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# Privacy and Community Property

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## PRIVACY AND COMMUNITY PROPERTY\*

SALLY BROWN RICHARDSON\*\*

*Technological advances are transforming the issue of intra-spousal privacy. Increasingly, spying spouses are covertly obtaining emails and text messages, while spied-on spouses are filing lawsuits alleging intrusion upon their seclusion. The majority of courts that have examined the issue of intra-spousal privacy have held that spouses are no different than other individuals; spouses do not forfeit through marriage their expectation of privacy, even from one another.*

*Determining the scope of a spouse's right of privacy is uniquely difficult in the nine community property jurisdictions within the United States. The default rule in these states is that property created or acquired during marriage is classified as community property, and thus jointly owned by both spouses. Because two people have an ownership interest in community property, managerial rules must be written to determine which spouse controls the property. The default management rule generally allows either spouse to have the authority to manage community property, regardless of which spouse acquires or uses the property. Because of these ownership and managerial rules, it is unclear what, if any, rights of privacy spouses have vis-à-vis one another with regards to community property. This ambiguity is an increasingly vexing problem, particularly given the exponential increase in the creation of property that a spouse*

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*may wish to keep private—such as email and text messages—as well as the constant development of technology that makes these forms of property easier and more accessible.*

*This Article dissects the intersection of community property and privacy. In doing so, this Article finds that the privacy rights of spouses in community property jurisdictions are, at best, uncertain. History, modern jurisprudence, and policy considerations lead to the normative position taken herein: that spouses in community property states should have an unambiguous right of privacy from one another, even with regards to property jointly owned. This Article provides a series of alternative strategies that courts and legislatures may pursue to ensure that such a right is fully protected, including possible modifications to current community property ownership or management rules.*

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## INTRODUCTION

Since Warren and Brandeis wrote *The Right to Privacy* in 1890<sup>1</sup>—and arguably before that time—the common law has recognized a person’s right to a reasonable expectation of privacy from other private, non-governmental individuals.<sup>2</sup> In this vein, the *Restatement (Second) of Torts* precludes intrusions upon the solitude or seclusion of an individual or his private affairs or concerns that would be “highly offensive to a reasonable person.”<sup>3</sup> While the right of privacy remains a cornerstone of tort law, the precise contours of what constitutes a highly offensive intrusion remain elusive, particularly in situations where property is jointly held. When two individuals have a concurrent property interest in the same thing, the law is unclear as to what rights of privacy the individuals have vis-à-vis one another with regards to the jointly held property.<sup>4</sup>

The question of privacy between joint owners is at its greatest level of complexity in its most intimate context: property jointly owned by spouses. While spouses in all fifty states can and do acquire property together, intra-spousal privacy is of particular concern in the nine community property jurisdictions<sup>5</sup> where, by default, *all* property spouses create or acquire while married is jointly owned as community property.<sup>6</sup>

1. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

2. See *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891); see also Neil M. Richards & Daniel J. Solove, *Prosser’s Privacy Law: A Mixed Legacy*, 98 CALIF. L. REV. 1887, 1891 (2010); Lior Jacob Strahilevitz, *A Social Networks Theory of Privacy*, 72 U. CHI. L. REV. 919, 930–35 (2005).

3. RESTATEMENT (SECOND) OF TORTS § 652B (AM. LAW INST. 1977).

4. To be clear from the outset, the question raised here is not what constitutional rights of privacy joint owners have from one another. The question is what *common law and statutory rights* of privacy joint owners have from one another.

5. The nine community property jurisdictions are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. See William Perez, *Community Property Laws by States*, BALANCE (Sept. 8, 2016), <https://www.thebalance.com/community-property-states-3193432> [<https://perma.cc/B67X-2EEP>].

6. E.g., ARIZ. REV. STAT. ANN. § 25-211 (Westlaw through 2016 2d Reg. Sess.) (defining community property as property acquired during marriage); CAL. FAM. CODE § 760 (West, Westlaw through 2016 Reg. Sess. laws) (same); IDAHO CODE § 32-906 (LEXIS through 2016 Reg. Sess.); LA. CIV. CODE ANN. art. 2338 (Westlaw through 2016 2d Extraordinary Sess.); NEV. REV. STAT. ANN. § 123.220 (West, Westlaw through 2015

What rights of privacy spouses have in community property remains an unanswered and increasingly vexing question. Technological advances are transforming the issue of intra-spousal privacy, thus increasing the need to determine the extent of spouses' privacy rights in community property jurisdictions. Today, individuals engage in more transactions and communications online, thereby increasing the "digital lipstick [left] on the collar."<sup>7</sup> For more than a decade, spy software has been available for less than \$100 and can be easily installed without making anyone the wiser.<sup>8</sup> Case law in non-community property states, or separate property jurisdictions, is replete with stories of spouses secretly videotaping one another or hacking into the other's email accounts.<sup>9</sup>

Numerous courts in separate property jurisdictions that have thus far examined the issue of intra-spousal privacy have held that spouses are no different than other individuals—spouses do not "forfeit through marriage [their] expectation of privacy."<sup>10</sup> Courts typically analyze intra-spousal privacy under the modern privacy tort of intrusion upon seclusion.<sup>11</sup> Under this analysis, the question is whether the intrusion would be highly offensive to a reasonable person.<sup>12</sup> The fact that spouses share a home may, in some instances,

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Legis. Sess. and 2016 Spec. Sess.); *In re Estate of Patton*, 494 P.2d 238, 242 (Wash. Ct. App. 1972) (noting that each spouse has a one-half interest in community property); J. Thomas Oldham, *Management of the Community Estate During an Intact Marriage*, 56 LAW & CONTEMP. PROBS. 99, 100 (1993).

The discussion herein focuses on community property jurisdictions because the default rule in these jurisdictions is that, barring legislation to the contrary, all property acquired during marriage is jointly owned from the moment of its acquisition. *E.g.*, ARIZ. REV. STAT. ANN. § 25-211 (Westlaw). The same issues of privacy arise for property jointly owned by spouses in non-community property jurisdictions. Future projects will examine more broadly the issues of privacy and jointly owned property. The quantity of jointly owned property automatically created in community property regimes makes privacy and community property a particularly interesting starting point.

7. Laura M. Holson, *Text Messages: Digital Lipstick on the Collar*, N.Y. TIMES (Dec. 8, 2009), [http://www.nytimes.com/2009/12/09/us/09text.html?\\_r=0](http://www.nytimes.com/2009/12/09/us/09text.html?_r=0) [<https://perma.cc/3MMt-NMT7>].

8. Joyce Crane, *Is It Healthy To Be Stealthy? Using Software to Spy*, BOS. GLOBE, Apr. 9, 2001, at C2.

9. *E.g.*, *In re Marriage of Tigges*, 758 N.W.2d 824, 825 (Iowa 2008) (spouse secretly videotaping other spouse); *People v. Walker*, 813 N.W.2d 750, 751 (Mich. 2012) (mem.) (spouse reading other spouse's emails without authorization); *State v. Hormann*, 805 N.W.2d 883, 886–87 (Minn. Ct. App. 2011) (spouse monitoring whereabouts of other spouse's vehicle without other spouse's knowledge); *see also infra* Part II.

10. *Tigges*, 758 N.W.2d at 828 (citing *Miller v. Brooks*, 123 N.C. App. 20, 472 S.E.2d 350 (1996); *Clayton v. Richards*, 47 S.W.3d 149 (Tex. Ct. App. 2001)).

11. *See infra* Section II.A.1.

12. RESTATEMENT (SECOND) OF TORTS § 652B (AM. LAW INST. 1977).

suggest that an actionable intrusion did not occur, but this is purely a factual determination in what is, and is not, a highly offensive intrusion within an intimate living arrangement.<sup>13</sup> The legal rule is generally the same for spouses as it is for non-spouses—individuals, regardless of whether they are married, have a reasonable expectation of privacy from other parties.<sup>14</sup>

Determining the scope of spouses' rights of privacy is uniquely difficult in community property jurisdictions. In these states, all property created or acquired during the marriage is jointly owned by the spouses from the moment the property is created or acquired.<sup>15</sup> For example, if a spouse purchases a diary while married, the diary is classified as community property from the time of its purchase, regardless of whether only one spouse uses and has access to it. Ownership rules in community property jurisdictions do not distinguish between which spouse purchases the diary or intends to write in the diary.

Spouses may lose at least some, and perhaps all, of their rights of privacy with regard to community property for two reasons. First, individuals who jointly own property traditionally have equal rights of

13. *E.g.*, *Miller v. Brooks*, 123 N.C. App. 20, 27, 472 S.E.2d 350, 355 (1996); see Laura W. Morgan & Lewis B. Reich, *The Individual's Right of Privacy in a Marriage*, 23 J. AM. ACAD. MATRIM. L. 111, 125–27 (2010).

14. *Tigges*, 758 N.W.2d at 828; *Walker*, 813 N.W.2d at 751; *Miller*, 123 N.C. App. at 27, 472 S.E.2d at 355.

15. *E.g.*, ARIZ. REV. STAT. ANN. § 25-211 (Westlaw through 2016 2d Reg. Sess.) (“All property acquired by either husband or wife during the marriage is the property of the husband and wife . . .”). As discussed in depth herein, there are exceptions to the rule that property acquired during marriage is community property. See *infra* Section III.A.1. Furthermore, as I have previously argued, it is possible (though improbable) that some forms of community property that spouses might wish to keep private, such as emails or text messages, could escape the classification of community property under certain scenarios, such as if it is found to be a gift to one spouse or in some jurisdictions if it is considered the profit of a separate property email account. See Sally Brown Richardson, *Classifying Virtual Property in Community Property Regimes: Are My Facebook Friends Considered Earnings, Profits, Increases in Value, or Goodwill?*, 85 TUL. L. REV. 717, 758–70 (2011) [hereinafter Richardson, *Classifying Virtual Property*].

Even in that unlikely situation, and despite the numerous exceptions to the classification of property as community, community property jurisdictions create broader presumptions that property possessed or owned while married is community property, thereby making it more difficult to have property classified as separate property. See, e.g., LA. CIV. CODE ANN. art. 2340 (Westlaw through 2016 2d Extraordinary Sess.); TEX. FAM. CODE ANN. § 3.003(a) (West, Westlaw through 2015 Legis. Sess.) (stating that property possessed during marriage is presumed to be community property); WIS. STAT. ANN. § 766.31 (West, Westlaw through 2015 Act 392) (stating that all property is presumed to be community property).

use of that property.<sup>16</sup> Equal rights of use usually preclude the joint owners from excluding one another from the jointly owned property.<sup>17</sup> Without an ability to exclude, it is unclear the extent to which a joint owner, like a spouse in a community property regime, can maintain a right of privacy. For example, with regards to a community property diary, if the spouse who writes in the diary has no ability to exclude the non-authoring spouse from the diary, it is uncertain what rights of privacy, if any, the authoring spouse actually has in the diary.

Second, the default rule in community property regimes is that community property is subject to equal management.<sup>18</sup> Equal management means that either spouse can make decisions regarding the property, such as decisions to sell, encumber, or lease the property, without needing the consent of the other spouse.<sup>19</sup> If the diary is subject to equal management—which it likely would be—either the authoring or non-authoring spouse has the authority to sell the diary.<sup>20</sup> It remains an open question whether one spouse can retain a right of privacy in a piece of community property that either spouse could, at any time, lawfully alienate.<sup>21</sup> In other words, if equal management grants both spouses the greater rights to sell, encumber, or lease community property, should not both spouses have lesser

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16. See, e.g., *McCormick v. McCormick*, 220 So. 2d 654, 655 (Fla. Dist. Ct. App. 1969); *Snodgrass v. Baumgart*, 974 P.2d 604, 607 (Kan. Ct. App. 1999); *Seaboard Air Line R. Co. v. Atl. Coast Line R. Co.*, 237 N.C. 88, 95, 74 S.E.2d 430, 435 (1953).

17. See, e.g., *Skalla v. Canepari*, 430 S.W.3d 72, 79 (Ark. 2013); *Galasso v. Del Guercio*, 276 A.2d 186, 189 (N.J. 1971).

18. See, e.g., ARIZ. REV. STAT. ANN. § 25-214(B) (Westlaw) (establishing that spouses have equal management over community property); CAL. FAM. CODE § 1100 (Westlaw); LA. CIV. CODE ANN. art. 2346 (Westlaw through 2016 2d Extraordinary Sess.) (providing for equal management unless otherwise provided by law).

19. E.g., IDAHO CODE § 32-912 (LEXIS through 2016 Reg. Sess.); LA. CIV. CODE ANN. art. 2346 (Westlaw); N.M. STAT. ANN. § 40-3-14 (West, Westlaw through 2016 Reg. Sess.).

20. See Elizabeth De Armond, *It Takes Two: Remodeling the Management and Control Provisions of Community Property Law*, 30 GONZ. L. REV. 235, 249 (1995) (discussing equal management schemes).

21. There are instances under community property law when one spouse may have sole managerial authority over a particular piece of community property, thereby giving the managing spouse the sole right to make decisions with regards to that property. See, e.g., CAL. FAM. CODE § 1100(d) (Westlaw); LA. CIV. CODE ANN. art. 2351 (Westlaw); TEX. FAM. CODE ANN. § 3.102 (West, Westlaw through 2015 Legis. Sess.). It is not clear, however, that having sole managerial authority establishes a right of privacy for the managing spouse given that the non-managing spouse still retains an ownership interest in the property. See *infra* Section III.B.2.

rights in that property, such as the rights to read and use the property?

While the nature of community property calls into question the extent to which spouses retain a right of privacy from one another, there is a strong public policy in favor of intra-spousal privacy.<sup>22</sup> The majority of states—including the nine community property jurisdictions—recognize intrusion upon seclusion as a tort.<sup>23</sup> Statutes in all fifty states make modern invasions of privacy, such as eavesdropping and wiretapping, unlawful.<sup>24</sup> Non-community property jurisdictions have almost universally held that spouses retain their common law and statutorily provided rights of privacy vis-à-vis one another after entering marriage.<sup>25</sup> If spouses living under community property regimes receive different—and ultimately fewer—rights of privacy, this strong public policy in favor of individual privacy would diminish that privacy interest for married individuals. Despite public policy, it remains unclear whether spouses in community property jurisdictions have a right of privacy from one another in their community property. Courts have not yet examined this intersection of privacy and community property law, and little scholarship has been written on the topic.<sup>26</sup>

22. *E.g.*, Clayton v. Richards, 47 S.W.3d 149, 155–56 (Tex. Ct. App. 2001). The right of privacy discussed here is limited to the right of privacy from other private parties.

23. *See, e.g.*, WIS. STAT. ANN. § 995.50(2)(a) (West, Westlaw through 2015 Act 392); Godbehere v. Phoenix Newspapers, Inc., 783 P.2d 781, 784–85 (Ariz. 1989) (noting that Arizona imposes a stricter standard for the intrusion tort when the damages alleged are emotional); Sanders v. Am. Broad. Cos., 978 P.2d 67, 72 (Cal. 1999); Hoskins v. Howard, 971 P.2d 1135, 1140 (Idaho 1998); Jaubert v. Crowley Post-Signal, Inc., 375 So. 2d 1386, 1388 (La. 1979); City of Las Vegas Downtown Redevelopment Agency v. Hecht, 940 P.2d 134, 138 (Nev. 1997); PETA v. Bobby Berosini, Ltd., 895 P.2d 1269, 1279 (Nev. 1995), *overruled on other grounds*, Moore v. Sun Publ'g Corp., 881 P.2d 735, 743 (N.M. Ct. App. 1994), *cert. denied*, 882 P.2d 21 (N.M. 1994); Valenzuela v. Aquino, 853 S.W.2d 512, 524 (Tex. 1993); Mark v. King Broad. Co., 618 P.2d 512, 518 (Wash. Ct. App. 1980); *see also* RESTATEMENT (SECOND) TORTS § 652A (AM. LAW INST. 1977).

24. *See* sources cited *infra* notes 157, 164 (listing all state statutes making eavesdropping, wiretapping, and unauthorized computer access unlawful). As discussed more fully herein, the federal Electronic Communications Privacy Act also prohibits the unauthorized interception of wire, oral, and electronic communications. *See infra* Section II.B.

25. *See infra* Part II.

26. *See* Richardson, *Classifying Virtual Property*, *supra* note 15, at 758–70; Sally Brown Richardson, *How Community Property Jurisdictions Can Avoid Being Lost in Cyberspace*, 72 LA. L. REV. 89, 90 (2011) [hereinafter Richardson, *How Community Property Jurisdictions*]. *See generally* Lillian Marie Grappe, Comment, “Yours, Mine, or Ours?”: *Ownership and Management of Electronic Communications in Community Property Regimes*, 18 TUL. J. TECH. & INTELL. PROP. 161 (2015) (exploring ownership regimes within community property jurisdictions).

As discussed herein, history, modern jurisprudence, and policy considerations lead to the normative position that spouses in community property states should have an unambiguous right of privacy from one another, even with regards to property they jointly own.<sup>27</sup> If spouses are to retain meaningful rights of privacy, then jurisdictions must determine how two spouses can have ownership and managerial rights in community property when one spouse has a right of privacy in that community property from the other spouse. In other words, states that want to ensure spouses have a right of privacy must address the fundamental question of how community property law can coexist with intra-spousal privacy.

This Article asserts that intra-spousal rights of privacy can be clearly established within community property regimes by altering community property ownership or management rules. In doing so, this Article provides a series of alternative strategies that courts and legislatures may pursue. These possible solutions include alterations to current community property ownership rules based on Neil Richards's theory of intellectual privacy, as well as changes to community property management law that make spouses' privacy rights akin to the rights of privacy provided under the Fourth Amendment and the Freedom of Information Act.<sup>28</sup>

To reach this end, the Article proceeds as follows. Part I discusses the evolution of marriage, demonstrating how the law has developed from viewing spouses as one person to seeing spouses as two, distinct individuals. This evolving construction has thereby allowed courts to recognize a spouse's right of privacy from her spouse. Part II details the right of privacy a person generally has from other non-governmental individuals and examines how this right is applied to the spousal relationship in separate property jurisdictions. Part III explains how community property ownership and management law creates a lack of clarity regarding intra-spousal privacy. Part IV asserts that spouses in community property states should retain a right of privacy with regards to their community property and proposes a series of possible revisions to state community property law that seek to ensure that such personal privacy interests are protected.

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27. *See infra* Section IV.A.

28. *See infra* Section IV.B.

## I. THE EVOLUTION OF MARRIAGE

Since the beginning of civilization, individuals have exchanged vows of marriage, and society has valued the marriage institution.<sup>29</sup> The import placed on marriage has impacted laws regulating the rights of spouses as a unit, as well as the rights of spouses as individuals. Over time, as perspectives on marriage and the individuality of spouses have changed, the rights of spouses vis-à-vis one another have similarly transformed. This transformation in the rights of spouses has allowed courts to find that spouses have a right of privacy from one another.

A. *A Historic Union on Which Society Was Built*

In describing the value of the city-state, Aristotle wrote, “Since . . . the legislator should see to it from the start that the bodies of children being reared develop in the best possible way, he must first supervise the union of the sexes . . . .”<sup>30</sup> Aristotle’s belief that procreation was good and necessary for the future of the state served as the basis for his conclusion that the state should be in the business of “determin[ing] what sorts of people should have marital relations with one another, and when.”<sup>31</sup>

Considering marriage as a valuable union was by no means a unique view during the early development of civilization. Cicero shared Aristotle’s view that marriage was important to the foundation of government.<sup>32</sup> For Cicero, the foundation of civil government was built on the “bond of union[s] of the human race in general,” and “the first bond of union [was] that between husband and wife.”<sup>33</sup>

Given the early beliefs in the importance of marriage for the formation of government, it is of little surprise that America’s founding fathers similarly valued the marriage union.<sup>34</sup> John Adams

29. See *In re Marriage Cases*, 183 P.3d 384, 401 (Cal. 2008) (discussing the tradition of marriage).

30. ARISTOTLE, *POLITICS*, bk. VII, ll. 1334<sup>b</sup>29–32, at 220 (C.D.C. Reeve trans., Hackett Publ’g Co. 2d ed. 1998) (c. 350 B.C.E.).

31. *Id.*

32. MARCUS TULLIUS CICERO, *DE OFFICIIS* bk. I, xvii, at 56–57 (T.E. Page, E. Capps & W.H.D. Rouse eds., Walter Miller trans., Harv. Univ. Press 1913) (c. 44 B.C.E.).

33. *Id.*

34. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 695 (Arthur Goldhammer trans., Penguin Putnam, Inc. 2004) (1835) (referring to marriage as “the bonds of matrimony” and emphasizing the importance of the wife’s role and domestic interests to the unique economic and religious principles of the United States).

noted that the family was “[t]he foundation[] of national morality.”<sup>35</sup> Thomas Jefferson similarly wrote, “Harmony in the marriage state is the very first object to be aimed at.”<sup>36</sup> Benjamin Franklin, responding in the *Pennsylvania Packet* to a reader’s inquiry on whether the reader was wise to enter into an early marriage, said,

I am glad you are married, and congratulate you cordially upon it. You are now more in the way of becoming a useful citizen; and you have escap’d the unnatural State of Celibacy for Life, the Fate of many here who never intended it, but who, having too long postpon’d the Change of their Condition, find at length that ‘tis too late to think of it, and So live all their Lives in a Situation that greatly lessens a Man’s Value . . . .<sup>37</sup>

From its inception, the United States Supreme Court indicated a similar view on the importance of marriage. In deciding whether religious freedom could be used as a defense against prosecution for polygamy, the Court in *Reynolds v. United States*<sup>38</sup> offered an early commentary on the value of marriage.<sup>39</sup> The Court held that it was “impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life. Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law.”<sup>40</sup> By placing marriage above all else, the Court reflected on the view of marriage as a union upon which “society may be said to be built.”<sup>41</sup>

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35. JOHN ADAMS, PASSY & PARIS, in 4 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 111, 123 (L.H. Butterfield, Leonard C. Faber & Wendell D. Garrett eds., 1962).

36. Letter from Thomas Jefferson, U.S. President-Elect, to Mary Jefferson Eppes (Jan. 7, 1798), <https://founders.archives.gov/documents/Jefferson/01-30-02-0008>. [<http://perma.cc/RDR8-UM2M>].

37. Letter from Benjamin Franklin to John Alleyne (Aug. 9, 1768), <https://founders.archives.gov/documents/Franklin/01-15-02-0101> [<http://perma.cc/P34U-S9NA>].

38. 98 U.S. 145 (1878).

39. *Id.* at 165.

40. *Id.*

41. *Id.* See *Davis v. Beason*, 133 U.S. 333, 343–44 (1890); see also *Maynard v. Hill*, 125 U.S. 190, 205 (1888) (describing 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”); *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885) (describing marriage as “the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement”).

*B. An Ebb and Flow of Intra-Spousal Rights*

The Court's axiomatic acceptance of marriage as the bedrock of society coupled well with the understanding in the 1700s and 1800s that marriage created one person, such that individuality—specifically that of the woman—ended upon the beginning of wedded life.<sup>42</sup> As Blackstone famously wrote,

By 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 every thing; and is therefore called in our law-french a *feme-covert* . . . is said to be *covert-baron*, or under the protection and influence of her husband, her *baron*, or lord; and her condition during her marriage is called her *coverture*.<sup>43</sup>

Blackstone's view heavily influenced American courts.<sup>44</sup> The implications of molding the wife's person into that of her husband's person were vast, touching nearly every facet of private law. Because a wife had no separate personality, she was unable to own property during marriage;<sup>45</sup> all property was considered owned by the

42. See *Pinkas v. Fiveash*, 126 So. 2d 910, 911 (Fla. Dist. Ct. App. 1961); NORMA BASCH, *IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK* 17 (1982); EDWARD WESTERMARCK, *THE HISTORY OF HUMAN MARRIAGE* 41 (1903) (citing R. H. CODRINGTON, *THE MELANESIANS: STUDIES IN THEIR ANTHROPOLOGY AND FOLK-LORE* 34 (1891)); Karen S. Nelson, Comment, *Domestic Tranquility and the Right to Privacy: Is There a Right to Privacy Within the Family?*, 18 S. TEX. L.J. 121, 127 (1976). The notion that spouses become one upon marriage has biblical roots: "Therefore shall a man leave his father and his mother, and shall cleave unto his wife: and they shall be one flesh." *Genesis* 2:24 (King James). See BASCH, *supra*, at 27 (discussing the religious and empirical roots for the view that spouses became one person upon marriage). See generally MARY DALY, *THE CHURCH AND THE SECOND SEX* (1985) (discussing the historical role of the church in maintaining an inequality between the sexes).

43. 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*441. See *Ingalls v. Campbell*, 24 P. 904, 906 (Or. 1889) ("At common law, marriage merged the existence of the wife into that of the husband, and constituted them one person in the law."); JOAN HOFF, *LAW, GENDER, AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN* 119 (Kathleen Barry ed., 1991) (noting that the "legal fiction [of coverture] was at the heart of Blackstone's famous common-law dictum about the 'civil death' of married women").

44. *Fitch v. Brainerd*, 2 Day 163, 169 (Conn. 1805); *Long v. Kinney*, 49 Ind. 235, 238 (1874); *Wilder v. Brooks*, 10 Minn. 50, 54 (1865); *Jaques v. Methodist Episcopal Church*, 17 Johns. 548, 583 (N.Y. 1820).

45. See Michael M. Sheehan, *The Influence of Canon Law on the Property Rights of Married Women in England*, in *MARRIAGE, FAMILY, AND LAW IN MEDIEVAL EUROPE: COLLECTED STUDIES* 16, 20 (James K. Farge ed., 1996). In Greek times, the restriction on

husband.<sup>46</sup> Even a desiring husband could not “grant anything to his wife, or enter into covenant with her: for the grant would be to suppose her separate existence; and to covenant with her, would be only to covenant with himself.”<sup>47</sup>

Beyond being unable to own property, wives were also unable to administer the property attributed to their husbands.<sup>48</sup> A married woman was incapable of entering into contracts regarding property.<sup>49</sup> She could not sell, encumber, or lease property, and usually this limitation even included any property the wife brought with her into the marriage.<sup>50</sup> Instead, the one legal personality of the marriage, namely the husband, had sole authority over all property.<sup>51</sup>

Arguably even more egregious than a wife’s inability to hold property rights, the one-person view of marriage led to the conclusion that husbands and wives were unable to commit crimes or torts against one another.<sup>52</sup> A husband could not, for example, rape his wife, for doing so would be merely a crime against himself.<sup>53</sup>

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owning property was not limited to married women; all women—regardless of marital status—were unable to own property. W. K. LACEY, *THE FAMILY IN CLASSICAL GREECE* 24 (H. H. Scullard ed., 1968).

46. Sheehan, *supra* note 45, at 20.

47. 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*441. See *Kelly v. Neely*, 12 Ark. 657, 663 (1852); *Long v. Kinney*, 49 Ind. 235, 238 (1874); *Bennett v. Bennett*, 23 N.E. 17, 19 (N.Y. 1889); *People ex rel. Barry v. Mercein*, 3 Hill 399, 408 (N.Y. 1842).

48. Sheehan, *supra* note 45, at 20.

49. See, e.g., *Uhl v. Oakdale Auto Co.*, 170 A.2d 914, 915 (Me. 1961); *Citizens Commercial & Sav. Bank v. Raleigh*, 406 N.W.2d 479, 481 (Mich. Ct. App. 1987); *Brazell v. Tschirhart*, 438 S.W.2d 603, 606 (Tex. Ct. App. 1969).

50. See, e.g., *Lewis v. Lewis*, 245 S.W. 509, 511 (Ky. 1922); *Whiton v. Snyder*, 88 N.Y. 299, 303 (N.Y. 1882) (citing *Ridout v. Earl of Plymouth* (1740) 26 Eng. Rep. 465 (HL)).

51. E.g., *Snyder v. People*, 26 Mich. 106, 108–10 (1872). The Michigan Supreme Court held that Michigan’s liberalizing statute allowing for separate property ownership by the wife meant that a wife could contract with regard to her property, but that she did not have a general right to the property; that right remained with her husband. *Id.* Therefore, the court held that the husband was not guilty of arson for burning down the dwelling house owned by the wife. *Id.* at 111.

52. See, e.g., OHIO REV. CODE ANN. § 3103.04 (West, Westlaw through File 123 of 2015–2016 131st Gen. Assemb.) (“Neither [husband nor wife] can be excluded from the other’s dwelling, except upon a decree or order of injunction made by a court of competent jurisdiction.”). Several Ohio courts interpreted this provision such that it was impossible for a husband or wife to commit burglary or trespass against the other. See *State v. Middleton*, 619 N.E.2d 1113, 1114 (Ohio Ct. App. 1993); *State v. Herder*, 415 N.E.2d 1000, 1004 (Ohio Ct. App. 1979). Eventually, though, Ohio courts became concerned with this line of precedent for the purposes of domestic violence cases, and the Ohio Supreme Court held that the statute is inapplicable to criminal cases. See *State v. O’Neal*, 721 N.E.2d 73, 74 (Ohio 2000); *State v. Lilly*, 717 N.E.2d 322, 323 (Ohio 1999).

53. See, e.g., *People v. Brown*, 632 P.2d 1025, 1027 (Colo. 1981) (citing the marital exception statute for criminal sexual assault and holding that the state’s interest in family

In the 1830s, the tide began to change for intra-spousal rights as states began discussing—and in some cases passing—statutes that relieved women of many of their legal handicaps.<sup>54</sup> In 1835, Arkansas passed the first statute that acknowledged women’s property as separate from that of her husband, though the statute merely exempted the wife’s property from the debts of her husband.<sup>55</sup> Mississippi became the first state to pass a married women’s property act in 1839, when the state legislature passed a statute allowing a wife to possess property “in her own name, and as of her own property.”<sup>56</sup> Maryland soon followed in Mississippi’s footsteps.<sup>57</sup> In 1848, after hosting the influential Seneca Falls convention, New York passed a similar statute that was used as a model for other states.<sup>58</sup>

States’ passage of married women’s property acts “effectively destroyed the ‘one person concept’ ” that previously existed.<sup>59</sup> With the destruction of the old common law fiction that husbands and wives were one person, courts began to adopt the notion that spouses were separate individuals.<sup>60</sup> As one Kansas court stated in 1888,

In this state a husband and wife are two independent persons, and the husband has no more immediate interest or control over the property of the wife than any other person. Our system of marriage literally implies the equality of the husband and wife; the integrity and individuality of each; the mutual

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harmony afforded a rational basis for the marital rape exemption); *Commonwealth v. Shoemaker*, 518 A.2d 591, 594 (Pa. Super. Ct. 1986) (noting that, historically, marriage was a defense to rape); see also Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2122–25 (1996) (footnotes omitted) (discussing the legal right husbands had over their wives, including rights to physically punish).

54. BASCH, *supra* note 42, at 136–38; HOFF, *supra* note 43, at 127.

55. An Act to Secure the Property of Females, 1835 Ark. Acts 34, 34–35 (“[T]he property, both real and personal, possessed by any woman . . . shall not be subject to the payment of the debts or damages, contracted or incurred by the husband at any time before marriage.”); ELIZABETH BOWLES WARBASSE, *THE CHANGING LEGAL RIGHTS OF MARRIED WOMEN: 1800–1861*, at 159 (1987).

56. An Act for the Protection and Preservation of the Rights and Property of Married Women, ch. 26, § 1, 1839 Miss. Laws 920, 920–21.

57. An Act to Regulate Conjugal Rights as They Regard Property, ch. 293, 1842 Md. Laws 254, 254–55.

58. An Act for the More Effectual Protection of the Property of Married Women, 1848 N.Y. Laws 307. See HOFF, *supra* note 43, at 127–28.

59. *Haumschild v. Cont’l Cas. Co.*, 95 N.W.2d 814, 817 (Wis. 1959).

60. E.g., *Sparks v. Roberts*, 65 Ga. 571, 574 (1880); *Harrington v. Lowe*, 84 P. 570, 578 (Kan. 1906); *Campbell Cty. Bd. of Educ. v. Boulevard Enters., Inc.*, 360 S.W.2d 744, 745 (Ky. 1962); *Hack v. Hack*, 433 A.2d 859, 861 (Pa. 1981).

obligation in which love and duty find no bondage; the division of labor; and the multiplication and sharing of happiness.<sup>61</sup>

Such attitudes were the foundations not only for women's ownership of property but also for women entering into separate contracts,<sup>62</sup> allowing tort suits between spouses,<sup>63</sup> and other activities that highlighted that spouses were separate individuals.<sup>64</sup>

### C. *Continuing Value Placed on the Marriage Union*

Though by the early 1900s spouses were generally viewed as separate individuals, the marriage union remains highly protected by courts today. Cases discussing the marital evidentiary protections highlight the pedestal on which courts have placed the marriage relationship.<sup>65</sup> The marital privilege that prohibits spouses from testifying against one another was historically grounded on the Blackstonian idea that husbands and wives were one person and that an accused individual could not be forced to testify against his own interest.<sup>66</sup> Thus, "what was inadmissible from the lips of the defendant-husband was also inadmissible from his wife."<sup>67</sup> Yet even after the Supreme Court abolished the notion that spouses became one individual upon marriage,<sup>68</sup> jurisdictions retained the marital privilege on the grounds that allowing adverse spousal testimony would likely "destroy" marriages.<sup>69</sup>

61. *Baker v. Stewart*, 19 P. 904, 912 (Kan. 1888).

62. *Bruce v. Bruce*, 11 So. 197, 197–98 (Ala. 1892); *Elliot v. Atkinson*, 90 N.E. 779, 780 (Ind. Ct. App. 1910); *Scotvold v. Scotvold*, 298 N.W. 266, 268 (S.D. 1941).

63. *Cramer v. Cramer*, 379 P.2d 95, 97 (Alaska 1963); *Brown v. Brown*, 89 A. 889, 890 (Conn. 1914); *Fiedeer v. Fiedeer*, 140 P. 1022, 1023–24 (Okla. 1914). See generally Carl Tobias, *Interspousal Tort Immunity in America*, 23 GA. L. REV. 359 (1989) (recounting the history of interspousal tort immunity).

64. E.g., *Thaler v. Thaler*, 391 N.Y.S.2d 331, 336–37 (Sup. Ct. 1977) (allowing either spouse to collect alimony), *rev'd*, 396 N.Y.S.2d 815 (App. Div. 1977) (mem.).

65. See Pamela A. Haun, *The Marital Privilege in the Twenty-First Century*, 32 U. MEM. L. REV. 137, 139–44 (2001) (discussing the historical development of the marital privilege in state and federal courts).

66. *Trammel v. United States*, 445 U.S. 40, 44 (1980).

67. *Id.*

68. *Id.* at 52.

69. *Hawkins v. United States*, 358 U.S. 74, 78 (1958). The adverse testimonial privilege was limited by the Court in *Trammel*. *Trammel*, 445 U.S. at 53. In *Trammel*, the Court narrowed the scope of the adverse testimonial privilege by allowing it to be invoked only by the witness-spouse, under the theory that if the witness-spouse opted to not invoke the privilege, the marriage was in such a state of "disrepair" that the spousal rationale behind the rule no longer applied. *Id.*

In 1934, the Court expanded the evidentiary protections afforded to spouses by creating the marital communications privilege.<sup>70</sup> In explaining why spousal communications should be granted immunity, the Court offered that “[t]he basis of the immunity given to communications between husband and wife is the protection of marital confidences, regarded as so essential to the preservation of the marriage relationship as to outweigh the disadvantages to the administration of justice which the privilege entails.”<sup>71</sup>

The Court similarly expounded on the importance of marriage in the landmark case *Griswold v. Connecticut*.<sup>72</sup> In *Griswold*, the Supreme Court questioned the constitutionality of a Connecticut statute that made it illegal for any person to use contraception and for any person who “assists, abets, counsels, causes, hires or commands another” to use contraception.<sup>73</sup> Two individuals—one a physician and professor at Yale Medical School, one the executive director for Planned Parenthood—gave information to married couples regarding the use of contraception and were arrested and fined \$100 under the accessory law.<sup>74</sup>

In determining whether the Connecticut statute violated the constitutional rights of married persons, the Court held that the marriage union was protected by a constitutional right to privacy.<sup>75</sup> The Court asked, “Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.”<sup>76</sup> In describing the constitutional right of privacy afforded to the marriage union, the Court went on to say,

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together that for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a

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70. *Wolfe v. United States*, 291 U.S. 7, 14 (1934) (holding that “communications between the spouses, privately made, are generally assumed to have been intended to be confidential, and hence they are privileged”).

71. *Id.*

72. 381 U.S. 479 (1965).

73. *Id.* at 480 (quoting CONN. GEN. STAT. § 53-32 (1958)).

74. *Id.*

75. *Id.* at 485. The *Griswold* Court held the appellants had standing to raise the constitutional rights of married persons. *Id.* at 481.

76. *Id.* at 485–86.

harmony in living, not political faiths; a bilateral loyalty, not commercial or social project. Yet it is an association for as noble a purpose as any involved in our prior decisions.<sup>77</sup>

Since *Griswold*, courts have similarly reiterated the importance of the marriage union. In holding that prohibitions against interracial marriage were unconstitutional, the Court in *Loving v. Virginia*<sup>78</sup> stated that marriage is “fundamental to our very existence and survival.”<sup>79</sup> The Court subsequently struck down a Wisconsin statute that required individuals who owed child support to minor children not in the individual’s custody to get court permission before being allowed to marry in *Zablocki v. Redhail*,<sup>80</sup> noting that marriage “is the foundation of the family in our society.”<sup>81</sup>

More recently, in *Obergefell v. Hodges*,<sup>82</sup> the Court recognized a constitutional right to same-sex marriage under both the due process clause and the equal protection clause of the Fourteenth Amendment to the Constitution.<sup>83</sup> The majority opinion began with a statement regarding the importance of marriage: “From their beginning to their most recent page, the annals of human history reveal the transcendent importance of marriage.”<sup>84</sup> Moving beyond the historical importance of marriage, the *Obergefell* Court said, like courts before it, that marriage was significant, a “basic human need[,]” and even “essential to our most profound hopes and aspirations.”<sup>85</sup> Marriage, as it has been since before the birth of the nation, remains an important and valued institution.

## II. THE INTERSECTION OF PRIVACY AND MARRIAGE

Just as marriage is, in the eyes of the law, a valued institution, spouses’ rights of privacy are highly valued. Placing a high import on the rights of privacy of spouses may not be at first intuitive; in fact, the value that courts, like the one in *Obergefell*, continue to place on marriage could lead to the conclusion that spouses have no right of privacy within a union to one another. Allowing spouses to keep

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77. *Id.* at 486.

78. 388 U.S. 1 (1967).

79. *Id.* at 12.

80. 434 U.S. 374 (1978).

81. *Id.* at 386.

82. 135 S. Ct. 2584 (2015).

83. *Id.* at 2604.

84. *Id.* at 2593.

85. *Id.* at 2594.

aspects of their lives private and, in effect, hidden from each other might be viewed as upsetting the institution of marriage. To an extent, marital evidentiary privileges help facilitate open communications between spouses, and the law views open communication between spouses as a good worth protecting, regardless of its cost to the administration of justice.<sup>86</sup> Allowing spouses to keep things private from one another may be perceived as undermining the good society sees in having open communications between spouses.

Despite the protections the marital unit continues to receive, in the context of intra-spousal privacy, protecting the individuality of spouses tends to trump protecting the marital unit. As the view of spouses has shifted from perceiving married persons as a single unit to viewing married persons as separate individuals, the majority of courts have not hesitated to grant intra-spousal privacy rights, be it under tort law or by statute.<sup>87</sup>

#### A. Common Law Right of Privacy

Under tort law, a spouse's right of privacy is generally examined under the privacy tort of intrusion upon seclusion. This privacy tort, which finds its origins with Warren and Brandeis, has been applied many times in the spousal context.

When Warren and Brandeis authored *The Right of Privacy*, they described a common law right of privacy that other American jurists were just beginning to recognize.<sup>88</sup> Warren and Brandeis believed that the need to create a right of privacy stemmed from the fact that the law had no existing principle to protect personal items such as appearance, writings, and relations, but technology and business practices had advanced such that these personal items were easily

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86. However, not all scholars view the marital privilege as a good worth protecting. Jeremy Bentham, for example, wrote that the marital privilege "secures, to every man, one safe and unquestionable and ever ready accomplice for every imaginable crime." 5 JEREMY BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 338 (London, Hunt & Clarke 1827). See David Medine, *The Adverse Testimonial Privilege: Time to Dispose of a "Sentimental Relic"*, 67 OR. L. REV. 519, 544-53 (1988) (arguing that marital privilege is no longer beneficial because it is prejudicial to the prosecution and does not serve its goals of protecting marital harmony).

87. Courts have also recognized intra-spousal rights of privacy under criminal law. *E.g.*, *State v. Perez*, 779 N.W.2d 105, 111 (Minn. Ct. App. 2010) (upholding a husband's conviction for interference with privacy for videotaping his wife "while she was alone and undressed in their bathroom without her knowledge or consent").

88. Warren & Brandeis, *supra* note 1, at 195. See Richards & Solove, *supra* note 2, at 1891.

made public.<sup>89</sup> The authors' particular concern was directed towards the press overstepping "the obvious bounds of propriety and of decency[.]" though the framework they developed has been applied to private individuals other than the press.<sup>90</sup>

In establishing the foundation for how personal privacy should be legally protected, Warren and Brandeis acknowledged that determining an exact line for what violated an individual's right of privacy was a difficult task; the particular facts of the situation must be taken into account.<sup>91</sup> Despite this difficulty, Warren and Brandeis created general rules for considering whether a violation of privacy had occurred.<sup>92</sup> These rules stated, among other things, that the right of privacy did not prohibit the publication of matters of public interest, that consent defeated an individual's privacy, that malice on the part of the publisher was not required, and that truth was not a defense.<sup>93</sup>

Seventy years later, William Prosser observed how courts had interpreted the work of Warren and Brandeis.<sup>94</sup> Prosser organized courts' privacy findings into four distinct wrongs: (1) the unreasonable intrusion upon the seclusion of another, (2) the appropriation of another's name or likeness, (3) the unreasonable publication of another's private life, and (4) the publication of material that unreasonably places another in a false light.<sup>95</sup> These four forms of invading an individual's right of privacy were then included by Prosser, as the chief reporter, in the *Restatement (Second) of Torts*.<sup>96</sup> The four privacy torts imagined by Prosser were adopted by courts and remain accepted in law today.<sup>97</sup>

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89. Warren & Brandeis, *supra* note 1, at 213. According to Warren and Brandeis, "Thoughts, emotions, and sensations demand[] legal recognition." *Id.* at 196.

90. Warren & Brandeis, *supra* note 1, at 196; *see also* Pavesich v. N. Eng. Life Ins. Co., 50 S.E. 68, 80–81 (Ga. 1905); William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 383–89 (1960).

91. *Id.* at 214.

92. *Id.* at 214–18.

93. *Id.*

94. William L. Prosser, *supra* note 90, at 384–88.

95. *Id.* at 389.

96. RESTATEMENT (SECOND) OF TORTS § 652A (AM. LAW INST. 1977); Paul M. Schwartz & Karl-Nikolaus Peifer, *Prosser's Privacy and the German Right of Personality: Are Four Privacy Torts Better Than One Unitary Concept?*, 98 CALIF. L. REV. 1925, 1939 (2010).

97. *See, e.g.*, WIS. STAT. § 895.50 (1977); Schwartz & Peifer, *supra* note 96, at 1937–42. For a collection of cases generally adopting and applying the privacy torts, *see* generally RESTATEMENT (SECOND) OF TORTS § 652A.

## 1. The Privacy Tort of Intrusion upon Seclusion

While the other three privacy torts require the publication of information, the intrusion tort does not.<sup>98</sup> Accordingly, claims concerning intra-spousal privacy tend to center on the intrusion tort because the spying spouse often does not publish the information discovered;<sup>99</sup> the intrusion itself is what causes the harm to the spied-on spouse.<sup>100</sup>

In writing about the privacy tort of intrusion, Prosser established that the intrusion must be highly offensive to a reasonable person and it must be an intrusion into something—whether a part of his person or his property—that was entitled to be private.<sup>101</sup> In describing what it means to intrude on another’s seclusion, the *Restatement (Second) of Torts* says that such an intrusion may be performed

by the use of the defendant’s senses, with or without mechanical aids, to oversee or overhear the plaintiff’s private affairs, as by looking into his upstairs windows with binoculars or tapping his telephone wires. It may be by some other form of investigation or examination into his private concerns, as by opening his private and personal mail, searching his safe or his wallet, examining his private bank account, or compelling him by a forged court order to permit an inspection of his personal documents.<sup>102</sup>

Following Prosser’s description, courts consider an intrusion on one’s seclusion as a violation of the right of privacy if that intrusion would be considered highly offensive by a reasonable person.<sup>103</sup> Accordingly, the elements most courts analyze in considering an intrusion claim are: (1) whether there was an intrusion, (2) whether the intrusion was highly offensive, and (3) whether the intrusion was

98. RESTATEMENT (SECOND) OF TORTS § 652B, cmt. a.

99. A spouse certainly could publish the private information discovered. In the recent revenge pornography cases that made national headlines, some of the cases involved husbands who posted private photos of their wives. *See, e.g., Rachel Cromidas, Chicago Lawsuit Filed as Legislators Debate Revenge Porn, REDEYE* (Mar. 12, 2014), [http://articles.redeyechicago.com/2014-03-11/news/48127548\\_1\\_hunter-moore-mary-anne-franks-legislators](http://articles.redeyechicago.com/2014-03-11/news/48127548_1_hunter-moore-mary-anne-franks-legislators) [<https://perma.cc/L4QR-C7HP>]. However, in most intra-spousal privacy claims, publication of the private information obtained does not occur.

100. *See, e.g., Schmidt v. Ameritech Ill.*, 768 N.E.2d 303, 310 (Ill. Ct. App. 2002); *see also, e.g., WIS. STAT. § 995.50(2)(a)* (West, Westlaw through 2015 Act 392).

101. Prosser, *supra* note 90, at 391.

102. RESTATEMENT (SECOND) OF TORTS § 652B cmt. b.

103. *See, e.g., WIS. STAT. § 995.50(2)(a)* (Westlaw) (“Intrusion upon the privacy of another of a nature highly offensive to a reasonable person . . .”).

in some matter in which the individual had a legitimate expectation of privacy.<sup>104</sup> Using this standard, courts have held that placing a listening or videotaping device in an individual's bedroom without his consent,<sup>105</sup> the unauthorized opening of another's mail,<sup>106</sup> taking unauthorized photographs of an individual at home through her windows,<sup>107</sup> and other similar acts, are all intrusions highly offensive to a reasonable person. However, courts have determined that sending unsolicited mailings<sup>108</sup> or taking photographs of an individual while outside in a place where neighbors could see her<sup>109</sup> are not, to a reasonable person, highly offensive intrusions.

## 2. Applying the Intrusion Tort to Spouses

Some state courts have interpreted the right to privacy from highly offensive intrusions as protecting spouses' rights of privacy vis-à-vis one another.<sup>110</sup> In determining whether one spouse has intruded on the rights of privacy of the other, courts apply the same legal analysis used in non-spousal cases—a spouse commits an intrusion upon seclusion if he intrudes, physically or otherwise, upon the solitude of his spouse or his spouse's private affairs or concerns, and that intrusion would be highly offensive to a reasonable person.<sup>111</sup>

For example, in *Miller v. Brooks*,<sup>112</sup> the Court of Appeals of North Carolina held that a wife engaged in a highly offensive intrusion upon her husband's seclusion when the wife hired a private investigator to place a surveillance camera in the ceiling of her estranged husband's bedroom.<sup>113</sup> Upon learning that his wife had the surveillance camera installed, the husband successfully sought a declaratory judgment and damages for the invasion of his privacy under the theory that his wife and the private detectives engaged in a

104. See, e.g., *Fletcher v. Price Chopper Foods of Trumann, Inc.*, 220 F.3d 871, 875–76 (8th Cir. 2000); *Wal-Mart Stores, Inc. v. Lee*, 74 S.W.3d 634, 644 (Ark. 2002); *Swarthout v. Mut. Serv. Life Ins. Co.*, 632 N.W.2d 741, 745–46 (Minn. Ct. App. 2001); *Mauri v. Smith*, 929 P.2d 307, 310 (Or. 1996).

105. *Hamberger v. Easteman*, 206 A.2d 239, 241–42 (N.H. 1964) (listening device); *Miller v. Brooks*, 123 N.C. App. 20, 27, 472 S.E.2d 350, 355 (1996) (video camera).

106. *Vernars v. Young*, 539 F.2d 966, 969 (3d Cir. 1976).

107. *Souder v. Pendleton Detectives, Inc.*, 88 So. 2d 716, 717–18 (La. Ct. App. 1956).

108. *Stilson v. Reader's Digest Ass'n*, 104 Cal. Rptr. 581, 582 (Ct. App. 1972).

109. *McLain v. Boise Cascade Corp.*, 533 P.2d 343, 346 (Or. 1975).

110. See, e.g., *In re Marriage of Tigges*, 758 N.W.2d 824, 826–27 (Iowa 2008); *Miller*, 123 N.C. App. at 27, 472 S.E.2d at 354–55.

111. See, e.g., WIS. STAT. § 895.50(2)(a) (1977).

112. 123 N.C. App. 20, 472 S.E.2d 350 (1996).

113. See *id.* at 27, 472 S.E.2d at 355.

highly offensive intrusion of his seclusion.<sup>114</sup> While agreeing that the wife's intrusion was highly offensive, the *Miller* court noted that in some cases a person's reasonable expectation of privacy might be less for married persons than it is for single individuals, in part depending on the living arrangements of the spouses.<sup>115</sup>

*White v. White*<sup>116</sup> presents the type of case alluded to in *Miller* in that what constitutes a highly offensive intrusion can be different for spouses who share a residence than it is for individuals who do not live in the same home.<sup>117</sup> In *White*, a New Jersey court recognized that a husband had lesser expectations of privacy in a family computer shared by him, his wife, and their three children.<sup>118</sup> After finding a letter the husband wrote to his girlfriend, the wife in *White* hired an investigator to search the family computer for more evidence of communications between the husband and his girlfriend.<sup>119</sup> The investigator discovered that the husband had inadvertently saved all of his emails to the hard drive of the computer and those emails could be accessed from the hard drive without using a password.<sup>120</sup> The investigator examined the documents saved on the hard drive of the family computer and discovered emails and photos sent between the husband and his girlfriend.<sup>121</sup>

The husband argued, *inter alia*, that the wife intruded upon his seclusion by accessing his emails.<sup>122</sup> Rejecting the husband's claim, the court noted,

Expectations of privacy are established by general social norms . . . . A person's expectation of privacy to a room used for storage and to which others have keys and access is not reasonable . . . . [The husband] lived in the sun room of the marital residence; the children and [the wife] were in and out of this room on a regular basis. The computer was in this room and the entire family had access to it and used it. Whatever [the husband's] subjective beliefs were as to his privacy, objectively,

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114. *Id.* at 26–27, 472 S.E.2d at 354.

115. *Id.* at 27, 472 S.E.2d at 355.

116. 781 A.2d 85 (N.J. 2001).

117. *Id.* at 91–92.

118. *Id.* at 92.

119. *Id.* at 87–88.

120. *Id.*

121. *Id.*

122. *Id.* at 91.

any expectation of privacy under these conditions is not reasonable.<sup>123</sup>

Subsequent cases have similarly concluded that rights of privacy in a shared computer are lesser than rights of privacy in a computer with a sole user.<sup>124</sup> However, courts have acknowledged that while a spouse's right of privacy in a commonly used piece of property—like a computer or a bedroom—may be less than a non-spouse's right of privacy due to the shared use of the property, that does not mean there is no intra-spousal right of privacy.<sup>125</sup>

For example, in *In re Marriage of Tigges*,<sup>126</sup> a husband who suspected his wife was having an affair installed a video camera in the alarm clock located in his wife's bedroom and videotaped her without her knowledge while he was out of the house.<sup>127</sup> After divorcing her husband, the wife successfully filed an invasion of privacy suit against him.<sup>128</sup> In holding for the wife, the *Tigges* court stated that the wife did not “forfeit through marriage her expectation of privacy as to her activities when she was alone in the bedroom.”<sup>129</sup>

#### B. Statutorily Protected Rights of Privacy

The majority of federal courts have also recognized intra-spousal privacy rights in existing statutes, specifically in the context of violations of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (“Wiretap Act”).<sup>130</sup> Under the Wiretap Act, it is unlawful for “any person” to “willfully intercept[], endeavor[] to intercept, or procure[] any other person to intercept or endeavor to intercept, any wire or oral communication.”<sup>131</sup> Violations of the Wiretap Act are

123. *Id.* at 92.

124. *See, e.g.,* *Lazette v. Kulmatycki*, 949 F. Supp. 2d 748, 761 (N.D. Ohio 2013); *see also* *Byrne v. Byrne*, 650 N.Y.S.2d 499, 500 (Sup. Ct. 1996) (holding that a wife had full rights to the computer's memory of her husband's work laptop that was left in the family home).

125. *See, e.g.,* *Miller v. Brooks*, 123 N.C. App. 20, 27, 472 S.E.2d 350, 355 (1996) (“[A] person's reasonable expectation of privacy might, in some cases, be less for married persons than for single persons.”). As cases like *Miller* have shown, though, spouses still retain at least some rights of privacy. *Id.* (holding that hiding a video camera in a spouse's home is a sufficient claim “for invasion of privacy by intrusion on his seclusion, solitude, or private affairs”).

126. 758 N.W.2d 824 (Iowa 2008).

127. *Id.* at 825.

128. *Id.* at 830.

129. *Id.* at 828.

130. Wiretap Act, 18 U.S.C. §§ 2510–22 (2015).

131. *Id.* § 2511(1)(a).

punishable by both civil and criminal penalties, including a fine of up to \$10,000 and a five-year term of imprisonment.<sup>132</sup> Perhaps more importantly for some family law cases, any evidence obtained in violation of the Wiretap Act cannot be admitted into evidence.<sup>133</sup>

The United States Court of Appeals for the Fifth Circuit first addressed the application of the Wiretap Act to spouses in *Simpson v. Simpson*.<sup>134</sup> In *Simpson*, a husband, who harbored uncertainties about his wife's faithfulness, recorded his wife's telephone conversations without her knowledge.<sup>135</sup> Following their divorce, the wife filed a civil suit for damages against her then ex-husband, asserting that he violated the Wiretap Act by willfully intercepting her wire communications without her consent.<sup>136</sup> The Fifth Circuit, while noting that the husband violated the "naked language" of the statute, which prohibited "any person" from intercepting wire communications, held that the statute did not apply to married couples.<sup>137</sup> The *Simpson* court reached this conclusion based on its view that Congress did not intend for the statute to apply to spouses because "only a minor portion [of congressional testimony] was with reference to the marital setting."<sup>138</sup> The *Simpson* court stated that "personal surveillance by the other spouse... is consistent with whatever expectation of privacy spouses might have vis-à-vis each other within the marital home."<sup>139</sup>

The *Simpson* court's holding that the Wiretap Act did not create an intra-spousal right of privacy was quickly questioned by other

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132. *Id.* § 2511(1)(d).

133. *Id.* § 2515.

134. 490 F.2d 803 (5th Cir. 1974), *overruled by* *Glazner v. Glazner*, 347 F.3d 1212 (11th Cir. 2003).

135. *Id.* at 804.

136. *Id.* at 804–05.

137. *Id.* at 805 & n.4 (citing 18 U.S.C. § 2511(1) (1974)).

138. *Id.* at 808.

139. *Id.* at 809. *See Remington v. Remington*, 393 F. Supp. 898 (E.D. Pa. 1975). In *Remington*, a wife spied on her husband by hiring a detective agency to place a wiretapping device in the home telephone, thus allowing the wife to record conversations the husband had with his attorney. *Id.* at 900. The *Remington* court held that "Congress apparently did not intend to provide a Federal remedy for persons aggrieved by the personal acts of their spouses committed within the marital home," but that the facts presented in *Remington* were distinguishable from those in *Simpson* and granted the husband a right of action. *Id.* at 901. *See* William J. Holt, Note, *Interspousal Electronic Surveillance Immunity*, 7 TOLEDO L. REV. 185, 185–86 (1975) (explaining that the *Remington* court agreed with the Fifth Circuit holding but deemed it inapplicable).

federal courts and, in some instances, rejected.<sup>140</sup> Two years after *Simpson*, the United States Court of Appeals for the Sixth Circuit held in *United States v. Jones*<sup>141</sup> that a husband violated the statute by placing a wiretapping device in the home of his estranged wife.<sup>142</sup> The *Jones* court directly contradicted the *Simpson* court by recognizing that the legislative history of the Wiretap Act indicated that Congress did intend to apply the statute to domestic relations.<sup>143</sup> Further, in direct opposition to the *Simpson* court, the *Jones* court interpreted the “any person” language of the statute as including spouses.<sup>144</sup>

In the wake of *Jones* and *Simpson*, other courts remained split on whether the Wiretap Act included an intra-spousal right of privacy in communications, with the Second Circuit following *Simpson*,<sup>145</sup> but the Fourth Circuit and the bulk of the federal district courts following *Jones*.<sup>146</sup>

The split between *Jones* and *Simpson* dissipated after the Wiretap Act was amended by the Electronic Communications Privacy Act of 1986 (“ECPA”).<sup>147</sup> The ECPA was designed to update the Wiretap Act to “protect against the unauthorized interception of electronic communications . . . in light of the dramatic changes in new computer and telecommunications technologies.”<sup>148</sup> The ECPA amended the Wiretap Act by making it unlawful for “any person” to intercept or endeavor to intercept not only wire and oral communications, but also electronic communications.<sup>149</sup> In amending the Wiretap Act, Congress retained the provisions of the Wiretap Act that made violations of the statute punishable by civil fines and

140. See, e.g., *Pritchard v. Pritchard*, 732 F.2d 372, 373–74 (4th Cir. 1984); *United States v. Jones*, 542 F.2d 661, 672–73 (6th Cir. 1976).

141. 542 F.2d 661 (6th Cir. 1976).

142. See *id.* at 672–73.

143. *Id.* at 669.

144. *Id.* at 671.

145. See *Anonymous v. Anonymous*, 558 F.2d 677, 678–79 (2d Cir. 1977). Some state courts have also followed the *Simpson* opinion. See *Stewart v. Stewart*, 645 So. 2d 1319, 1321–22 (Miss. 1994); *Baumrind v. Ewing*, 279 S.E.2d 359, 360 (S.C. 1981).

146. See, e.g., *Pritchard v. Pritchard*, 732 F.2d 372, 373–74 (4th Cir. 1984); *Nations v. Nations*, 670 F. Supp. 1432, 1436 (W.D. Ark. 1987); *Heyman v. Heyman*, 548 F. Supp. 1041, 1044–45 (E.D. Ill. 1982); *Gill v. Willer*, 482 F. Supp. 776, 778 (W.D.N.Y. 1980); *Kratz v. Kratz*, 477 F. Supp. 463, 467 (E.D. Pa. 1979).

147. Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 (codified as amended in scattered sections of 18 U.S.C.).

148. S. REP. NO. 99-541, at 1 (1986).

149. 18 U.S.C. § 2511(1) (2012).

imprisonment, as well as those provisions that excluded any evidence obtained in violation of the statute.<sup>150</sup>

With the advent of the ECPA, federal courts unanimously took the position that spouses retained a federally protected right of privacy in their communications.<sup>151</sup> For example, in *Heggy v. Heggy*,<sup>152</sup> a husband recorded his wife's telephone conversations without her knowledge.<sup>153</sup> The Tenth Circuit held that spouses were included in the ECPA's statement that it was unlawful for "any person" to intercept communications.<sup>154</sup> The Eleventh Circuit reached the same conclusion on almost identical facts in *Glazner v. Glazner*,<sup>155</sup> thus overruling its predecessor circuit decision in *Simpson*.<sup>156</sup>

Forty-eight states have adopted a state statute akin to the ECPA.<sup>157</sup> Like the majority of federal courts, state courts generally

150. *Id.* § 2511(4)(a) (providing for criminal penalties); *id.* § 2515 (excluding intercepted communications from being used as evidence); *id.* § 2520 (allowing for the recovery of civil fines).

151. *See Kempf v. Kempf*, 868 F.2d 970, 973 (8th Cir. 1989).

152. 944 F.2d 1537 (10th Cir. 1991).

153. *Id.* at 1538.

154. *Id.* at 1540.

155. 347 F.3d 1212, 1215 (11th Cir. 2003).

156. *Id.* at 1215–16. In *Glazner*, a husband recorded his wife's telephone conversations without her knowledge or the knowledge of third parties. *Id.* at 1214. The *Glazner* court read the plain language of the ECPA to include spouses because spouses were "any person" thus bringing the Eleventh Circuit in line with the bulk of jurisprudence addressing the issue. *Id.* at 1214–15 (quoting 18 U.S.C. § 2511(1) (2003)). It was, however, a reversal of the previous law of the circuit, namely the rule stated in *Simpson*. *See Simpson v. Simpson*, 490 F.2d 803, 805 (5th Cir. 1924). *Simpson* was decided in 1974, prior to the Eleventh Circuit's split from the Fifth Circuit in 1980, but when the Eleventh Circuit was created, the court adopted as binding precedent all decisions of the former Fifth Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

157. *See* ALA. CODE § 13A-11-31 (Westlaw through 2016 Reg. Sess.); ALASKA STAT. § 42.20.310 (LEXIS through 2016 2d Reg. Sess. and 5th Spec. Sess.); ARIZ. REV. STAT. ANN. § 13-3005 (Westlaw through 2016 2d Reg. Sess.); ARK. CODE ANN. § 5-60-120 (LEXIS through 2016 laws); CAL. PENAL CODE § 632 (West, Westlaw through 2016 Reg. Sess. laws); COLO. REV. STAT. § 18-9-304 (LEXIS through 2016 2d Reg. Sess.); CONN. GEN. STAT. ANN. § 53a-189 (West, Westlaw through 2016 Feb. Reg. Sess. and 2016 Sept. Spec. Sess.); DEL. CODE ANN. tit. 11, § 1335 (West, Westlaw through 80 Laws 2016, ch. 430); FLA. STAT. ANN. § 934.03 (West, Westlaw 2016 2d Reg. Sess.); GA. CODE ANN. § 16-11-62 (2015); HAW. REV. STAT. ANN. § 803-42 (West, Westlaw through 2016 2d Spec. Sess.); IDAHO CODE § 18-6702 (LEXIS through 2016 Reg. Sess.); 720 ILL. COMP. STAT. ANN. 5/14-2 (West, Westlaw through P.A. 99-934 of 2016 Reg. Sess.); IND. CODE ANN. § 35-46-8.5-1 (West, Westlaw through 2016 Second Reg. Sess.); IOWA CODE ANN. § 727.8 (West, Westlaw through 2016 Reg. Sess.); KAN. STAT. ANN. § 21-6101 (West, Westlaw through 2016 Legis. Sess.); KY. REV. STAT. ANN. § 526.010 (West, Westlaw through 2017 Reg. Sess. ch. 7); LA. STAT. ANN. § 15:1303 (Westlaw through 2016 2d Extraordinary Sess.); ME. REV. STAT. ANN. tit. 15, § 710 (West, Westlaw through 2015 2d Reg. Sess.); MD. CODE ANN., CTS. & JUD. PROC. § 10-402 (West, Westlaw through 2016 Reg. Sess.);

have held that state statutes striving to protect the privacy of communications apply to spouses.<sup>158</sup> For example, in *O'Brien v. O'Brien*,<sup>159</sup> a wife installed spyware on her husband's computer without his knowledge that took screenshots of the husband's online conversations via email, instant messenger, and other online chatting devices.<sup>160</sup> The court held that the wife violated Florida's version of the ECPA, and therefore the evidence the wife obtained regarding the husband chatting online with another woman could not be admitted in the divorce proceeding of the husband and wife.<sup>161</sup>

In addition to the ECPA,<sup>162</sup> states have adopted other statutory measures to protect individuals' privacy, which have been interpreted

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MASS. GEN. LAWS ANN. ch. 272 § 99 (West, Westlaw through ch. 1 of 2017 1st Ann. Sess.); MICH. COMP. LAWS ANN. § 750.539c (West, Westlaw through No. 516 of 2016 Reg. Sess.); MINN. STAT. ANN. § 626A.02 (West, Westlaw through 2017 Reg. Sess. ch. 3); MISS. CODE ANN. § 41-29-533 (LEXIS through 2017 Reg. Sess. H.B. 32); MONT. CODE ANN. § 45-8-213 (West, Westlaw through 2015 Sess.); NEB. REV. STAT. ANN. § 20-203 (West, Westlaw through 2016 2d Reg. Sess.); NEV. REV. STAT. ANN. § 200.650 (West, Westlaw through 2015 Reg. Sess. and 2016 Spec. Sess.); N.H. REV. STAT. ANN. § 570-A:2 (Westlaw through 2016 Reg. Sess., ch. 330); N.J. STAT. ANN. § 2A:156A-3 (West, Westlaw through 2017, J.R. No. 1); N.M. STAT. ANN. § 30-12-1 (West, Westlaw through 2016 Reg. Sess.); N.Y. PENAL LAW § 250.05 (Mckinney, Westlaw through 2016, ch. 6); N.C. GEN. STAT. § 15A-287 (2015); N.D. CENT. CODE § 12.1-15-02 (LEXIS through 2016 Spec. Legis. Sess.); OHIO REV. CODE ANN. § 2933.52 (West, Westlaw through 131st Gen. Assemb.); OKLA. STAT. ANN. tit. 21, § 1202 (West, Westlaw through ch. 395 of 2016 2d Sess.); OR. REV. STAT. ANN. § 165.540 (West, Westlaw through 2016 Reg. Sess.); 18 PA. STAT. AND CONS. STAT. ANN. § 5703 (West, Westlaw through 2016 Reg. Sess. Acts 1-109); 11 R.I. GEN. LAWS § 11-35-21 (LEXIS through 2016 Sess.); S.C. CODE ANN. § 17-30-20 (2015); S.D. CODIFIED LAWS § 23A-35A-20 (Westlaw through 2016 Sess. laws); TENN. CODE ANN. § 39-13-601 (2012); TEX. PENAL CODE ANN. § 16.02 (West, Westlaw through 2015 Reg. Sess.); UTAH CODE ANN. § 77-23a-4 (West, Westlaw through 2016 4th Spec. Sess.); VA. CODE ANN. § 19.2-62 (2015); WASH. REV. CODE ANN. § 9.73.030 (West, Westlaw through 2016 Reg. and Spec. Sess.); W. VA. CODE ANN. § 62-1D-3 (West, Westlaw through 2016 2d Extraordinary Sess.); WIS. STAT. ANN. § 968.31 (West, Westlaw through 2015 Wis. Act 392); WYO. STAT. ANN. § 7-3-702 (West, Westlaw through 2016 Budget Sess.). The only states without a state ECPA are Missouri and Vermont. Both Missouri and Vermont have adopted other state statutes that prohibit the unlawful use of another's computer. MO. ANN. STAT. § 569.095 (West, Westlaw through 2016 Reg. Sess.); VT. STAT. ANN. tit. 13, § 4103 (West, Westlaw through 2015 Legis. Sess.).

158. *E.g.*, *Collins v. Collins*, 904 S.W.2d 792, 797 (Tex. Ct. App. 1995), *writ denied per curiam*, 923 S.W.2d 569 (Tex. 1996).

159. 899 So. 2d 1133 (Fla. Dist. Ct. App. 2005).

160. *Id.* at 1134.

161. *Id.* at 1137.

162. Beyond the ECPA at the federal level, there is also the Stored Communications Act, which could help protect intra-spousal privacy. 18 U.S.C. §§ 2701-12 (2015). While the federal and state ECPAs prohibit interception of electronic communications, the federal Stored Communications Act prohibits the intentional access to any electronic communication while it is in electronic storage of "a facility through which [the] electronic

as applying to spouses.<sup>163</sup> For example, all states but one have a criminal statute prohibiting the fraudulent access to computers.<sup>164</sup>

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communication service is provided.” *Id.* § 2701(a). The difference in the Stored Communications Act and the ECPA is that the former protects against the unauthorized riffling through of an individual’s email account, for example, to find electronic transmissions that were previously sent and received, the latter protects against contemporaneous unauthorized interceptions of electronic transmissions. *Id.* § 2701(a)(1)–(2); Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848, 1850. Accordingly, a spouse who installs keylogger software on a computer (such that he can learn the passwords of his spouse’s email accounts) and then uses those passwords to read emails sent to his spouse that his spouse has already read does not violate the ECPA because the emails were not intercepted. *Bailey v. Bailey*, No. 2:07-CV-11672, 2008 WL 324156, at \*6 (E.D. Mich. Feb. 6, 2008). See *United States v. Ropp*, 347 F. Supp. 2d 831, 835–36 (C.D. Cal. 2004) (holding that use of keylogger software did not violate the ECPA because the interception occurred at the keyboard). However, the same spying spouse may be in violation of the Stored Communications Act because the emails were in the electronic storage of the email account. See *Bailey*, 2008 WL 324156, at \*6; *Miller v. Meyers*, 766 F. Supp. 2d 919, 923 (W.D. Ark. 2011).

Though some courts have interpreted the Stored Communications Act as completing the privacy protections in an individual’s electronic communications, many courts have given the Act a very narrow interpretation, thus opening up large legal loopholes for prying eyes. See *Jennings v. Jennings*, 736 S.E.2d 242, 245 (S.C. 2012) (holding that a copy of an email retained in an email account does not qualify as electronic storage unless a second copy of that email exists elsewhere, otherwise, the email found in the account does not qualify as an email being stored for purposes of “backup” protection); Robert M. Goldstein & Marin G. Weinberg, *The Stored Communications Act and Private E-Mail Communications*, 31 CHAMPION, Aug. 2007, at 2, 7 (asserting that the government takes the position that the Stored Communications Act applies only to unread emails); Cary J. Mogerma & Stephanie L. Jones, *The New Era of Electronic Eavesdropping and Divorce: An Analysis of the Federal Law Relating to Eavesdropping and Privacy in the Internet Age*, 21 J. AM. ACAD. MATRIM. LAW. 481, 482–83 (2008) (“The Stored Communications Act regulates communications that have been communicated by a sender but have not been received by the intended recipient (such as voicemail messages waiting to be listened to by the recipient or unread e-mails in an inbox.)”; see also *Bailey*, 2008 WL 324156, at \*7 (holding that the Act does not apply to any stored copies of emails on the hard drive of a computer because such stored copies of emails are not part of the storage of the electronic communication service). The limited application of the Stored Communications Act has made it a relatively toothless provision for the purposes of finding a right of privacy between spouses. See Richard C. Turkington, *Protection for Invasions of Conversational and Communication Privacy by Electronic Surveillance in Family, Marriage, and Domestic Disputes Under Federal and State Wiretap and Store Communications Acts and the Common Law Privacy Intrusion Tort*, 82 NEB. L. REV. 693, 722 (2004).

163. E.g., *Miller*, 766 F. Supp. at 924–25 (holding that Arkansas’s computer trespass statute applied to a husband who used key-logger software to access his wife’s email and social media accounts without her authorization).

164. All states, except Washington, have statutes in effect like Michigan’s that prohibit the unauthorized use of another’s computer. See ALA. CODE § 13A-8-112 (Westlaw through 2016 Reg. Sess. and Act 2016-485 of 1st Spec. Sess.); ALASKA STAT. § 11.46.740 (LEXIS through 2016 2d Reg. Sess. and 5th Spec. Sess.); ARIZ. REV. STAT. ANN. § 13-2316 (Westlaw through 2016 2d Reg. Sess.); ARK. CODE ANN. § 5-41-203 (LEXIS through

Under these statutes, it is generally unlawful for a person to intentionally and without authorization access a computer, computer program, computer system, or computer network of another.<sup>165</sup> In the case of *People v. Walker*,<sup>166</sup> the Michigan Supreme Court refused to overturn a lower court's holding that the Michigan version of this statute applied to spouses.<sup>167</sup>

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2016 3d Extraordinary Sess.); CAL. PENAL CODE § 502 (West, Westlaw through all 2016 Reg. Sess. laws); COLO. REV. STAT. § 18-5.5-102 (LEXIS through 2016 2d Reg. Sess. laws); CONN. GEN. STAT. ANN. § 53a-251 (West, Westlaw through 2016 Reg. Sess. and Sept. 2016 Spec. Sess.); DEL. CODE ANN. tit. 11, § 932 (West, Westlaw through 80 Del. Laws, ch. 430); FLA. STAT. § 815.06 (2016); GA. CODE ANN. § 16-9-93 (Supp. 2016); HAW. REV. STAT. § 708-890 (West, Westlaw through 2016 2d Spec. Sess.); IDAHO CODE § 18-2202 (LEXIS through 2016 Reg. Sess.); 720 ILL. COMP. STAT. ANN. 5/17-51 (West, Westlaw through P.A. 99-934 of 2016 Reg. Sess.); IND. CODE ANN. § 35-43-2-3 (West, Westlaw through 2016 2d Reg. Sess.); IOWA CODE ANN. § 716.6B (West, Westlaw through 2016 Reg. Sess.); KAN. STAT. ANN. § 21-5839 (West, Westlaw through 2016 Reg. and Spec. Sess.); KY. STAT. ANN. § 434.850 (West, Westlaw through 2016 Reg. Sess.); LA. STAT. ANN. § 14:73.5 (Westlaw through 2016 2d Extraordinary Sess.); ME. REV. STAT. ANN. tit. 17-A § 432 (Westlaw through 2015 2d Reg. Sess.); MD. CODE ANN., CRIM. LAW § 7-302 (West, Westlaw through 2016 Reg. Sess.); MASS. GEN. LAWS ANN. ch. 266, § 120F (West, Westlaw through 2017 1st Ann. Sess., ch. 1); MICH. COMP. LAWS ANN. § 752.795 (West, Westlaw through No. 516 of 2016 Reg. Sess.); MINN. STAT. ANN. § 609.891 (West, Westlaw through ch. 3 of 2017 Reg. Sess.); MISS. CODE ANN. § 97-45-5 (LEXIS through 2016 Reg. Sess. H.B. 32); MO. ANN. STAT. § 569.095 (West, Westlaw through 2016 Reg. Sess.); MONT. CODE ANN. § 45-6-311 (West, Westlaw through 2015 Sess.); NEB. REV. STAT. ANN. § 28-1343.01 (West, Westlaw through 2016 2d Reg. Sess.); NEV. REV. STAT. ANN. § 205.4765 (West, Westlaw through 2015 Reg. Sess. and 2016 Spec. Sess.); N.H. REV. STAT. ANN. § 638:17 (West, Westlaw through 2016 Reg. Sess., ch. 330); N.J. STAT. ANN. § 2C:20-25 (West, Westlaw through 2017, J.R. No. 1); N.M. STAT. ANN. § 30-45-5 (West, Westlaw through 2016 Reg. Sess.); N.Y. PENAL LAW § 156.05 (Mckinney, Westlaw through 2016, ch. 6); N.C. GEN. STAT. § 14-454 (2015); N.D. CENT. CODE § 12.1-06.1-08 (LEXIS through 2016 Spec. Legis. Sess.); OHIO REV. CODE ANN. § 2913.04 (West, Westlaw through 131st Gen. Assemb.); OKLA. STAT. tit. 21, § 1958 (West, Westlaw through 2016 Sess.); OR. REV. STAT. ANN. § 164.377 (West, Westlaw through 2016 Reg. Sess.); 18 PA. STAT. AND CONS. STAT. ANN. § 7611 (West, Westlaw through 2016 Reg. Sess.); 11 R.I. GEN. LAWS § 11-52-2 (LEXIS through Jan. 2016 Sess.); S.C. CODE ANN. § 16-16-20 (2015); S.D. CODIFIED LAWS § 43-43B-1 (Westlaw through 2016 Sess. laws); TENN. CODE ANN. § 39-14-602 (2012); TEX. PENAL CODE ANN. § 33.02 (West, Westlaw through 2015 Reg. Sess.); UTAH CODE ANN. § 76-6-703 (West, Westlaw through 2016 4th Spec. Sess.); VT. STAT. ANN. tit. 13, § 4103 (LEXIS through 2015 Sess.); VA. CODE ANN. § 18.2-152.5 (2015); W. VA. CODE ANN. § 61-3C-13 (West, Westlaw through 2016 2d Extraordinary Sess.); WIS. STAT. ANN. § 943.70 (West, Westlaw through 2015 Act 392); WYO. STAT. ANN. § 6-3-506 (LEXIS through 2016 Legis. Sess.).

165. See, e.g., MICH. COMP. LAWS ANN. § 752.795(a) (Westlaw).

166. 813 N.W.2d 750 (Mich. 2012) (mem.); *People v. Walker*, No. 304593, 2011 WL 6786935, at \*8 (Mich. Ct. App. Dec. 27, 2011), *appeal denied*, 813 N.W.2d 750 (Mich. 2012).

167. *Walker*, 813 N.W.2d at 750. See *Walker*, 2011 WL 6786935, at \*8.

In *Walker*, a wife's third husband allegedly accessed her email without her consent, and, in doing so, found evidence that the wife was having an affair with her second husband.<sup>168</sup> The third husband gave the evidence he discovered in the wife's email to the wife's first husband, and the first husband attempted to use the email evidence to gain custody of the child the first husband had fathered with the wife.<sup>169</sup> After being served with an emergency custody motion from the first husband, the wife notified the authorities that her third husband had hacked into her email accounts.<sup>170</sup> The third husband was subsequently charged with violating Michigan's Fraudulent Access to Computers statute.<sup>171</sup> The third husband in *Walker* asserted that the Michigan statute did not apply to spouses, but Michigan courts rejected his argument.<sup>172</sup> Although the Michigan court held the text of the statute applied to spouses, multiple justices on the Michigan Supreme Court expressed their concern with criminalizing intra-spousal spying.<sup>173</sup> Justice Markman noted in his concurrence that the statute potentially encompassed "an extremely broad range of conduct" and urged "the Legislature to consider whether it intends to criminalize the full range of conduct to which the statute potentially extends."<sup>174</sup>

*Walker* highlights the sentiment of many state and federal courts—spouses have a right of privacy vis-à-vis one another. Both the common law and statutory protections of privacy apply to spouses. That application, though, creates some uneasiness from courts on both sides of the issue: in *Walker*, the justices had concerns regarding criminalizing spousal spying;<sup>175</sup> in *Simpson*, the Fifth Circuit noted it had doubts about its conclusion to find no intra-spousal right of privacy in the Wiretap Act.<sup>176</sup> Courts have been and continue to be uncomfortable treading into the issue of determining when one spouse violates the other's right of privacy.

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168. *Walker*, 2011 WL 6786935, at \*1.

169. *Id.*

170. *Id.*

171. *Id.* at \*1–2.

172. *Id.* at \*8–9. *See Walker*, 813 N.W.2d at 750 (denying defendant's leave to appeal the judgment from the Court of Appeals).

173. *See, e.g., Walker*, 813 N.W.2d at 750–51 (Markman, J., concurring).

174. *Id.*

175. *Id.*

176. *Simpson v. Simpson*, 490 F.2d 803, 810 (5th Cir. 1974), *overruled by Glazner v. Glazner*, 347 F.3d 1212 (11th Cir. 2003).

As uncomfortable as they may be, courts at this time appear to recognize that spouses have a right of privacy from one another.<sup>177</sup> However, there remains uncertainty in how far courts are willing to stretch what a reasonable spouse would find to be a highly offensive intrusion upon his seclusion. Despite the one bright-line rule that it is unlawful to videotape a spouse without their knowledge, there is far more gray area in the context of electronic communications.

The *Walker* case also highlights the growing need to determine the contours of intra-spousal privacy. After the third husband in *Walker* lost his motion regarding the application of the Fraudulent Access to Computer statute to spouses before the Michigan Supreme Court, the case against him was set to go to trial during the summer of 2012.<sup>178</sup> The charges against the third husband, however, were dropped mere days before the trial was to begin because the prosecutor's office learned that the wife had been simultaneously spying on the third husband by accessing his text messages without his authorization.<sup>179</sup> Thus, *Walker* demonstrates not only the difficulty in reconciling an intra-spousal right of privacy with the digital age, but it also highlights how often spouses violate each other's rights of privacy.

Perhaps more importantly, though, the *Walker* case exemplifies why many spouses engage in intra-spousal spying—leverage. Evidence of adultery for purposes of obtaining a divorce is no longer necessary, as all states have adopted no-fault divorce.<sup>180</sup> Evidence of adultery, however, can create an advantage with regard to child custody and spousal support.<sup>181</sup> Moreover, in some jurisdictions—

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177. *E.g.*, *Pritchard v. Pritchard*, 732 F.2d 372, 372, 374 (4th Cir. 1984); *United States v. Jones*, 542 F.2d 661, 669, 673 (6th Cir. 1976).

178. *Walker*, 813 N.W.2d at 750.

179. L.L. Brasier, *Charges Against Man in E-Mail Case Are Dropped After Wife Snooped, Too*, DETROIT FREE PRESS, July 14, 2012, at A1; *Final Charges Dropped in Husband-Wife Hacking Case*, CBS DETROIT (July 21, 2012, 8:29 AM), <http://detroit.cbslocal.com/2012/07/21/final-charges-dropped-in-husband-wife-hacking-case/> [<https://perma.cc/S2V7-CL76>].

180. *E.g.*, ARIZ. REV. STAT. ANN. § 25-903(5) (Westlaw through 2016 2d Reg. Sess.); Rebecca Brennan, Note, *Mismatch.com: Online Dispute Resolution and Divorce*, 13 CARDOZO J. CONFLICT RESOL. 197, 198 n.11 (2011) (explaining that New York was the last state to adopt no-fault divorce in 2010).

181. For example, in Louisiana, child custody is determined based on which arrangement would be in the best interest of the child. LA. CIV. CODE art. 131 (Westlaw through 2016 2d Extraordinary Sess.). Among the factors for determining the best interest of the child are the “moral fitness” of the parents. *Id.* art. 134(6). The sexual relationships of the parents have been taken into consideration in determining their “moral fitness.” *E.g.*, *Crowson v. Crowson*, 742 So. 2d 107, 112 (La. Ct. App. 1999). Arizona courts have

including some community property jurisdictions—evidence of wrongdoing by one spouse can impact the division of property.<sup>182</sup> The prevalence of spousal spying combined with the reasons that spousal spying occurs, makes intra-spousal privacy an issue courts throughout the United States will continue to face in the future.

### III. THE COMMUNITY PROPERTY OVERLAY ON PRIVACY

Intra-spousal privacy is a particularly complex issue for the nine community property jurisdictions in the United States where property created or acquired during marriage is classified as community property, meaning that both spouses have a joint ownership interest in the property from the moment it is acquired. For community property jurisdictions, what rights of privacy spouses have vis-à-vis one another is more complicated because, to the extent that community property is jointly owned by spouses, it is unclear whether one spouse has the authority to preclude the other spouse from accessing that property. These privacy concerns are further compounded by the managerial schemes applied to community property.

#### A. *Privacy and Ownership*

Community property ownership rules complicate a spouse's right of privacy because, generally, all property created or acquired during the marriage's existence is jointly owned by the spouses. This joint ownership creates the possibility that spouses in community property jurisdictions have few, if any, rights of privacy from one another. Community property jurisdictions have not yet provided much guidance on this issue. Examining how other forms of joint ownership, such as co-ownership, impact privacy rights may help further understand privacy in a community property system. Furthermore, guidance may be gained by studying property where two or more people have possessory rights, such as employer property that is used by employees.

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similarly allowed acts of adultery to impact custody. *See, e.g.*, *Anonymous v. Anonymous*, 436 P.2d 157, 158 (Ariz. Ct. App. 1968) (“The [mother’s] shameless rampage of adultery, established through admission and unrepudiated evidence, demonstrates she is morally unfit to have custody.”).

182. WILLIAM A. REPPY, JR., CYNTHIA A. SAMUEL & SALLY BROWN RICHARDSON, *COMMUNITY PROPERTY IN THE UNITED STATES* 350–51 (8th ed. 2015).

### 1. Ownership in Community Property Regimes

Community property, as recognized in the United States, provides that spouses share in the acquisitions and gains of one another during the marriage.<sup>183</sup> Accordingly, community property includes all of the property “which is increased or multiplied during marriage” by onerous cause.<sup>184</sup> In defining community property, Louisiana—the first state to adopt a community property regime—originally stated,

The partnership, or community consists of the profits of all the effects of which the husband has the administration and enjoyment; of the produce of the reciprocal labor and industry of both husband and wife; and of the estates which they may acquire during the marriage either by donations made jointly to them both, or by purchase, or in any other similar way, even although the purchase may be only in the name of one of the two and not of both, because in that case the period of time when the purchase was made is alone attended to and not the person who made the purchase.<sup>185</sup>

Modern definitions of community property are much simpler, but cover the same ground.<sup>186</sup> For example, the Arizona statute defining community property states, “All property acquired by either husband

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183. See RICHARD A. BALLINGER, A TREATISE ON THE PROPERTY RIGHTS OF HUSBAND AND WIFE, UNDER THE COMMUNITY OR GANACIAL SYSTEM § 5, at 23–30 (Seattle, Bancroft-Whitney Co. 1895); WILLIAM Q. DE FUNIAK & MICHAEL J. VAUGHAN, PRINCIPLES OF COMMUNITY PROPERTY § 1, at 2 (2d ed. 1971); Nina Nichols Pugh, *The Spanish Community of Gains in 1803: Sociedad de Gananciales*, 30 LA. L. REV. 1, 1–2 (1969).

184. BALLINGER, *supra* note 183, § 5, at 205 (footnote omitted); see also GEORGE MCKAY, A TREATISE ON THE LAW OF COMMUNITY PROPERTY § 297, at 211–12 (2d ed. 1925).

185. A DIGEST OF THE CIVIL LAWS NOW IN FORCE IN THE TERRITORY OF ORLEANS WITH ALTERATIONS AND AMENDMENTS ADAPTED TO ITS PRESENT FORM OF GOVERNMENT 336 (New Orleans, Bradford & Anderson 1808).

186. See, e.g., LA. CIV. CODE ANN. art. 2338 (Westlaw through 2016 2d Extraordinary Sess.). Today, community property is defined in article 2338 of the Louisiana Civil Code as

property acquired during the existence of the legal regime through the effort, skill, or industry of either spouse; property acquired with community things or with community and separate things, unless classified as separate property under Article 2341; property donated to the spouses jointly; natural and civil fruits of community property; damages awarded for loss or injury to a thing belonging to the community; and all other property not classified by law as separate property.

*Id.*

or wife during the marriage is the community property of the husband and wife.”<sup>187</sup>

Despite the overarching definition of jurisdictions like Arizona, there are a number of exceptions to the rule that all property created or acquired during marriage is community property. For example, property acquired by using separate property<sup>188</sup> and property received as inheritance or a donation to a spouse individually<sup>189</sup> are classified as separate property.<sup>190</sup> In some jurisdictions, the profits of separate property retain their separate classification.<sup>191</sup> Spouses may also contract out of the community property regime through a pre- or post-nuptial agreement, thereby establishing that all or some of the property acquired during marriage is owned separately.<sup>192</sup>

Though some property created or acquired during a marriage may be separate property, the vast majority of property gained during a marriage is community property. Such community property can include traditional forms of real property, such as land and buildings, and also personal property such as salaries, retirement accounts, and

187. ARIZ. REV. STAT. ANN. § 25-211 (Westlaw through 2016 2d Reg. Sess.). Other states define community property in the same manner. *See, e.g.*, CAL. FAM. CODE § 760 (West, Westlaw through 2016 Reg. Sess. laws); IDAHO CODE § 32-906 (LEXIS through 2016 Reg. Sess.); NEV. REV. STAT. ANN. § 123.220 (West, Westlaw through 2015 Reg. Sess. and 2016 Spec. Sess.).

188. *E.g.*, *Burlingham v. Burlingham*, 384 P.2d 699, 705 (N.M. 1963) (noting that separate property does not lose its separate classification when comingled with “community property, unless . . . [it] cannot be traced and identified”); *Boyd v. Boyd*, 131 S.W.3d 605, 616 (Tex. Ct. App. 2004) (holding that property acquired with separate property is classified as separate property).

189. *E.g.*, *Bilbao v. Bilbao*, 205 P.3d 311, 313–14 (Alaska 2009) (citing *Schmitz v. Schmitz*, 88 P.3d 1116, 1127 (Alaska 2004)).

190. There are other exceptions to the general rule that property created or acquired during marriage is community property. *Brown v. Brown*, 675 P.2d 1207, 1212 (Wash. 1984). Accordingly, damages received for pain and suffering are classified as separate property, *see, e.g.*, TEX. FAM. CODE ANN. § 3.001 (West, Westlaw through 2015 Reg. Sess.); *Soto v. Vandeventer*, 245 P.2d 826, 832 (N.M. 1952), whereas damages for the recovery of lost earnings are classified as community property, because the earnings that the damages are replacing would have been community property, *see, e.g.*, *Graham v. Franco*, 488 S.W.2d 390, 396 (Tex. 1972); *Brown*, 675 P.2d at 1212.

191. *E.g.*, ARIZ. REV. STAT. ANN. § 25-213(A) (Westlaw); CAL. FAM. CODE § 770 (Westlaw); NEV. REV. STAT. ANN. § 123.130 (Westlaw). Jurisdictions that classify the profits differently from separate properties are collectively referred to as American Rule jurisdictions, whereas jurisdictions that classify the profits of separate property as community property are referred to as Civil Law Jurisdictions. REPPY ET AL., *supra* note 182, at 179–80.

192. *E.g.*, *Lebeck v. Lebeck*, 881 P.2d 727, 734–35 (N.M. Ct. App. 1994). *But see* *Button v. Button*, 388 N.W.2d 546, 551–52 (Wis. 1986) (requiring that postnuptial agreements be substantively fair); *Moore v. Moore*, 383 S.W.3d 190, 194–95 (Tex. Ct. App. 2012) (requiring that prenuptial agreements be entered into voluntarily).

intellectual property.<sup>193</sup> Moreover, community property jurisdictions also apply joint ownership to more modern forms of property, such as emails, blog posts, Snapchat photos, and Facebook statuses.<sup>194</sup>

That community property is automatically jointly owned by both spouses during the marriage is arguably *the* distinguishing factor between community and separate property regimes. As community property scholar Thomas Oldham has stated, the difference in community property and separate property regimes is relatively minor when a marriage terminates, be it by death or divorce.<sup>195</sup> Most, if not all, separate property states have adopted equitable remedies at divorce,<sup>196</sup> and instruments like the elective share provide means for a surviving spouse to keep a percentage of the property earned by the other spouse when the earning spouse dies.<sup>197</sup>

During an intact marriage, however, there are great differences between community property and separate property jurisdictions. As Oldham notes, “spouses in community property states are equal owners of all property acquired during marriage due to either’s effort, regardless of title[.]” and that equal ownership applies from the moment the property is acquired.<sup>198</sup>

193. See *Rodrigue v. Rodrigue*, 218 F.3d 432, 438 (5th Cir. 2000) (applying community property law to copyright); *In re Marriage of Worth*, 241 Cal. Rptr. 135, 137 (Ct. App. 1987) (applying community property law to copyright); *Michel v. Michel*, 484 So. 2d 829, 833 (La. Ct. App. 1986) (recognizing a community property interest in a writing); *Alsenz v. Alsenz*, 101 S.W.3d 649, 653 (Tex. Ct. App. 2003) (applying community property law to patents). See generally Richardson, *Classifying Virtual Property*, *supra* note 15, at 742–46 (discussing the application of community property classification rules to intellectual property).

194. See LA. CIV. CODE ANN. art. 2341 (Westlaw through 2016 2d Extraordinary Sess.); Richardson, *Classifying Virtual Property*, *supra* note 15, at 758–70 (contemplating how URLs, websites, email accounts, and Facebook profiles can be classified as community property).

195. Oldham, *supra* note 6, at 99.

196. E.g., FLA. STAT. ANN. § 61.075(1) (West, Westlaw through 2016 Reg. Sess.) (stating that at a divorce proceeding the court must begin with the premise that marital assets and liabilities will be equal between the spouses); N.Y. DOM. REL. § 236(B)(5)(c) (McKinney, Westlaw through Jan. 23, 2016) (providing that marital property is to be divided equitably between the spouses at divorce); see also Margaret M. Mahoney, *The Equitable Distribution of Marital Debts*, 79 UMKC L. REV. 445, 445–46 (2010) (discussing the equitable division of debts in separate property jurisdictions). *But see* Allison Anna Tait, *Divorce Equality*, 90 WASH. L. REV. 1245, 1260–62 (2015) (discussing how equitable division statutes have not achieved true equality in divorce).

197. See UNIF. PROBATE CODE § 2-202 (UNIF. LAW COMM’N 2015). *But see* Terry L. Turnipseed, *Community Property v. the Elective Share*, 72 LA. L. REV. 161, 161–62 (2011) (arguing that the community property regime is more advantageous than the elective share because the elective share can be avoided through trusts).

198. Oldham, *supra* note 6, at 100.

The question for community property jurisdictions is thus whether one spouse has a right of privacy in property jointly owned with the other spouse. This question remains, unsurprisingly, unanswered by courts in community property jurisdictions. With regard to intact marriages, courts are hesitant to interfere with how spouses use community property, given that if spouses are unable to amicably resolve how such property is to be used, divorce is likely imminent.<sup>199</sup> For spouses who divorce, any issues regarding a claim one spouse may have against the other for unlawful intrusion usually do not make it before a judge, given that the vast majority of divorce cases settle out of court.<sup>200</sup>

Though no court in a community property jurisdiction has discussed the intersection of community property ownership rules and spousal privacy, at least one court in a separate property jurisdiction has held that a spouse has no right of privacy in property in which both spouses possess a marital property interest.<sup>201</sup> In *State v. Hormann*,<sup>202</sup> a husband installed a tracking device on the car his wife drove.<sup>203</sup> The question facing the Minnesota appellate court was whether the husband violated a state statute that provided that no person could install a tracking device on a vehicle without consent of the owner of the vehicle.<sup>204</sup> The *Hormann* court held that the husband did not violate the statute because the car was marital property, and, as marital property, both spouses had an ownership interest in the vehicle.<sup>205</sup> The husband did not violate the statute because an owner of the vehicle—namely him—consented to the tracking device being placed on the vehicle.<sup>206</sup>

While courts in community property jurisdictions have not addressed how privacy law and community property ownership laws interact, at least two courts in Louisiana (a community property jurisdiction) have concluded that community property debt rules supplant a spouse's right of privacy for at least some forms of

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199. *Id.* at 122.

200. Jeff Landers, *Divorcing Women: Is It Best to Litigate or Settle?*, FORBES (May 22, 2014, 9:24 AM), <http://www.forbes.com/sites/jefflanders/2014/05/22/divorcing-women-is-it-best-to-litigate-or-settle/#52ea038254d6> [https://perma.cc/HG89-T5BS (staff-uploaded archive)] (“In fact, it’s estimated that 95% of divorces are settled out of court.”).

201. *See State v. Hormann*, 805 N.W.2d 883, 893 (Minn. Ct. App. 2011).

202. 805 N.W.2d 883 (Minn. Ct. App. 2011).

203. *Id.* at 892.

204. *Id.* at 892–93.

205. *Id.* at 893–94.

206. *Id.*

property.<sup>207</sup> In all community property jurisdictions, debts incurred during the existence of the community and for the benefit of the community are classified as community debts and may be satisfied by using community property.<sup>208</sup> In *Hennig v. Alltel Communications, Inc.*,<sup>209</sup> a husband sought his wife's cell phone records from her cell phone service provider without the wife's consent.<sup>210</sup> Upon receiving the cell phone records, the husband filed for divorce on the basis of adultery.<sup>211</sup> The wife then sued the cell phone service provider, alleging, among other things, that it violated her right of privacy.<sup>212</sup> The court summarily rejected the wife's claim, stating that the husband was "legally entitled to view the records associated with a community debt."<sup>213</sup>

The use of community property debt rules to overcome an individual spouse's right of privacy in a case like *Hennig* makes it easy to imagine a community property jurisdiction reaching the same conclusion as the *Hormann* court based on community property ownership rules. If community property jurisdictions find that community property ownership rules allow spouses to place tracking devices on community-owned vehicles or access community-owned cell phone records without the consent of the other spouse, spousal privacy in community property jurisdictions will essentially be vitiated.

Just as the *Hennig* court used community debt law to preclude an individual spouse's right of privacy in community property,<sup>214</sup> some community property jurisdictions have passed legislation regarding the duties spouses owe one another with regard to community property; the breadth of those duties imply there are few, if any,

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207. *Hennig v. Alltel Commc'ns, Inc.*, 903 So. 2d 1137, 1141 (La. Ct. App. 2005); *Pennison v. Provident Life & Accident Ins. Co.*, 154 So. 2d 617, 618 (La. Ct. App. 1963).

208. *See, e.g.*, *Johnson v. Johnson*, 683 P.2d 705, 711 (Ariz. 1982).

209. 903 So. 2d 1137 (La. Ct. App. 2005).

210. *Id.* at 1139.

211. *Id.*

212. *Id.* at 1138–39.

213. *Id.* at 1141. The court in *Pennison v. Provident Life & Accident Ins. Co.*, 154 So. 2d 617 (La. Ct. App. 1963), reached the same conclusion with regards to medical records, *id.* at 618. In *Pennison*, the husband acquired his wife's medical records from a hospital without the wife's consent. *Id.* The wife sued the hospital for violating her privacy by disclosing her medical records. *Id.* The court rejected the wife's argument that her privacy was violated, and held the hospital bill created a community debt for which the husband was responsible. *Id.* Thus, the husband had the right to examine the wife's medical records, even without her consent. *Id.*

214. *Hennig*, 903 So. 2d at 1141.

privacy rights for spouses.<sup>215</sup> For example, California Family Code section 1100(e) requires that a spouse “make full disclosure to the other spouse of all material facts and information regarding the existence, characterization, and valuation of all assets in which the community has or may have an interest.”<sup>216</sup> Other jurisdictions have similarly established that spouses owe one another a fiduciary duty to act in good faith with all community property.<sup>217</sup>

Courts’ applications of these intra-spousal duties have thus far always pertained to financial decisions made by one spouse.<sup>218</sup> California courts have applied the fiduciary duties and disclosure requirements to pensions and other retirement accounts.<sup>219</sup> Louisiana has applied its spousal fiduciary duties to sales of community property, such as stock options.<sup>220</sup>

At least one California court has implicitly allowed intra-spousal spying into financial affairs. In *In re Marriage of Feldman*,<sup>221</sup> a wife secretly copied documents relating to a 401(k) account her husband established without her knowledge.<sup>222</sup> Thereafter, the wife filed for divorce.<sup>223</sup> During the divorce proceeding, the husband did not disclose the 401(k) account.<sup>224</sup> The husband argued he did not breach any fiduciary duty he owed to his wife because she had been secretly copying the 401(k) account documents throughout their marriage.<sup>225</sup> The *Feldman* court rejected the husband’s argument, stating that the 401(k) account was community property and the husband was in a superior position to access documents relating to the account, thus he had the duty to disclose information concerning the account to his wife.<sup>226</sup> The fact the wife had secretly obtained information regarding

215. See, e.g., CAL. FAM. CODE § 1100(e) (West, Westlaw through 2016 Reg. Sess. laws).

216. *Id.*

217. See, e.g., WIS. STAT. ANN. § 766.15(1) (West, Westlaw through 2015 Act 392); *Gerow v. Covill*, 960 P.2d 55, 64 (Ariz. Ct. App. 1998); *In re Marriage of Duffy*, 111 Cal. Rptr. 2d 160, 169–70 (Ct. App. 2001).

218. See, e.g., *In re Marriage of Lucero*, 173 Cal. Rptr. 680 (Ct. App. 1981) (reviewing a husband’s decision to borrow money from his retirement account).

219. See, e.g., *In re Stanifer*, 236 B.R. 709, 717 (B.A.P. 9th Cir. 1999); *In re Marriage of Feldman*, 64 Cal. Rptr. 3d 29, 42 (Ct. App. 2007); *Lucero*, 173 Cal. Rptr. at 683.

220. *Ogden v. Ogden*, 331 So. 2d 592, 597 (La. Ct. App. 1976).

221. 64 Cal. Rptr. 36 (Ct. App. 1967).

222. *Id.* at 42.

223. *Id.* at 32.

224. *Id.* at 41.

225. *Id.* at 42.

226. *Id.*

the 401(k) account did not impact the husband's disclosure duties.<sup>227</sup> Perhaps more importantly for the purposes of intra-spousal privacy, the *Feldman* court did not object to the secretive means by which the wife obtained the financial documents.<sup>228</sup>

In analyzing the outcomes of the previous cases where spouses have failed to disclose financial assets or made poor financial decisions (at least in hindsight), it is not a far stretch to interpret statutes like California Family Code section 1100(e) as requiring the disclosure of *all* community property. Applying this interpretation, statutes, like California Family Code section 1100(e), might require the disclosure of community property which one spouse might rather keep private, like a diary or an email account. Such community property may be of no monetary value at the time disclosure is required, but nothing in current community property law requires that only positively valued property be disclosed to the other spouse.<sup>229</sup> Even without statutes requiring disclosure of community property assets, the very nature of joint ownership might be interpreted to prohibit spouses from hiding community property from one another, regardless of the property's financial worth.

Reading a disclosure requirement into community-owned property, whether because of statutes or because of the inherent nature of community property, calls into question the level of privacy spouses may possess in certain forms of property. Modern cars with built-in GPS systems have the ability to track the location of the vehicle.<sup>230</sup> Most cell phones today possess the same ability.<sup>231</sup> If a car

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227. *Id.*

228. *Id.* The *Feldman* court did not issue any reprimand to the wife for her means of acquiring information regarding the husband's 401(k) account. *Id.* To the contrary, the court chided the husband for not producing information regarding his 401(k) account prior to his wife producing the evidence regarding the account that she had secretly obtained. *Id.*

229. See, e.g., CAL. FAM. CODE § 1100(e) (West, Westlaw through 2016 Reg. Sess. laws).

230. Chris Woodyard & Jane O'Donnell, *Your Car May Be Invading Your Privacy*, USA TODAY (Mar. 25, 2013, 11:45 AM), <http://www.usatoday.com/story/money/cars/2013/03/24/car-spying-edr-data-privacy/1991751/> [<https://perma.cc/4BUX-H2UN>].

231. See Drew Prindle, *Find Your Phone with These Helpful Tracking Tips*, DIGITAL TRENDS (May 27, 2016, 10:28 AM), <http://www.digitaltrends.com/mobile/how-to-track-a-cell-phone/> [<https://perma.cc/4FFQ-4LGQ>] (discussing different ways to track a phone using its GPS system). Government use of built-in GPS systems on most cell phones has raised numerous questions relating to the Fourth Amendment. See Orin Kerr, *6th Circuit: No Fourth Amendment Rights in Cell-Site Records*, WASH. POST (Apr. 13, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/04/13/6th-circuit-no-fourth->

or cell phone is community property, does community ownership necessarily mean that both spouses have a right to know where the community property car or cell phone is located at any moment in time? Current community property law provides no answer to this question.

## 2. Comparison to Privacy of Other Joint Owners

Cases like *Feldman* do not expressly draw a line where community property law ends and an individual spouse's right of privacy begins. Cases like *Feldman* do, however, imply that spouses have few, and perhaps no, rights of privacy in community property.<sup>232</sup> Given the lack of express jurisprudence on intra-spousal privacy rights in community property, it is helpful to examine other situations in which individuals jointly own property, such as co-ownership or tenancy in common.

For co-owners and tenants in common, each co-owner or cotenant generally has a right to possess the entirety of the property.<sup>233</sup> Consequently, a co-owner or co-tenant does not have the right to exclude the other.<sup>234</sup> For example, in *Kellum v. Williams*,<sup>235</sup> when one co-tenant excluded the other co-tenant from using a water line held in common, the court concluded that "neither cotenant had a right to exclude the other from use of this common property[.]" because the neighbors were co-tenants.<sup>236</sup>

Courts have reached the same conclusion when the co-owners are spouses in a separate property regime. In *Frost v. Frost*,<sup>237</sup> a husband and wife in Missouri jointly owned land, which the husband sold for \$3,000.<sup>238</sup> The husband then used the \$3,000 to purchase more land in his name alone.<sup>239</sup> The wife sued the husband for her \$1,500 share in the proceeds of the sale of the jointly owned land.<sup>240</sup> In

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amendment-rights-in-cell-site-records/?utm\_term=.b305c914b25c [https://perma.cc/HG9S-BH9J].

232. See *In re Marriage of Feldman*, 64 Cal. Rptr. 36, 42 (Ct. App. 1967).

233. See, e.g., *Fyffe v. Fyffe*, 11 N.E.2d 857, 861–62 (Ill. Ct. App. 1937); *O'Brien v. Ginter*, 744 N.Y.S.2d 511, 511 (App. Div. 2002); *Mueller v. Allen*, 128 P.3d 18, 24 (Utah Ct. App. 2005).

234. See, e.g., *Skalla v. Canepari*, 430 S.W.2d 72, 79 (Ark. 2013); *Galasso v. Del Guercio*, 276 A.2d 186, 189 (N.J. 1971).

235. 39 So. 2d 573 (Ala. 1949).

236. *Id.* at 573.

237. 98 S.W. 527 (Mo. 1906).

238. *Id.* at 527.

239. *Id.*

240. *Id.*

discussing what rights the spouses had in the proceeds, the *Frost* court stated that because the land sold was jointly owned by the spouses, “neither husband nor wife ha[d] an interest in the property to the exclusion of the other.”<sup>241</sup>

The inability of one co-owner or co-tenant to exclude the other from the property held in common implies that joint holders of property have no right of privacy in their jointly held property.<sup>242</sup> As with community property, no cases specifically address the intersection of co-ownership and privacy. However, if co-owners cannot exclude one another, it stands to reason how much privacy co-owners can reasonably expect in co-owned property. For example, if two individuals co-own a diary, and neither co-owner can exclude the other co-owner from the diary, can either co-owner have a legitimate expectation of privacy within the diary?

### 3. Comparison to Employee Privacy in Employers’ Property

Because co-ownership and community property jurisprudence do not provide specific privacy cases, it may be useful to turn to another area of law where one individual uses property owned by another individual and sometimes that use is for private purposes. This issue arises routinely with regard to employees’ right of privacy from their employers when using employers’ property. Employees are undoubtedly different than spouses and other joint owners; employees do not usually have an ownership interest in the property they are using because the property interest resides with the employers. But employees are similar to spouses and other joint owners in that employees are using property in which *another person* has a property interest. Thus, the analogy to employees may prove helpful for understanding whether spouses could (and if so, should) retain a right of privacy in property in which another individual, namely the other spouse, has an ownership interest.

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241. *Id.* at 529.

242. For example, in *LeBlanc v. Scurto*, 173 So. 2d 322 (La. Ct. App. 1965), three parties shared an interest in real property that included an alley. *Id.* at 323. One co-owner parked large trucks in the alley so as to prevent the other co-owners from accessing the co-owned property. *Id.* at 323–24. The blocked co-owners successfully brought an injunction to preclude the other co-owner from preventing them from accessing the property. *Id.* at 325. The court stated that all co-owners have “the right to demand of the other[s] equal possession and coextensive use of any given spot within the common estate.” *Id.* Given that co-owners must provide each other coextensive use and access to all co-owned property, co-owners seem to enjoy no right of privacy from one another in their co-owned property.

In *Gates v. Wheeler*,<sup>243</sup> a court held that such a right of privacy may exist.<sup>244</sup> In *Gates*, two individuals, Gates and Wheeler, co-owned an LLC.<sup>245</sup> As co-owner and administrator of the LLC's computer server, Wheeler had access to Gates's company email account.<sup>246</sup> As the relationship between Wheeler and Gates deteriorated, Wheeler reviewed Gates's emails, including communications Gates had with his attorneys and his wife.<sup>247</sup> When Gates learned that Wheeler had intercepted his emails without his consent, Gates successfully sought a temporary injunction.<sup>248</sup>

In appealing the temporary injunction, Wheeler argued that the district court abused its discretion by granting the injunction because Gates could not have a reasonable expectation of privacy in the LLC email account since it was a work email account owned by the LLC.<sup>249</sup> The *Gates* court recognized that jurisdictions were split on whether an employee has a right of privacy in a work email account,<sup>250</sup> thus indicating that the trial court had not abused its discretion in granting the temporary injunction.<sup>251</sup>

The court in *Gates* is correct to say that jurisprudence on employee privacy runs the gamut from holding employees have some rights of privacy to holding that employees have no right of privacy when using an employer's property.<sup>252</sup> For example, in *Smyth v. Pillsbury Co.*,<sup>253</sup> Pillsbury officials told employees that their company email was confidential and would not be intercepted to be used against employees.<sup>254</sup> An employee exchanged emails with his supervisor, and those emails were intercepted by the company, despite the company's statements to the contrary, and then used as the reason to fire the employee.<sup>255</sup> The court held that the employee

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243. No. A09-2355, 2010 WL 4721331 (Minn. Ct. App. Nov. 23, 2010).

244. *Id.* at \*8.

245. *Id.* at \*1.

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.* at \*6.

250. *Id.*

251. *Id.* at \*8.

252. See, e.g., *Smyth v. Pillsbury Co.*, 914 F. Supp. 97, 101 (E.D. Pa. 1996) (holding that employees do not have a reasonable expectation of privacy in company email); *Restuccia v. Burk Tech., Inc.*, No. 952125, 1996 WL 1329386, at \*3 (Mass. Super. Ct. Aug. 13, 1996) (holding that employees can have a right of privacy in company email).

253. 914 F. Supp. 97 (E.D. Pa. 1996).

254. *Id.* at 98.

255. *Id.* at 98–99.

had no intrusion claim against Pillsbury because the employee did not have a reasonable expectation of privacy in the contents of email sent over a company email system and because the interception of the emails was not a highly offensive intrusion into the employee's seclusion.<sup>256</sup>

Some courts have held that whether a highly offensive intrusion occurs turns on the employer's motives for searching an employee's email. For example, in *Sitton v. Print Direction, Inc.*,<sup>257</sup> the court held that because an employer suspected the employee of using his work computer to conduct competing business, the employer's search of the employee's emails "did not constitute such an unreasonable intrusion as to rise to the level of invasion of privacy."<sup>258</sup>

Cases like *Smyth* and *Sitton* notwithstanding, other courts have not foreclosed the possibility that, under certain factual scenarios, an employee may have a valid expectation of privacy in her email. In *Restuccia v. Burk Technology, Inc.*,<sup>259</sup> supervisors had access to employees' computer files, including their backed-up email messages, but employees were never alerted to this access.<sup>260</sup> Two employees exchanged disparaging emails regarding their supervisor.<sup>261</sup> The supervisor read the emails by accessing the employees backed-up computer files and then terminated the employees' employment.<sup>262</sup> The employees filed a lawsuit against the employer for invasion of privacy.<sup>263</sup> The court rejected the employer's motion for summary judgment, stating that "a genuine dispute of material fact remains on the invasion of privacy issues," thus establishing that the employees could, under the right facts, prevail.<sup>264</sup>

Still other courts have held that employees have rights of privacy from their employers while using the employers' property. In *K-Mart*

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256. *Id.* at 101. The same result has been reached in other cases. *See, e.g.*, *Miller v. Blattner*, 676 F. Supp. 2d 485, 497 (E.D. La. 2009); *Garrity v. John Hancock Mut. Life Ins. Co.*, No. 1:00-CV-12143, 2002 WL 974676, at \*2 (D. Mass. May 7, 2002); *Battenfield v. Harvard Univ.*, No. 915089F, 1993 WL 818920, at \*8 (Mass. Super. Ct. Aug. 31, 1993); *McLaren v. Microsoft Corp.*, No. 05-97-00824-CV, 1999 WL 339015, at \*5 (Tex. Ct. App. May 28, 1999).

257. 718 S.E. 2d 532 (Ga. App. 2011).

258. *Id.* at 537.

259. No. 952125, 1996 WL 1329386 (Mass. Super. Ct. Aug. 13, 1996).

260. *Id.* at \*1.

261. *Id.* The emails created nicknames for the supervisor and commented on his extramarital affair with another employee. *Id.*

262. *Id.*

263. *Id.*

264. *See id.* at \*3.

*Corp. Store No. 7441 v. Trotti*,<sup>265</sup> the employee had been given a locker at the K-Mart where she worked for the purposes of storing her personal effects.<sup>266</sup> With K-Mart's consent, the employee placed her own lock on the locker.<sup>267</sup> After the store manager removed the employee's lock and searched the employee's locker, the employee filed an intrusion lawsuit against K-Mart.<sup>268</sup> In upholding the jury's determination that K-Mart had intruded upon the employee's seclusion, the *Trotti* court stated that because the employee supplied her own lock with K-Mart's permission, the jury was "justified in concluding that the employee manifested, and the employer recognized, an expectation that the locker and its contents would be free from intrusion and interference."<sup>269</sup>

Employee privacy cases highlight the topical and complex nature of privacy disputes. Thus far, courts have not reached uniformity on issues such as whether employees have a reasonable expectation of privacy at work or whether an employer's search of an employee's email is a highly offensive intrusion. Be that as it may, courts have made clear that employees can, under the right fact patterns, have a right of privacy in property owned by their employers. Given that employees typically lack any ownership interest in the property they are seeking to keep private, it stands to reason that spouses in community property regimes would have greater rights of privacy in community property than employees have in their employers' property because spouses have an actual ownership interest in the community property in question whereas employees do not.

#### *B. Privacy and Management*

A further wrinkle in determining what rights of privacy spouses have in community property regimes is the managerial schemes that apply to community property. In all community property jurisdictions, there are three forms of management for community property: sole management, joint management, and equal management. Equal and joint managerial systems may, based on their nature, tend toward holding that spouses have lesser rights of privacy,

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265. 677 S.W.2d 632 (Tex. Ct. App. 1984).

266. *Id.* at 634.

267. *Id.* at 634–35.

268. *Id.*

269. *Id.* at 637. For similar results relating to email accounts, see *Alexander v. City of Greensboro*, 762 F. Supp. 2d 764, 811–18 (M.D.N.C. 2011).

while sole managerial systems may tend toward reaching the opposite conclusion.

### 1. Equal or Joint Management

Equal management is the default management regime in community property jurisdictions.<sup>270</sup> Under equal management, either spouse may manage the community property without obtaining consent from the other spouse.<sup>271</sup> Managerial decisions that may be made under equal management include decisions such as to alienate, encumber, and lease the property. Thus, a spouse who has equal management over community property like a diary may sell the diary without first obtaining the consent of the other spouse.

The advantage of equal management is that it facilitates transactions involving community property.<sup>272</sup> If spouses had to consult with one another every time groceries needed to be purchased because community funds were being used, transactions involving community property would prove prohibitively inefficient.

The disadvantage of equal management is that it also facilitates a race between spouses to manage community property<sup>273</sup>: “if one spouses wants to sell an item of community property and the other does not, the spouse wishing to sell cannot be stopped” under an equal management regime.<sup>274</sup>

While equal management gives either spouse authority over community property, under joint management, each spouse must consent on all managerial decisions.<sup>275</sup> The goal of joint management is to provide spouses with maximum protection.<sup>276</sup> Accordingly, community property subject to joint management traditionally includes the more valuable items a couple might own, such as real

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270. *E.g.*, ARIZ. REV. STAT. ANN. § 25-214 (Westlaw through 2016 2d Reg. Sess.) (establishing that spouses have equal management over community property); CAL. FAM. CODE § 1100 (West, Westlaw through 2016 Reg. Sess. laws); LA. CIV. CODE ANN. art. 131 (Westlaw through 2016 2d Extraordinary Sess.) (providing for equal management unless otherwise provided by law).

271. REPPY ET AL., *supra* note 182, at 255–56.

272. Oldham, *supra* note 6, at 114.

273. REPPY ET AL., *supra* note 182, at 179–80.

274. Oldham, *supra* note 6, at 114.

275. *See, e.g.*, King v. Uhlmann, 437 P.2d 928, 941–42 (Ariz. 1968) (en banc); Dynan v. Gallinatti, 197 P.2d 391, 391–93 (Cal. Ct. App. 1948); Klaas v. Haueter, 745 P.2d 870, 872–73 (Wash. Ct. App. 1987).

276. Oldham, *supra* note 6, at 107.

property.<sup>277</sup> For these forms of property, the law seeks to protect the spouses by prohibiting one spouse from selling the property out from under the other.<sup>278</sup> Household furnishings similarly fall under the category of joint management.<sup>279</sup> In these situations, the law seems to view protecting spouses' interests in community property as more important than encouraging efficient transactions.

Donations to third parties are also generally subject to joint management for similar protective reasons.<sup>280</sup> If a spouse donates community property, the community receives nothing in return. Applying a joint management system to donations protects the non-donor spouse from losing community property without receiving any compensation. For the sake of efficiency, however, donations that are reasonable and within the spouse's economic position are typically not subject to joint management.<sup>281</sup> Spouses need not seek each other's permission to give items like birthday gifts, provided the gift is commensurate with the financial position of the spouses.<sup>282</sup>

While equal management and joint management are in many ways opposite—one gives spouses free reign over community property, one requires that spouses act together when making decisions about community property—equal and joint managerial

277. *E.g.*, ARIZ. REV. STAT. ANN. § 25-214(C) (Westlaw through 2016 2d Reg. Sess.); CAL. FAM. CODE § 1102 (West, Westlaw through 2016 Reg. Sess. laws); LA. CIV. CODE ANN. art. 2347 (Westlaw through 2016 2d Extraordinary Sess.); NEV. REV. STAT. ANN. § 123.230(3) (West, Westlaw through 2015 Reg. Sess. and 2016 Spec. Sess.); N.M. STAT. ANN. § 40-3-13(A) (West, Westlaw through 2016 Reg. Sess.).

278. Oldham, *supra* note 6, at 107.

279. *E.g.*, NEV. REV. STAT. ANN. § 123.230(5) (Westlaw); LA. CIV. CODE ANN. art. 2347(A) (Westlaw).

280. *See generally* Ballinger v. Ballinger, 70 P.2d 629 (Cal. 1937) (holding that a husband gifting his wife community property results in the land being her property); Banner Life Ins. Co. v. Mark Wallace Dixson Irrevocable Tr., 206 P.3d 481 (Idaho 2009) (holding that an asset that is community property cannot be given away without partner's consent); *In re* Succession of Wagner, 993 So. 2d 709 (La. Ct. App. 2008) (holding that donation of gold coins was invalid without mother's consent).

281. *See* Schindler v. Schindler, 131 So. 3d 439, 444 (La. Ct. App. 2013) (stating that wife's consent was not needed for gifting proceeds from donations of certain municipal bonds); Ackel v. Ackel, 595 So. 2d 739, 742 (La. Ct. App. 1992) (noting that certain statutes allow for the gifting of property without consent of spouse); Khalsa v. Puri, 344 P.3d 1036, 1038, 1047 (N.M. Ct. App. 2014) (defining factors that allow for gifting of community property without spousal consent); Smitheal v. Smith, 31 S.W. 422, 424 (Tex. Ct. App. 1895) (stating that particular jury instructions were fair regarding reasonableness of gift without wife's consent).

282. *See* ANDREA CARROLL & RICHARD D. MORENO, 16 LA. CIV. L. TREATISE, MATRIMONIAL REGIMES, § 5:14, Westlaw (database updated Dec. 2016) (stating that there is an implied consent in simple gifts like these).

schemes have an important similarity for the purposes of determining the intra-spousal rights of privacy: each management system provides each spouse with some degree of managerial authority over community property.

Asserting a right of privacy in community property from a spouse that has managerial authority over that property is difficult. Consider the hypothetical of the diary subject to equal management. A non-authoring spouse has authority to sell the diary. If the non-authoring spouse has the authority to sell the diary, it would be a challenge to assert the non-authoring spouse did not also have lesser rights in the diary, such as the right to access the diary or to read the diary. As Justice Holmes famously wrote, “[e]ven in the law the whole generally includes its parts.”<sup>283</sup>

Moreover, if the non-authoring spouse exercised his equal managerial rights and sold the diary, the buyer of the diary, as the diary’s new owner, would certainly have the right to read the diary. If the non-authoring spouse can, as the seller, transfer the right to read the diary to the buyer, the non-authoring spouse must also have the right to read the diary.<sup>284</sup>

## 2. Sole Management

The third form of management over community property is sole management. The spouse with sole managerial authority has the right to make decisions regarding community property without obtaining

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283. *W. Union Tel. Co. v. Kansas ex rel. Coleman*, 216 U.S. 1, 53 (1910). The law routinely holds that greater authority must include lesser authority. *See, e.g., Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 433 (1989) (Stevens, J., concurring) (reasoning that the power to exclude members necessarily included the power to include members subject to regulation); *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 345–46 (1986) (holding that if the state has the greater ability to ban gambling it must have the lesser ability to ban gambling advertisements); *FERC v. Mississippi*, 456 U.S. 742, 765 (1982) (holding that if Congress can regulate the entirety of the natural gas field, Congress has the lesser authority to allow states to regulate the natural gas field provided states comply with federal regulations); *Terrace v. Thompson*, 263 U.S. 197, 215 (1923) (noting that an essential feature of the greater right of ownership is the lesser rights of use, lease, and disposition); *Davis v. Massachusetts*, 167 U.S. 43, 48 (1897) (stating that the greater authority to exclude must include the lesser authority to include subject to conditions).

284. This example is an application of the basic principle *nemo dat quod non habet*. *See Mitchell v. Hawley*, 83 U.S. 544, 550 (1872) (defining *nemo dat quod non habet* as the principle that no one “can sell personal property and convey a valid title to it unless he is the owner or lawfully represents the owner”).

the consent of the other spouse.<sup>285</sup> As the name implies, only one spouse can have sole managerial authority; the other spouse has no decision-making authority over the community property.<sup>286</sup>

Sole management, like equal management, has a certain efficiency in its operation. One spouse has the authority to make all decisions with regards to the community property, thereby removing the potentially inefficient requirement of obtaining both spouses' consent.<sup>287</sup> Sole management is not without problems, however. The non-managing spouse retains an ownership interest in property, but has no authority to exercise any control over that ownership interest, thus leading to possible conflict if the non-managing spouse disagrees with the actions taken by the managing spouse.<sup>288</sup> In such a situation, the non-managing spouse has no recourse.<sup>289</sup>

Sole management applies to very limited forms of property. For example, registered personal property, such as automobiles, and the personal property of a business that is solely managed by one spouse are subject to sole management.<sup>290</sup> If a car is registered in one spouse's name, that spouse has sole managerial authority over the car and may sell the car without first consulting the other spouse. Both spouses have an ownership interest in the car, but only the spouse in whose name the car is registered has the authority to make managerial decisions with regards to the car.

Some scholars have argued that privity of contract applies to community property, thereby subjecting contracts entered into by one spouse to the sole management of that spouse.<sup>291</sup> While some cases support a privity of contract theory,<sup>292</sup> many cases do not.<sup>293</sup> For

285. REPPY ET AL., *supra* note 182, at 256 (noting that states have created sole management exceptions to equal management).

286. *Id.*

287. Oldham, *supra* note 6, at 113 ("The sole management system facilitates transactions for the family.").

288. *Id.*

289. *See id.* at 113–14.

290. *See, e.g.*, TEX. FAM. CODE ANN. § 3.102(a)(1), (b) (West, Westlaw through 2015 Reg. Sess.) (highlighting instances in which sole management arises, such as individual earnings provided that such earnings are not mixed with other community property); Oldham, *supra* note 6, at 112–14, 122–25.

291. *See, e.g.*, LA. CIV. CODE ANN. art. 2346, cmt. b (Westlaw through 2016 2d Extraordinary Sess.); Lee Hargrave, *Community Property Interests in Individual Retirement Accounts*, 55 LA. L. REV. 509, 511–12 (1995).

292. *See, e.g.*, Canale v. Gus Mayer, 481 So. 2d 170 (La Ct. App. 1985). In *Canale*, a wife brought a community property fur coat to a department store for storage purposes. *Id.* at 170–71. The department store gave the wife a claim ticket with which to retrieve her coat in the future. *Id.* at 171. The husband called the department store and had the coat

example, in *Brown v. Boeing Co.*,<sup>294</sup> the Washington appellate court implied that a non-employee spouse could exercise management over an employee-spouse's pension, thus implying the pension was subject to equal, not sole, management.<sup>295</sup>

To the extent that community property is subject to sole management, arguably the sole managing spouse should have a right of privacy in that property. The non-managing spouse has no managerial rights in the property. Having no managerial rights may be interpreted as meaning the non-managing spouse does not have a right to access the community property. If that is the case, the managing spouse may have a right of privacy in solely managed community property.

The difficulty in resting intra-spousal privacy rights in community property is two-fold. First, many types of property in which a spouse might want a right of privacy, like a diary, are not subject to sole management. This is particularly true if privity of contract does not apply to community property.<sup>296</sup>

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delivered to him. *Id.* When the wife returned to the department store, the coat was no longer there. *Id.* The wife successfully sued the department store for breach of contract because it returned the coat to her husband and not to her. *Id.* at 170–71. The appellate court ruled in favor of the wife, holding that the department store and the wife had a contract of deposit with one another and that the husband could not manage that contract. *Id.* at 172.

293. See, e.g., *Johns v. Retirement Fund Tr.*, 149 Cal. Rptr. 551, 551 (Ct. App. 1978) (holding that a non-employee spouse “has as much right to manage and control the community property” as the employee spouse).

294. 622 P.2d 1313 (Wash. Ct. App. 1980).

295. *Id.* at 1315–17. In *Brown*, the employee-spouse elected to receive his pension payouts as straight-life method payments as opposed to joint and survivor payments. *Id.* at 1315. By receiving pension payments through the straight-line method, the individual payments were higher than they would have been under the joint and survivor system, but the payments terminated at the death of the employee. *Id.* The employee-spouse told his non-employee spouse of his election and the non-employee spouse objected, but never contacted the employer. *Id.* at 1316. The employee-spouse passed away two months after his retirement. *Id.* The non-employee spouse sued the employer, asserting that the deceased employee-spouse violated his fiduciary duties to act in the best interest of the spouses when he elected the straight-life method for pension payments. *Id.*

In holding for the employer, the *Brown* court noted that, under Washington law, either spouse had the authority to manage the pension because the pension did not fall under any of the statutorily provided pieces of property subject to dual or sole management. *Id.* Furthermore, the court stated that the non-employee spouse could have contacted the employer, presumably to alter the pension payout method. *Id.* at 1315, 1317. Conclusions like that in *Brown* cut against the theory that privity of contract applies to community property, such that contractual arrangements are subject to the sole management of the contracting spouse.

296. If, as some scholars have argued, privity of contract applies to community property, then property like an email account may be subject to sole management because

Second, regardless of the managerial scheme, community property is still jointly owned. Even under a sole management regime, all of the aforementioned issues regarding what rights joint owners of property have in that property still remain. Sole management could be interpreted to mean the managing spouse has a right of privacy in the community property, and thus the ability to exclude the other spouse from that property, but courts have not thus far interpreted sole management in such a manner. Admittedly, courts have not been faced with the issue of whether a non-managing spouse can be excluded from accessing solely managed community property. Courts could reach such a conclusion, but could also just as easily conclude the opposite.

#### IV. THE WAY FORWARD FOR COMMUNITY PROPERTY JURISDICTIONS

When community property and privacy law intersect, ambiguities abound. There is extensive uncertainty surrounding what rights of privacy spouses in community property jurisdictions have vis-à-vis one another with regard to community property.

For many spouses, and perhaps even most, that lack of clarity may never matter. According to a 2014 Pew Research Center study, sixty-seven percent of Internet users in a married or committed relationship have shared the password to one or more of their online accounts with their spouse or partner.<sup>297</sup> In a perfect marriage, both spouses might be so open with one another that they do not desire keeping anything private. Or perhaps in a utopian world, spouses might be so trusting and respectful of one another that they would always honor any desire the other spouse had for privacy.

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one spouse contracts with the email provider when creating the account. See Richardson, *Classifying Virtual Property*, *supra* note 15, at 754–55 (discussing how email accounts are registered); Richardson, *How Community Property Jurisdictions*, *supra* note 26, at 111–15 (2011) (discussing the management of Twitter accounts).

297. AMANDA LENHART & MAEVE DUGGAN, PEW RESEARCH CTR., COUPLES, THE INTERNET, AND SOCIAL MEDIA 2 (2014). A *New York Times* column in January 2016 highlighted that many spouses are “No Secrets[.]” meaning they allow one another to read each other’s emails, texts, etc. Philip Galanes, *Social Q’s: She Asked for Cash*, N.Y. TIMES, Jan. 24, 2016, at ST8. The twenty-first century equivalent of giving your high school sweetheart your letter jacket is to give her—or him—the password to your social media networks. See Matt Richtel, *Young, in Love and Sharing Everything, Including a Password*, N.Y. TIMES, Jan. 18, 2012, at A1.

In the real world, marriages are not perfect. Spouses snoop. Wives hack into email accounts. Husbands make secret recordings. Rights of privacy, assuming they exist, are regularly violated.

Delineating the line between community property and privacy law must be done because this distinction can have great legal and practical consequences. Whether a spouse can successfully sue for intrusion upon seclusion, violation of the ECPA, or any other privacy-protecting statute turns on identifying the exact scope of a spouse's privacy in community property.

The intersection of privacy and community property law also matters for evidentiary purposes. Evidence obtained in violation of the ECPA, as well as evidence derived from information obtained in violation of the ECPA, is inadmissible in all trials, hearings, and proceedings.<sup>298</sup> California has specifically legislated that in divorce hearings, evidence collected by eavesdropping is inadmissible.<sup>299</sup> If spouses have no rights of privacy in community property, then spouses cannot violate the ECPA or any evidence-barring state statutes because the thing being intercepted is community property.

Of course, determining where community property law ends and privacy law begins may be putting the cart before the horse. First, a normative decision must be made on the question of whether spouses in community property jurisdictions should retain a right of privacy upon entering marriage. Only if that question is answered in the affirmative must jurisdictions clarify the extent of a spouse's right of privacy within a community property regime.

A. *Should Spouses in Community Property Jurisdictions Retain a Right of Privacy?*

Unlike the common law, community property law has always viewed spouses as two separate individuals.<sup>300</sup> As the Texas Supreme Court stated in the mid-1800s in response to the assertion that spouses morphed into one upon marriage, “[h]usband and wife are not one under our laws. The existence of a wife is not merged in that

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298. 18 U.S.C. § 2515 (2012). Evidence obtained by intruding upon the seclusion of a spouse is, however, usually admissible, as the common law privacy tort does not have a built-in exclusionary rule. *See* Turkington, *supra* note 162, at 736–37. Similarly, there is no exclusionary rule included in the Stored Communications Act.

299. CAL. FAM. CODE § 2022(a) (West, Westlaw through 2016 Reg. Sess. laws).

300. DE FUNIAK & VAUGHAN, *supra* note 183, § 2, at 3–4.

of the husband. Most certainly is this true so far as the rights of property are concerned.”<sup>301</sup>

Given community property’s history in viewing spouses as separate individuals, it seems only natural that community property jurisdictions would find that spouses retain their separate rights of privacy.<sup>302</sup> American courts reached this conclusion in part because of the shift from viewing spouses as one individual to considering spouses as separate people.<sup>303</sup> As community property law has always held the position that spouses are distinct individuals, it follows logically that community property jurisdictions would also adopt the view that spouses maintain their separate rights of privacy after entering marriage.

Currently, some community property jurisdictions appear to be in favor of holding that spouses maintain a right of privacy.<sup>304</sup> In *Clayton v. Richards*,<sup>305</sup> a Texas appellate court recognized that a wife intruded upon the seclusion of her husband by, without his knowledge, videotaping him in their bedroom and opening his mail.<sup>306</sup> No community property interest in the bedroom or mail was asserted, and therefore the court did not inquire as to whether the husband had a right of privacy.<sup>307</sup> Thus, the *Clayton* court made no statement regarding the interplay of community property law and privacy law. The court did, however, make a strong statement about the right of privacy afforded to spouses:

As a spouse with equal rights to the use and access of the bedroom, it would not be illegal or tortious as an invasion of privacy for a spouse to open the door of the bedroom and view a spouse in bed. It could be argued that a spouse did no more than that by setting up a video camera, but that the viewing was

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301. *Wood v. Wheeler*, 7 Tex. 13, 19–20 (1851).

302. DE FUNIAK & VAUGHAN, *supra* note 183, § 2, at 5 & n.17; Michael J. Vaughn, *The Policy of Community Property and Inter-Spousal Transactions*, 19 BAYLOR L. REV. 20, 34 (1967) (stating that community property’s “cardinal principles are based upon the separate identity of each spouse”).

303. *See supra* Part II.

304. *See, e.g.*, *Clayton v. Richards*, 47 S.W.3d 149, 155 (Tex. Ct. App. 2001). Of course, not all courts have held that spouses retain a right of privacy in community property; in fact, as previously noted, some have reached the contrary conclusion. *See Hennig v. Alltel Commc’ns, Inc.*, 903 So. 2d 1137, 1141 (La. Ct. App. 2005); *Tooley v. Provident Life & Accident Ins. Co.*, 154 So. 2d 617, 618–619 (La. Ct. App. 1963); *see also supra* Section III.A.1.

305. 47 S.W.3d 149 (Tex. Ct. App. 2001).

306. *Id.* at 154–55.

307. *Id.* at 155.

done by means of technology rather than by being physically present. It is not generally the role of the courts to supervise privacy between spouses in a mutually shared bedroom. However, the videotaping of a person without consent or awareness when there is an expectation of privacy goes beyond the rights of a spouse because it may record private matters, which could later be exposed to the public eye. The fact that no later exposure occurs does not negate that potential and permit willful intrusion by such technological means into one's personal life in one's bedroom.<sup>308</sup>

Though the *Clayton* court did not contemplate how community property laws might impact the husband's right of privacy, the court's rationale provides strong support for concluding that spouses retain at least some rights of privacy even within the community property regime.

Moreover, since non-community property jurisdictions have held, almost unanimously, that spouses have a right of privacy, it likely behooves community property jurisdictions to reach the same conclusion. Community property states like California, Texas, and Louisiana, would certainly not desire discouraging spouses from settling in their jurisdiction.<sup>309</sup> Granting fewer privacy protections to spouses in community property jurisdictions could have that effect.

Marriage, as previously noted, is viewed as an important institution in the United States. Given the importance placed on marriage, it seems that married individuals should receive, at a minimum, the same protections against one another as unmarried individuals. There is no question as to whether unmarried individuals have a right of privacy from one another. As marriage is viewed as an important institution, it would be illogical to grant married individuals lesser protections than unmarried individuals.<sup>310</sup>

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308. *Id.* at 155–56.

309. *See* 52 AM. JUR. 2D *Marriage* § 3 (2016) (“Public policy favors the institution of marriage . . . . The state has a vital interest in the marriage relation, and it is the public policy to foster and promote the marriage relationship or institution of marriage.”).

310. By its nature, marriage involves compromises and, arguably, sacrifices on the part of both spouses. That spouses might give up *some* of their rights of privacy is not surprising. Cases like *White v. White*, 781 A.2d 85, 92 (N.J. Super. Ct. Ch. Div. 2001), highlight this by recognizing that a spouse's right of privacy to property that both spouses regularly use is less than a spouse's right of privacy would be to property that only one spouse uses, *id.* at 92. The point here is that spouses living together should have the same rights of privacy vis-à-vis one another as non-married individuals living together.

Similarly, courts have held that individuals who lack an ownership interest in property, like employees, can have rights of privacy in property owned by others.<sup>311</sup> It is counterintuitive to grant an owner of property fewer privacy protections than a non-owner of that property would have. Spouses with an ownership interest in community property should have as much, if not more, privacy rights than someone like an employee, who has no ownership interest in his employer's property.

While history, modern jurisprudence, and policy considerations seem to encourage courts and lawmakers to conclude that spouses in community property jurisdictions have a right of privacy from one another, arguments against finding a right of privacy certainly exist.

Reading the jurisprudence regarding intra-spousal privacy may lead to questions regarding what a right of privacy is really protecting. The vast majority of cases in which intra-spousal privacy claims have been raised involve one spouse thinking, correctly or incorrectly, that the other spouse is committing adultery.<sup>312</sup> While a spying spouse may desire evidence of the other spouse having an extramarital affair for any number of health and safety reasons,<sup>313</sup> the common use of such information is, as previously stated, for leverage in custody and spousal support disputes.<sup>314</sup> Some may argue that spouses should have a right to obtain evidence of adultery by any means because of the impact it may have on custody and spousal support litigation. Furthermore, in at least some other areas of the law, it has been stated that adultery is not protected under privacy law.<sup>315</sup>

311. See *supra* Section III.A.3.

312. See, e.g., *Simpson v. Simpson*, 490 F.2d 803, 804–05 (5th Cir. 1974), *overruled by* *Glazner v. Glazner*, 347 F.3d 1212 (11th Cir. 2003); *Miller v. Meyers*, 766 F. Supp. 2d 919, 924–25 (W.D. Ark. 2011); *O'Brien v. O'Brien*, 899 So. 2d 1133, 1134 (Fla. Ct. App. 2005); *In re Marriage of Tigges*, 758 N.W.2d 824, 825 (Iowa 2008); *People v. Walker*, 813 N.W.2d 750, 750–51 (Mich. 2012) (mem.); *State v. Hormann*, 805 N.W.2d 883, 887 (Minn. Ct. App. 2011); *White v. White*, 781 A.2d 85, 91–92 (N.J. 2001); *Byrne v. Byrne*, 650 N.Y.S.2d 499, 500 (Sup. Ct. 1996); *Miller v. Brooks*, 123 N.C. 20, 28, 472 S.E.2d 350, 355 (1996); *Clayton v. Richards*, 47 S.W.3d 149, 153 (Tex. Ct. App. 2001).

313. Jennifer Mitchell, *Sex, Lies, and Spyware: Balancing the Right to Privacy Against the Right to Know in the Marital Relationship*, 9 J.L. & FAM. STUD. 171, 183 (2007).

314. See *supra* notes 180–82 and accompanying text.

315. See *Oliverson v. W. Valley City*, 875 F. Supp. 1465, 1478–79 (D. Utah 1995) (holding that a police officer who was suspended without pay due to his extramarital affairs that occurred during non-duty hours had no right of privacy in his adultery); *City of Sherman v. Henry*, 928 S.W.2d 464, 469–70 (Tex. 1996) (holding that a police officer who was denied promotion due to his adulterous actions had no right of privacy in those actions). *But see* *Briggs v. N. Muskegon Police Dep't*, 563 F. Supp. 585, 590–92 (W.D. Mich. 1983) (holding that a married police officer's right of sexual privacy was infringed

Accordingly, it may be argued that the law should not concern itself with protecting a spouse's ability to keep private evidence of adultery.

While concerns of adultery may be a catalyst, and perhaps even the primary impetus, for many spouses to snoop, evidence of adultery is not the only item found when a spouse's seclusion is intruded upon. The discovery of a spouse's private matters is—as the *Clayton* court noted—a serious concern, particularly given that the private matters discovered can be repeated and distributed by the spying spouse to the detriment of the spied-upon spouse.<sup>316</sup> Though some individuals might like an intra-spousal privacy doctrine that protects privacy when the spied-on spouse is free of any wrongdoing, but allows for spying when the spied-on spouse is engaged in less savory behavior, certainly that cannot be the law. Intra-spousal privacy law, like Fourth Amendment law, cannot and should not be crafted using an ends-justifies-the-means formula.<sup>317</sup>

It may be argued that the very nature of community property dictates that spouses have no rights of privacy from one another. Community property law has been said to take a “wastebasket” approach to property, throwing all property into the community classification unless it falls under one of the limited instances of separate property.<sup>318</sup> Historically, the wastebasket approach was taken so far as to find that damages to an individual spouse for his or her own pain and suffering should be classified as community property.<sup>319</sup> If spouses want privacy, they can always opt out of the community property regime. To the extent they do not, it may be argued that the spirit of community property law says spouses should have access to all property created or acquired during the marriage.

In modern times, community property jurisdictions have moved away from the wastebasket approach. Rules regarding the classification of damages received for pain and suffering as

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upon when he was fired for living with a woman who was not his wife), *aff'd unpublished table decision*, 746 F.2d 1475 (6th Cir. 1984), *cert. denied*, 473 U.S. 909 (1985).

316. *Clayton*, 47 S.W.3d at 153; Samantha H. Scheller, Comment, *A Picture Is Worth a Thousand Words: The Legal Implications of Revenge Porn*, 93 N.C. L. REV. 551, 551 (2014) (documenting and analyzing the use of private photography and videotapes for the purpose of exacting revenge on an ex-partner).

317. See *Olmstead v. United States*, 277 U.S. 438, 473–76 (1928) (Brandies, J., dissenting), *overruled by Katz v. United States*, 389 U.S. 347 (1967).

318. *In re Marriage of Parsons*, 622 P.2d 415, 416 (Wash. Ct. App. 1981); Harry M. Cross, *The Community Property Law Revised*, 61 WASH. L. REV. 13, 28 (1986) (noting the historical use of the wastebasket approach).

319. *E.g.*, *Zaragosa v. Craven*, 202 P.2d 73, 76–77 (Cal. 1949) (en banc).

community property have long been reversed.<sup>320</sup> There are numerous instances in which property created and acquired during marriage is classified as separate property.<sup>321</sup> Community property states easily recognize that spouses can be in a community while still retaining a degree of separateness in their property.<sup>322</sup>

Ultimately, the reasons for holding in favor of a right of intra-spousal privacy in a community property regime outweigh those against it. Such a conclusion places privacy claims in line with other intra-spousal tort claims in community property jurisdictions. All community property jurisdictions have abolished the traditional rule of intra-spousal immunity in tort.<sup>323</sup> There is not a strong rationale for treating privacy rights differently than any other tort.

However, while spouses in community property regimes should have rights of privacy vis-à-vis one another, those rights must take into account the rights of the other spouse who also has an ownership interest in the property. Just as it cannot be the rule that one spouse has no recourse against the other for secretly videotaping her because of community property law, it similarly cannot be the rule that one spouse can hide financially valuable assets from the other because of privacy law.

#### *B. Altering the Community Property Regime to Protect Privacy*

Given that joint ownership and management of community property are the primary differences between community and separate property regimes, to undo these parts of community property may be considered a dismantling of the entire institution. Thus, some may assert that the best solution to the intra-spousal privacy problem is to do away with community property altogether.

That drastic solution throws the baby out with the bathwater. There are arguably many benefits created by community property law.<sup>324</sup> As has been noted, community property law is advantageous at

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320. See, e.g., TEX. FAM. CODE ANN. § 3.001 (West, Westlaw through 2015 Reg. Sess.); *Soto v. Vandeventer*, 245 P.2d 826, 832 (N.M. 1952); *Brown v. Brown*, 675 P.2d 1207, 1212 (Wash. 1984) (en banc).

321. See *supra* notes 188–92 and accompanying text.

322. *Id.*

323. See REPPY ET AL., *supra* note 182, at 233.

324. See, e.g., David W. Reinecke, *Community Property Issues for Noncommunity Property Practitioners*, 28 ACTEC J. 224, 233–35 (2002) (discussing tax and fairness advantages for community property jurisdictions). *But see* Andrea B. Carroll, *The Superior Position of the Creditor in the Community Property Regime: Has the Community Become a Mere Creditor Collection Device?*, 47 SANTA CLARA L. REV. 1, 2 (2007)

death, for in separate property jurisdictions, sophisticated individuals can plan around probate devices like the elective share that work to divide property equitably between spouses.<sup>325</sup> Community property law can also serve as an equalizer between the spouses because it generally allows for equal ownership of property acquired while married, regardless of which spouse specifically earned the property.<sup>326</sup> Historically, this has primarily benefitted women, given that women were less likely than men to be the primary financial provider for the family.<sup>327</sup> Regardless of the gender of the spouses, community property has an equalizing effect for the non-breadwinning spouse.

Assuming community property jurisdictions view community property law as beneficial and wish to retain it while also protecting intra-spousal privacy rights, then jurisdictions must take a hard look at how their current laws can be amended to adequately protect intra-spousal privacy rights.

Some of the most egregious examples of spousal spying, such as spouses secretly videotaping one another, may already be protected against under the constitutional theory that the right to bodily autonomy is among the penumbra of rights of privacy.<sup>328</sup> If the court recognizes that a spouse secretly records the other and state community property law is such that the videotaped spouse has no legal remedy, then the court might strike down the application of community property law. That a court would reach such a conclusion is far from certain.

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(arguing that community property is primarily advantageous for creditors, not the spouses themselves).

325. Turnipseed, *supra* note 197, at 177–82.

326. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-214(c) (Westlaw through 2016 2d Reg. Sess.).

327. Vaughn, *supra* note 302, at 38–41. Moreover, to the extent that women receive less pay than men even today, community property law can still be an equalizer between opposite sexes in a marriage. *See* NAT'L EQUAL PAY TASK FORCE, FIFTY YEARS AFTER THE EQUAL PAY ACT: ASSESSING THE PAST, TAKING STOCK OF THE FUTURE 6–7 (2013).

328. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992). In *Griswold*, Justice William Douglas described the constitutional rights of privacy protected by the Fourteenth Amendment as a “penumbral rights of privacy and repose.” *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (citing *Breard v. City of Alexandria*, 341 U.S. 622, 626 (1951), *abrogated by Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980)). Bodily autonomy has been held to be part of that penumbra. *See Roe v. Wade*, 410 U.S. 113, 155 (1973) (holding the right of privacy included the right for a woman to decide whether to have an abortion, though that right may be reasonably qualified by legislation).

Similarly, the federal ECPA may preempt the application of state community property law with regard to intercepted electronic communications. Modern federal courts have held that the ECPA applies to spouses.<sup>329</sup> To the extent that state community property law requires the ECPA to exclude spouses, then state community property law may be preempted. Federal courts have not hesitated to preempt other areas of community property law,<sup>330</sup> so there is no reason to think federal courts would not preempt the application of state community property with regards to the ECPA.

Though current privacy laws may protect some aspects of intra-spousal privacy in community property jurisdictions,<sup>331</sup> they do not protect everything. Community property jurisdictions must still consider modifying ownership and management rules to ensure spouses maintain their individual rights of privacy.

### 1. Change Ownership Rules

Joint ownership of community property is, arguably, at the root of the intra-spousal privacy problem for community property jurisdictions. Accordingly, joint ownership rules could be altered to protect a spouse's right of privacy.

One means by which community property ownership could be modified to protect privacy rights would be to find that intellectual property rights are not subject to community property law. Numerous scholars have previously argued that intellectual property rights should not be subject to community property law,<sup>332</sup> and the privacy issues raised herein may strengthen those arguments. Making

329. *E.g.*, *Collins v. Collins*, 904 S.W.2d 792, 797 (Tex. Ct. App. 1995), *writ denied per curiam*, 923 S.W.2d 569 (Tex. 1996).

330. *See* *Boggs v. Boggs*, 520 U.S. 833, 834 (1997) (holding that ERISA preempts the application of state community at death); *McCarty v. McCarty*, 453 U.S. 210, 235–36 (1981) (holding that federal law pertaining to military retirement pay preempts the application of state community property law); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 590–91 (1979) (holding that the Railroad Retirement Act preempts the application of state community property law); *Yiatchos v. Yiatchos*, 376 U.S. 306, 313–14 (1964) (holding that federal statutes pertaining to United States savings bonds preempts the application of state community property law); *Free v. Bland*, 369 U.S. 663, 669 (1962) (same).

331. *See, e.g.*, *King v. Uhlmann*, 437 P.2d 928, 941–42 (Ariz. 1968) (en banc).

332. *See, e.g.*, Dane S. Ciolino, *Why Copyrights Are Not Community Property*, 60 LA. L. REV. 127, 128 (1999); Lydia A. Nayo, *Revisiting Worth: The Copyright as Community Property Problem*, 30 U.S.F. L. REV. 153, 155–56 (1995); David Nimmer, *Copyright Ownership by the Marital Community: Evaluating Worth*, 36 UCLA L. REV. 383, 385 (1988); Debora Polacheck, Note, *The “Un-Worth-Y” Decision: The Characterization of a Copyright as Community Property*, 17 HASTINGS COMM. & ENT. L.J. 601, 603 (1995).

intellectual property rights separate property would potentially have the benefit of protecting material subject to copyright, like the content of email or diaries, from the prying eyes of a non-authoring spouse.

The difficulties with carving out intellectual property rights from community law are three-fold. First, it is unclear that making intellectual property rights separate property would have any impact on the ownership of the thing the intellectual property right protects. For example, in *Rodrigue v. Rodrigue*,<sup>333</sup> the Fifth Circuit held that the copyright to particular paintings was subject to community property law and, within community property law, under the sole management of the artist-husband.<sup>334</sup> However, that result had no bearing as to who had managerial control over the paintings themselves. Similarly, even if a copyright (or other intellectual property right) is the separate property of one spouse, that does not mean the work underlying the copyright would also be the separate property of that spouse.

Second, even if carving out intellectual property rights provides a greater right of privacy in certain forms of community property, there are other forms of property in which privacy issues arise that are not covered by intellectual property. The alarm clock in *Tigges* in which the husband inserted a pinpoint camera is such an example.<sup>335</sup> Making intellectual property rights separate property does nothing to protect against the altered community property alarm clock sitting in the community property house.

Third, there is a downside to making intellectual property rights separate. Intellectual property rights can be very fruitful financially. The profits generated by the intellectual property rights, to the extent they are attributable to the labor of a spouse during marriage, should be classified as community property. If intellectual property rights are classified as separate property, then under some community property jurisdictions, those profits would not fall under the community umbrella. Given these difficulties, changing community property ownership law to carve out intellectual property is an unsatisfactory approach.

Another approach to altering community property ownership law is to utilize Neil Richards's understanding of "intellectual

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333. 218 F.3d 432 (5th Cir. 2000).

334. *Id.* at 442–43.

335. *In re Marriage of Tigges*, 758 N.W.2d 824, 825 (Iowa 2008).

privacy” and find there is no community ownership in items that fall under the intellectual privacy rubric.<sup>336</sup> Richards argues that

[i]nformation relating to intellectual activity is increasingly being created, tracked, and maintained by government and private entities. Such information practices have conventionally been thought of as raising privacy concerns, but privacy has frequently failed to stand up to the countervailing interests that have been arrayed against it.<sup>337</sup>

Accordingly, Richards has developed a theory of intellectual privacy that establishes four freedoms that should be protected: freedom of thought and belief, freedom of intellectual activity and private spaces, freedom of private intellectual exploration, and freedom of confidential communications.<sup>338</sup> Richards argues that constitutional doctrine and state laws could be used to protect some of these areas of intellectual privacy.<sup>339</sup> He suggests, for example, that Fourth Amendment warrant requirements could be imposed in order for the government to obtain “intellectual records” from third parties, such as book purchases and search engine queries.<sup>340</sup> Similarly, Richards states that communications could be protected by “(1) preventing interception of . . . communications by third parties and (2) sometimes also preventing betrayal of confidences by . . . confidants.”<sup>341</sup>

While Richards’s theory of intellectual privacy does not perfectly overlay community property law, it could be used as a foundation for reconsidering rules of community property ownership. To the extent that intellectual activity, thoughts, and confidential communications are considered property, and thus could be classified as community property, jurisdictions might consider placing these items of intellectual privacy into the separate property classification. The private thoughts a spouse included in a diary would be considered the spouse’s separate property because they are part of the spouse’s intellectual privacy.

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336. See Neil M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387, 426 (2008) (arguing that intellectual property serves a vital function in the furtherance of the ultimate realization of First Amendment rights).

337. *Id.* at 427.

338. *Id.* at 408–25.

339. *Id.* at 431.

340. *Id.* at 439.

341. *Id.* at 422 (emphasis removed).

The difficulty in applying the intellectual privacy theory is drawing the line between when a thought or communication should fall under the classification of intellectual privacy and when that same thought or communication has moved beyond a private one and into a public one such that it should be classified as community property.<sup>342</sup> For example, assume a spouse, while married, begins to develop an idea for a book, but the idea is not fully fleshed out, the characters are not developed, and the setting is not even chosen. Divorce occurs and thereafter the spouse with the book idea writes the book she began to develop while married.<sup>343</sup> Under community property law, to the extent the authoring spouse exerted any labor on the book while married, some portion of the book (and its profits) is classified as community property. Under an intellectual privacy theory, the result might differ. If the development of the book while the spouses were married was considered the intellectual privacy of the authoring spouse, and those ideas did not become part of the public domain until after divorce, then there would be no community interest in the book.

Using Richards's theory may not perfectly capture or govern all of the items spouses wish to keep private during a marriage. Richards's theory has the benefit, though, of providing a starting point for reconsidering community property ownership law because it addresses some of those items that spouses might reasonably desire to keep private.<sup>344</sup> Additionally, Richards's theory builds in a level of necessary flexibility, as he acknowledges that "some accommodation of competing interests must necessarily take place."<sup>345</sup>

## 2. Change Management Rules

Some jurisdictions may, perhaps wisely, exhibit reticence to change community property ownership laws given the potentially vast

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342. See *id.* at 422. Richards describes the notion of a communication as private when it is not ready for "prime time[.]" *Id.* Accordingly, an idea that is in the public, or prime time, would ostensibly not be considered part of one's intellectual privacy. *Id.*

343. This fact pattern is akin to the facts of *Michel v. Michel*, 484 So. 2d 829, 833–34 (La. Ct. App. 1986).

344. Richards's goal is to keep thoughts private, even when those thoughts take on a tangible form. See Richards, *supra* note 336, at 388–89. Much of the community property that a spouse may wish to keep private can be described as the thoughts of that spouse that have taken a tangible form.

345. *Id.* at 408.

unintended consequences that may accompany such changes. A more surgical approach may thus be desired.<sup>346</sup>

Jurisdictions could instead opt to alter management rules. Altering management rules would have the benefit of not making it easier to classify property as separate and thus thwart the community property system. If jurisdictions so chose, there are a number of options for how management rules could be amended to reflect intra-spousal privacy rights.

First, as previously noted, courts might interpret sole management as providing an intra-spousal right of privacy.<sup>347</sup> That interpretation would not be a difficult stretch for courts; however, to date, no court has reached that decision. It would require courts to acknowledge that spouses with an ownership interest in community property can be excluded from that property, thereby making the joint ownership found in community property different from other jointly held property rights where joint interest holders cannot be excluded.

For jurisdictions concerned about whether courts will interpret sole management as providing a right of privacy, legislatures could amend sole management statutes to clearly provide that sole management includes the right to exclude the non-managing spouse from the community property. In doing so, legislatures must be cautious to exclude the non-managing spouse only from using or accessing the property, not from any financial benefits that may flow from the property.

Assuming sole management is interpreted to provide a right of privacy for one spouse, jurisdictions have alternatives as to how to bring more property under the sole management umbrella. One possibility is to make it easier for spouses to convert property that would otherwise be subject to equal management or joint management to property subject to sole management. While all community property jurisdictions allow spouses to contractually opt out of the community property regime, only two states—Louisiana and Texas—explicitly allow spouses to alter the managerial regime that applies to community property.<sup>348</sup> Louisiana requires that this

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346. As courts have said, there is no need to use a butcher knife when a scalpel will suffice. *See, e.g.,* *Perez v. Volvo Car Corp.*, 247 F.3d 303, 315 (1st Cir. 2001).

347. *See supra* Section III.B.2.

348. LA. CIV. CODE ANN. art. 2348 (Westlaw through 2016 2d Extraordinary Sess.) (allowing spouses to renounce their right to concur in managerial decisions for property subject to joint management); TEX. FAM. CODE ANN. § 3.102(c) (West, Westlaw through

alteration be done expressly, and, to the extent the alteration concerns real property, be done in writing.<sup>349</sup> At least one Texas court has allowed for oral agreements to serve as an agreement modifying the managerial scheme applied to community property.<sup>350</sup>

If sole management is interpreted as providing a right of privacy for one spouse, then jurisdictions could follow the Louisiana and Texas models and allow for spouses to contract around the default managerial rules.<sup>351</sup> This would allow spouses to agree that certain forms of property otherwise subject to equal management, such as the hypothetical diary previously mentioned, would be subject to sole management. The form requirements that jurisdictions establish, or do not establish, would determine the ease with which spouses could enter into such management-altering agreements.

A second possibility would be to increase the types of property subject to sole management. Privity of contract, for example, could be incorporated in the types of community property rights subject to sole management. That would allow for any property created under a contract between one spouse and a third party to be subject to the sole management of the contracting spouse. This would mirror, to some extent, the current registration rule for movable property. Property registered in one spouse's name alone is subject to sole management. Similarly, property contracted for by one spouse alone could be subject to sole management. The effect for privacy rights would be that property like email accounts and Facebook profiles would clearly be subject to sole management.<sup>352</sup>

The downside with incorporating privity of contract under the umbrella of sole management is that other properties, sometimes with high economic values, may be roped into the sole management scheme, too, for better or worse. Before jurisdictions decide that the way to ensure email is protected is to codify privity of contract

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2015 Reg. Sess.) (allowing for alterations in management to be made via written or other agreement).

349. LA. CIV. CODE ANN. art. 2348 (Westlaw).

350. See *LeBlanc v. Waller*, 603 S.W.2d 265, 267 (Tex. Civ. App. 1980). *But see* *Owen v. Porter*, 796 S.W.2d 265, 268 (Tex. Civ. App. 1990) (establishing that oral or implied agreements did not meet the requirements for altering the managerial scheme over particular community property).

351. See LA. CIV. CODE ANN. art. 2348 (Westlaw); TEX. FAM. CODE ANN. § 3.102(c) (Westlaw).

352. Arguably, e-mail accounts should already be considered under sole management pursuant to the registration rule. See Richardson, *How Community Property Jurisdictions*, *supra* note 26, at 112 (discussing Twitter accounts as an example of virtual property).

principles, jurisdictions should carefully consider whether pensions, 401(k) accounts, and similar items which are contracted for should also be subject to sole management.

A more nuanced approach would be to provide that property operated exclusively by one spouse or property for the exclusive benefit of one spouse is subject to that spouse's sole management. That rule reflects the general principle behind placing the personal property of a solely managed community business under the sole management scheme—if one spouse utilizes the property, that spouse should have managerial control over the property. This may solve the problem of the diary or an email account, without making more financially important properties, like a retirement account, subject to sole management. Under this approach, if one spouse, and only one spouse, uses an email account, the other spouse could be precluded from reviewing that account because the account is subject to the exclusive use of one spouse. A retirement account, however, is arguably for the benefit and use of both spouses, and thus would not fall under the sole management rule.

The notion of granting rights of privacy in property subject to one spouse's exclusive use has been used in other areas of the law, such as Fourth Amendment law. Privacy rights under the Fourth Amendment turn, in part, on whether an individual has exclusive use of the property. In *United States v. Matlock*,<sup>353</sup> the Court examined privacy rights under the Fourth Amendment that arose when a co-occupant of a bedroom consented for the police to search the bedroom.<sup>354</sup> The Court held that the evidence found in the bedroom was admissible because the consent of a party who possessed common authority over the bedroom was sufficient under the Fourth Amendment.<sup>355</sup> In discussing what it meant to have "common authority," the *Matlock* Court stated that the authority rests "on

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353. 415 U.S. 164 (1974).

354. *Id.* at 177. The standard for evaluating whether a search violates an individual's privacy as provided by the Fourth Amendment is different than the analysis used under tort law. The Fourth Amendment has been interpreted as creating a two-prong standard whereby courts first examine whether the individual had a subjective expectation of privacy, *see Minnesota v. Olson*, 495 U.S. 91, 95–96 (1990), and second, consider whether the expectation of privacy is objectively reasonable, *see O'Connor v. Ortega*, 480 U.S. 709, 715 (1987). For an explanation of the common law right of privacy, *see generally supra* Section II.A.

355. *Matlock*, 415 U.S. at 171–72, 177.

mutual use of the property by persons generally having joint access or control for most purposes.”<sup>356</sup>

The black letter law from *Matlock* exemplifies the type of privacy rule community property jurisdictions could enact. Community property states might statutorily apply sole management to community property that is subject to the exclusive use, access, or control by one spouse for most purposes and is for the benefit of one spouse.<sup>357</sup>

A different approach that could be taken by legislatures or courts would be to create a privacy exemption for certain types of community property that are private in nature. Instead of altering sole management rules, jurisdictions could find that some community property is so private in nature that it should not be disclosed to the other spouse. This is not to say the other spouse does not retain an ownership interest in the property, but simply to say that the property is exempt from disclosure.

Drawing the line as to what properties are so private in nature that they should be exempt from intra-spousal disclosure will not be easy. Though jurisdictions may codify the broad exemption rule, courts will ultimately need to determine whether community property is of a private nature. That determination will likely be made through a subjective, “I know it when I see it” approach.<sup>358</sup> Jurisdictions that opt to create a privacy exemption for community property may want to create some boundaries regarding what could constitute private property. Those boundaries might include protections for the excluded spouse. For instance, property impacting the financial position of the spouses could be excluded under the privacy exemption.

Creating a privacy exemption, though novel to community property law, is not unheard of. The Freedom of Information Act

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356. *Id.* at 171 n.7.

357. In doing so, jurisdictions may have to determine whether joint management provisions or sole management provisions should trump. For example, if only one spouse uses some household furnishing, such as a piano, it may be argued that the furnishing is subject to the sole use of one spouse and for only that spouse’s benefit. Arguably the piano is for the benefit of both spouses, but assuming it is not, then jurisdictions will have to decide whether the piano should be subject to the joint management rule because (1) it is a household furnishing; (2) it is subject to the sole management rule; or (3) it is an item used by and for the benefit of only one spouse.

358. See *Jacobellis v. Ohio*, 378 U.S. 184, 198 (1964) (Stewart, J., concurring) (utilizing the “I know it when I see it” approach).

(“FOIA”) provides an example.<sup>359</sup> FOIA allows for public inspection of records held by government bodies.<sup>360</sup> Exemption 6, the privacy exemption, limits what must be publicly available and allows certain documents to be withheld from public inspection if their disclosure “would constitute a clearly unwarranted invasion of personal privacy.”<sup>361</sup> Exemption 6 is an example of how community property states might build a privacy protection into certain types of community property.

A privacy exemption would serve as a means of protecting private information from community disclosure. Alternatively, states could create or enhance an affirmative managerial duty of spouses to disclose pertinent information to one another. Community property jurisdictions could follow provisions like California Family Code section 1100(e), which requires that a spouse “make full disclosure to the other spouse of all material facts and information regarding the existence . . . of all assets in which the community has or may have an interest.”<sup>362</sup> Though such provisions thus far have only required the disclosure of financial assets,<sup>363</sup> states could, legislatively or jurisprudentially, interpret such provisions as requiring the affirmative disclosure of all information that might be pertinent to the married couple. This could include information such as adulterous behavior, but exclude from disclosure the private, written thoughts of one spouse which may have no material impact on the marriage, but could cause unnecessary havoc if disclosed.

#### CONCLUSION

Courts in community property jurisdictions have not yet answered the question of where community property rights end and spousal privacy rights begin. However, courts should prioritize finding a solution to this issue to ensure that privacy rights are protected for spouses. This Article serves as a roadmap for how courts and legislatures can approach the issue without dismantling the entire community property system.

Ultimately, crafting a solution for ensuring that intra-spousal privacy is provided in community property regimes will require states

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359. 5 U.S.C. § 552 (2016).

360. *Id.* § 552(a).

361. *Id.* § 552(b)(6). *See* CHARLES H. KOCH, JR. & RICHARD MURPHY, 4 ADMIN. L. & PRAC. § 14:62 (3d ed. 2010) (discussing the privacy exemption allowed by most states).

362. CAL. FAM. CODE § 1100(e) (West, Westlaw through 2016 Reg. Sess. laws).

363. *See, e.g., In re Marriage of Feldman*, 64 Cal. Rptr. 3d 29, 46–47 (Ct. App. 2007).

individually to reflect on their pertinent statutes and jurisprudence to determine the most surgical means of clarifying what rights spouses have vis-à-vis one another. In doing so, states should be careful to balance an individual spouse's right of privacy with the other spouse's rights as partial owner of the community property.

In balancing the spouses' rights of privacy and ownership, jurisdictions might return to the oft-cited creators of privacy law, Warren and Brandeis. In *The Right of Privacy*, Warren and Brandeis wrote that there were limits to an individual's privacy.<sup>364</sup> These limitations on the right of privacy as described by Warren and Brandeis remain an important aspect of privacy law and may influence community property jurisdictions as to how far an intra-spousal privacy right should cut into community property law. Warren and Brandeis wrote that an individual's privacy must yield to matters of public importance, such as health, safety, and welfare.<sup>365</sup> The invasion of a spouse's privacy for the purposes of protecting the safety of the other spouse or a child should thus be warranted.<sup>366</sup> This limitation should likely be interpreted beyond mere physical health, safety, and welfare, to include economic safety and welfare. If a spouse consents to her spouse searching through her private writings or emails, that consent should negate any privacy claim asserted by the consenting spouse, similar to how Warren and Brandeis argued consent should generally preclude a privacy claim.

While the suggestions herein provide a way forward specifically for community property jurisdictions, these solutions may also serve as a starting point for privacy rights with regards to other forms of jointly held property. Community property law provides no answer for what rights of privacy two spouses have vis-à-vis one another with regard to their jointly owned property, but co-ownership law similarly has no answer to what rights of privacy co-owners have vis-à-vis one another with regards to co-owned property. Community property is one form of joint ownership, but it is not the only form. In all situations in which individuals have concurrent property rights, the issue of privacy can arise. Community property, as explored in this Article, may provide a case study for the intersection of privacy and other jointly held forms of property.

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364. Warren & Brandeis, *supra* note 1, at 214–18. See *supra* Section II.A.1 (discussing the limits proposed by Warren and Brandeis).

365. *E.g.*, Kathleen K. v. Robert B., 198 Cal. Rptr. 273, 276 (Ct. App. 1984).

366. *E.g.*, State v. Poling, 938 N.E.2d 1118, 1124 (Ohio Mun. Ct. 2010).