methods of wiretapping are now available.[163] Additionally, these contemporary methods are used to obtain information regarding the "private affairs or concerns" of one of the spouses in the marital relationship.[164]

The "reasonable" requirement is also of note. When spouses share a computer, phone, or any type of community property used for communication,

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160 *Id.* at 453.

161 William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).

162 RESTATEMENT (SECOND) OF TORTS § 652(B) (AM. L. INST. 1977).

163 *See* discussion *infra* Section III.B. (explaining new methods for wiretapping such as computer surveillance software and phone spyware).

164 *Id.*

taking offense to a spouse's surveillance may very well be unreasonable.[165] However, most individuals do not understand the capabilities of electronic surveillance devices or software, and they likely would not use the shared device if they knew their spouse could be spying on their secret communications, implying that reasonable offense to the conduct could still be taken.[166] As a result, finding a spousal exception to the Wiretap Act in the penumbra of "unified" marital privacy would be in disagreement with the accepted fact that individuals have autonomy over their communications in tort.[167]

Unlike those under historic coverture laws,[168] personal notions of individual privacy are not as easily signed away with the vow of "I do."[169] Although it is true that a couple forgoes certain levels of seclusion when they move in together, this does not mean that they also forego their personal right to be free from prying eyes.[170] This balancing act is a breeding ground for confusion surrounding whether an individual truly expects their communications to be free from interception by their spouse. It is true that a partner who operates under a "none of your business" attitude will create significant problems in a relationship, but the other end of the spectrum would require individuals entering into marriage to recognize that they no longer have a life outside of their spouse and no room for privacy—a sentiment echoing coverture.[171]

Of course, an individual cannot fully expect to maintain abundant levels of privacy away from their spouse and keep a healthy relationship. However, I argue that it would be reasonable to take offense to discovering that one's spouse has secretly intercepted their communications located on a personal

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165 *See* Sally Brown Richardson, *Privacy and Community Property*, 95 N.C. L. REV. 729, 733 (2017) ("Spouses may lose at least some, and perhaps all, of their rights of privacy with regard to community property.").

166 *See* Camille Calman, Note, *Spy vs. Spouse: Regulating Surveillance Software on Shared Marital Computers,* 105 COLUM. L. REV. 2097, 2111 (2005) ("Ordinary users, however, are probably unaware of the extent to which their computers store activity . . . . [N]o reasonable person would ever use a shared computer to conduct secret activities if he or she was aware such secrets were detectable.").

167 *See* Laura W. Morgan & Lewis B. Reich, *The Individual's Right of Privacy in a Marriage*, 23 J. AM. ACAD. MATRIM. LAWS. 111, 125 (2010) (noting that marriage does not eliminate one's constitutional right to "personal autonomy").

168 *See* discussion *supra* subsection II.A.1.

169 *See* Morgan & Reich, *supra* note 167, at 128 ("Despite the lack of clearly articulable standards as to what constitutes invasion of privacy, human beings innately crave an inner core of privacy that cannot be breached by society.") (citations omitted); *see also* Calman, *supra* note 166, at 2114 ("Entry into marriage does not entail signing away the right to communicate privately with persons outside the marital relationship.").

170 *See* Morgan & Reich, *supra* note 167, at 125 (describing the balance between "personal autonomy" and the lack of seclusion in marriage).

171 *See id.* at 128 ("At the same time, marriage or marriage-type relationships demand 'transparency.' One needn't be a psychologist to know that a spouse who says, "That's none of your business" to the other spouse is in deep trouble.") (citations omitted).

cell phone or computer. Perhaps under coverture one could argue that, once a spouse enters into a marriage, they lose any right to privacy from their spouse, but contemporary tort law, it seems, does not permit such a notion.[172]

In sum, there today exists a constitutionally protected individual privacy right rooted in personal autonomy. And today there is a cause of action in tort for invasions of privacy. Taken together, these principles demand that spouses retain individual zones of privacy within the marital relationship that, when infringed upon, can be remedied in a court of law. Therefore, a spouse wiretapping their partner's personal communications is engaging in an illegal and offensive act, regardless of the fact that they are the tappee's spouse.

III. CONTEMPORARY CONSIDERATIONS

The above survey of the evolution of constitutional and common law relating to areas of gender-based discrimination, marriage, and privacy reveals the crumbled foundations of the spousal wiretap exception. Contemporary social and technological developments also illustrate the difficulties in sustaining a spousal wiretap exception in the twenty-first century. While sex-based stereotypes are hardly absent from contemporary marital practices, marriage is now understood as a voluntary union of equal individuals who may choose whether to adhere to conventional gender roles. Additionally, wiretapping is no longer limited to putting a bug on the family telephone. Now, information can be captured in real-time through invasive technologies downloaded onto personal devices such as laptops and cellphones.[173] With these modern considerations in mind, the argument for maintaining a spousal exception to the Wiretap Act is significantly weakened.

A. *Social Marriage Developments*

A brief portrait of the social landscape of contemporary marriage is necessary to begin the discussion of why a spousal exception to the Wiretap Act cannot lie with its foundations in coverture. It is important to note that historic notions of marriage have not been completely wiped off the books. Indeed, individuals still engage in power struggles in the quest for fulfillment in their marital life just as they did in the early years of the nation.[174] However, spouses now have the ability to continuously contract within the relationship to create an arrangement that benefits them equally, instead of

172 *See supra* notes 162–167 and accompanying text.

173 *See* discussion *infra* Section III.B.

174 STEVEN MINTZ, THE PRIME OF LIFE: A HISTORY OF MODERN ADULTHOOD 97 (2015) ("Our understanding of marriage has changed dramatically in recent years, but the struggles for conjugal power, individuality, and fulfillment within marriage have remained constant.").

blindly adhering to paternalistic social structures.[175] The notion that spouses are a single entity perhaps may exist in romantic theory, but in the practical day to day, "spouses maintain their separate identity even after marriage."[176]

With equal bargaining power and the retention of individuality within the marital relationship, a doctrine based in women's subordination is not only constitutionally suspect but socially unsustainable. A spousal wiretap exception ignores how spouses today maintain their own individual lives, which require private communications that their marital partner is not entitled to see. Additionally, it is no longer necessary for spouses, especially wives, to depend fully on their partners for financial stability.[177] Thus, they are no longer required to give up the bargaining chips that they maintain as single individuals. Their property *can* be shared if they so choose, but it does not *need* to be shared for a secure marital relationship.

B. *Developments in the Digital Age*

Dramatic technological changes vastly expand the scope and nature of intrusions on personal privacy.[178] There is a newfound danger in allowing for a spousal wiretap exception that would permit spouses to intercept more than conversations over the phone.[179] The aforementioned *Luis* case provides one example of electronic surveillance being used for spousal spying,[180] but the electronic surveillance industry remains largely untouched by the courts in

175 *Id.* at 100 ("[F]ar-reaching transformations [have] radically reshaped marriage over the past four centuries. One involves the shift of marriage from a status and a social institution, with clearly defined roles, to a contractual relationship worked out by the partners.").

176 *Id.* at 105.

177 *See, e.g.*, Sarah Jane Glynn, *Breadwinning Mothers Continue to Be the U.S. Norm, CAP* (May 10, 2019), https://www.americanprogress.org/article/breadwinning-mothers-continue-u-s-norm [https://perma.cc/9XJ9-CFTD] ("Fathers have always been very likely to work for pay, but mothers have dramatically increased their participation in paid labor over the past 40 years. In 1976, only 56.3 percent of married mothers worked for pay, compared with 69.6 percent in 2017.").

178 *See* Calman, *supra* note 166, at 2098 (discussing how the introduction of computers and spyware changed the electronic surveillance landscape).

179 *See id.* at 2121 ("The unsettled nature of the law regarding e-mail and computer privacy opens a gap in privacy protection that is exploited by the makers and users of surveillance software. Because the pace of the law is generally slow while the pace of technological innovation is rapid, marital use of surveillance software remains legal . . . .").

180 *See* Luis v. Zang, 833 F.3d 619, 624 (6th Cir. 2016) ("The program allegedly 'records all PC activity including emails, IMs, websites visited, web searches, Facebook/MySpace activity, and anything typed in real time.'").

the spousal wiretap context.[181] In fact, spyware providers are enjoying booming business.[182]

Two prevalent types of modern electronic surveillance devices are surveillance software and spyware.[183] Surveillance software is manually downloaded by the spouse conducting the surveillance onto a device, whereas spyware is usually unintentionally and unknowingly downloaded by the individual being spied on.[184] Surveillance software works by "record[ing] a computer user's activity, either key-stroke by keystroke or by periodically saving 'screenshots' . . . or both."[185] Certain surveillance software can be installed and hidden, running secretly in the background and making it prime for use by curious spouses interested in computer activity.[186]

Spyware, on the other hand, poses even greater real-time risks. Spyware apps such as mSpy and The Spy Bubble (advertised as phone apps parents may use to monitor children), are "jack-of-all-spying-trades" apps downloaded onto smartphones that can track who a person calls, what their text messages say, their location, and the apps downloaded onto their phone.[187] Smartphones, however, often hold much more information than that. Indeed, spyware apps, which already access text messages, can also access "medical appointments, online banking activity, [and] intellectual musings . . . ."[188] Unless an individual has opted to share this personal information with their partner, there seems to be little concrete justification for such an invasion of privacy into the inner-workings of one's day-to-day simply because one holds the title of "spouse."

The ultimate challenge courts will likely face is how to nail these surveillance methods down as "wiretap devices," focusing primarily on the real-time transmission element of the Wiretap Act.[189] As seen in *Luis*, where the main question was not whether the defendant had a spousal defense but whether the communications were intercepted by the surveillance software in real-time, the court found it "significant" to the holding that the

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181 *See* Danielle Keats Citron, *Spying Inc.,* 72 WASH. & LEE L. REV. 1243, 1266 (2015) ("Despite the increasing prevalence of spyware, federal prosecutors have only brought a handful of cases.").

182 *Id.* at 1250 (noting that while the Federal Trade Commission and some state Attorneys General have sought action against spyware providers, "[their] services continue to proliferate [and] their ads brazenly appear online").

183 *See* Calman, *supra* note 166, at 2098 (distinguishing surveillance software from spyware).

184 *Id.*

185 *Id.* at 2099-100.

186 *Id.* at 2101 ("Both Spector and eBlaster [forms of spyware] can be installed in 'stealth mode,' so that the programs will not appear on the Windows desktop or any Windows menus.").

187 *See* Ann Brenoff, *5 Apps to Spy on Your Kids Without Them Knowing,* HUFFINGTON POST (July 29, 2015, 7:59 AM), https://www.huffpost.com/entry/how-to-track-your-kids-without-them-knowing-youre-on-their-tail_n_55afaff1e4b07af29d56f544 [https://perma.cc/D4KM-7BVW].

188 Citron, *supra* note 181, at 1247.

189 *See id.* at 1264 (discussing how surveillance software and spyware fit into the elements of what constitutes a wiretap device under § 2512 of the Wiretap Act).

surveillance software had obtained the communications while they were in the course of transmission.[190] If a device does not capture real-time transmissions, it does not constitute wiretapping, and the action would likely fall under the Stored Communications Act,[191] which does not have a similar spousal exception, instead of the Wiretap Act.

As individuals continue to grow more tech-savvy and providers sell spyware and surveillance software meant only for spying in real-time, it might be necessary for legislatures to regulate their use specifically. In any event, allowing for a spousal exception in a digital age wherein spouses can access deeply personal communications beyond simple phone conversations would neglect the changing technological landscape in favor of outdated principles of marital unity.

IV. ELIMINATING THE EXCEPTION FOR GOOD: STATE WIRETAP ACT CODIFICATION

Eliminating the spousal wiretap exception in all jurisdictions is necessary to mitigate the risk of intimate deceit. Maintaining individual privacy in the relationship is characteristic of modern marriage,[192] and without passing judgment on what may make a husband begin to spy on his unwitting wife, wiretapping her communications is an invasion of privacy. Not only does sanctioning the exception run the risk of allowing potentially damning information to be used in subsequent family law proceedings,[193] but spousal deception through spying may also result in emotional distress, expensive litigation costs, and harm to parties outside the relationship.[194]

Since the spousal exception is judicially promulgated common law, the simplest route to abolition is for the Second and Fifth Circuits to overrule

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190 Luis v. Zang, 833 F.3d 619, 631 (6th Cir. 2016) ("This near real-time monitoring is significant. If a [software] user can, in fact, review another person's communications in near real-time, then [the software] must be acquiring the communications and transferring them to [the software provider's] servers as soon as the communications are sent.").

191 18 U.S.C. §§ 2701–2712 (penalizing conduct that results in accessing or exceeding authorized access to stored communications). Notably, the Stored Communications Act has been found not to reach communications (such as emails) already opened by the intended recipient. *See, e.g.*, Santori v. Schrodt, 424 F. Supp. 3d 1121, 1134 (N.D. Fla. 2019) ("[T]he [Stored Communications Act] doesn't reach and protect undeleted emails that have already been delivered and opened by the intended recipient. In that situation . . . the emails are no longer 'in electronic storage.'").

192 *See* Stephanie Fairyington, *Do You Have a Right to Privacy in Your Marriage*, TIME (Aug. 8, 2016, 10:58 AM), https://time.com/4419321/privacy-in-marriage [https://perma.cc/J5RJ-XQT2] ("Despite the frightening and ever-expanding ways to electronically snoop, in order to fully modernize marriage we need to resist the degrading urge to spy on our spouses and acknowledge, in radical opposition to our times, each individual's right to privacy *within* matrimony.").

193 *See supra* note 14 and accompanying text.

194 *See* JILL ELAINE HASDAY, INTIMATE LIES AND THE LAW 78-95 (2019) (using first-person accounts, lawsuits, and social science research to describe the harms engendered by intimate deception).

the cases that support it. Without cases challenging the rulings in front of these Circuit Courts (sitting *en banc*), however, this is unlikely to occur.[195] Of course, it is possible that the existing circuit split on the issue may make a spousal wiretap case slightly more attractive for Supreme Court review, but this is also unlikely due to the small number of cases that the Court hears each year and the Court's recent willingness to leave many circuit splits unresolved.[196] Therefore, the cases will likely need to be legislatively overruled through Congressional action that amends the Federal Wiretap Act to explicitly deny the availability of a spousal exception.[197] For Congress to legislate on the issue, however, there would likely need to be a growing national concern surrounding spousal wiretapping,[198] much like the sentiment that existed at the time of the Wiretap Act's enactment. While this avenue to eliminating the spousal wiretap exception cannot be ruled out, the number of bills eventually enacted into law is extremely low,[199] diminishing hope for legislative action in this niche area.

A more practical option is to attack the spousal exception on the state level. I argue that state legislatures must eliminate any spousal exception to the Wiretap Act. It is settled that states are well equipped to handle divorce proceedings and regulations,[200] so a possible solution to the issue of spousal wiretapping is clear state legislation on the issue. States can achieve the intended result of eliminating the spousal wiretap exception by taking the initiative to explicitly ban interspousal wiretapping on the state level. By confirming that spouses are not exempt under the Act, the state is exercising its distinct power in the realm of domestic relations while respecting the baseline protections of the federal Wiretap Act. This decision would, at the very least, practically nullify the federal common law wiretap exception

195 Circuit courts sitting en banc may decline to follow established precedent of the court and use it only as persuasive authority. Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 798 (2012) ("Sitting en banc, circuit judges are not bound by prior panel decisions, but may give some deference to well-entrenched precedent.").

196 Historically, a circuit split on an issue was an indicator that the Supreme Court should take up a case to provide uniformity in the application of federal law going forward. However, with the declining number of cases that the Supreme Court hears each year, a growing number of circuit splits will remain unresolved. For a discussion on circuit split resolution considering the Supreme Court's shrinking docket, see generally Wyatt G. Sassman, *How Circuits Can Fix Their Splits*, 103 MARQUETTE L. REV. 1401, 1403 (2020).

197 *Cf.* NEAL DEVINS, ENCYC. SUP. CT. U.S., CONGRESSIONAL RESPONSES TO JUDICIAL DECISIONS (Mark Graber et al. eds., 2008) (noting that Congress is permitted to "negate a Supreme Court interpretation by enacting new legislation").

198 Members of Congress are likely to introduce legislation on salient issues in the United States. *See* Jeffrey Lazarus, *Issue Salience and Bill Introduction in the House and Senate*, 40 CONG. & PRESIDENCY 215, 226-27 (2013) ("Members of both the House and Senate disproportionately sponsor bills in issue areas that their constituents find salient.").

199 *Id.* at 215 (noting that slightly under 4% of introduced bills become law in most Congresses).

200 *See* discussion *supra* subsection II.A.3.

because state law would serve to deter the wiretapping in the first place. At most, state legislation on the issue would give rise to an occasion for the Fifth and Second Circuits to address the spousal wiretap exception if a case asserting it as a defense comes before those courts.

In her note on spousal surveillance, Camille Calman suggests that the differing perspectives of the states on privacy rights would allow "legislatures choosing to address the issue of marital computer privacy . . . [to] create a wide range of state statutes . . . ."[201] This process, in turn, gives the states a chance to "establish which solutions will best protect privacy without chilling legitimate uses of technology."[202] I recognize that having various state statutes on specific surveillance technology would provide the benefit of trial and error in legislating against providers of surveillance devices. However, I believe that a uniform adoption among the states of legislation explicitly dispelling the existence of a spousal wiretap exception would serve to deter spying spouses themselves—the key actors in these cases. When listing the codified exceptions to the wiretap law, legislators can tack on a disclaimer stating: "Individuals engaged in intimate domestic relationships, such as couples, domestic partners, and spouses, are not exempt from liability under this Act." These few words can serve to undo years of sexist and invasive legal doctrine on the subject of spousal wiretapping.

State legislation specifically disclaiming a spousal exception to wiretapping is permissible because states have the ability to promulgate wiretap laws that are stricter than the federal Wiretap Act.[203] The federal government would still retain the right to hear spousal wiretap cases should they arise, because most violations of state wiretap law implicate the federal Wiretap Act as well (due to the modeling of state statutes after the Act).[204] However, spouses would likely be deterred from engaging in wiretapping in anticipation of divorce proceedings when the legal prohibition against the conduct is abundantly clear. As a result, the deterrent effect will pass through to the federal level and the notion of a potential spousal exception to the Wiretap Act would likely fade from federal jurisprudence.

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201 Calman, *supra* note 166, at 2129.

202 *Id.* at 2129.

203 *See* Shana K. Rahavy, *The Federal Wiretap Act: The Permissible Scope of Eavesdropping in the Family Home*, 2 J. HIGH. TECH. L. 87, 89 (2003) ("To avoid preemption, states may adopt more stringent standards than required under Federal law, but not less restrictive.").

204 *See generally* Erin M. Pauley, *Conflicts Among Federal and State Wiretap Statutes Present Practical Challenges for Businesses*, 8 NAT. L. REV. 1, 2 (2018) ("Forty-nine states (all except for Vermont) have enacted statutes and regulations modeled after the Federal Wiretap Act . . . .").

V. CONCLUSION

The federal Wiretap Act, on its face, leaves virtually no room for a spousal exception. However, the spousal exception, a sexist and obsolete doctrine, stands as good law in some jurisdictions. These courts have attempted to use the domestic relations doctrine and silences in the legislative history of the Wiretap Act to determine that an implied spousal immunity exists.

The federal common law spousal wiretap exception was promulgated during a time of flux in the areas of marital, gender, and privacy law. Coming off the heels of coverture, certain jurisdictions' movements away from the promulgation of patriarchal structures and marital unity could not sway legal thinkers everywhere when, for some, those notions were all they had known up until that point in time. However, in retrospect, the jurisprudence surrounding the dismantling of coverture and focus on marital individualism, gender equality, and personal autonomy makes it impossible for the spousal exception to continue as a permissible doctrine. And yet, it sits untouched in the Circuits that held the exception as permissible nearly 50 years ago.

Eliminating the spousal exception will likely not be achieved through the federal judicial process or through Congress. Although the aim is to eliminate the potential exception to the federal Wiretap Act, states are in the best position to legislate against spousal wiretapping. By explicitly prohibiting spousal wiretapping on the state level, state legislation would deter spouses from engaging in wiretapping altogether.

Even if a savvy spouse in the Fifth or Second Circuit argues that longstanding precedent allows for spying on a partner's real-time communications, the case would not only bring the exception's viability to light but also give these courts another pass at an issue that would likely be decided differently today considering modern social and technological developments. Overall, marriage is meant to be a romantic and emotional union,[205] but it can no longer be viewed as a legal union that serves to eliminate the individual property or privacy rights of one spouse. If the spousal wiretap exception continues to go untouched, it would allow for snooping spouses, in the name of a doctrine based in widely dispelled patriarchal structures, to diminish the sanctity of marital trust going forward.

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205 *See generally* STEPHANIE COONTZ, MARRIAGE, A HISTORY: HOW LOVE CONQUERED MARRIAGE (2005) (describing the evolution of the concept of marrying for love).