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Reading Between the Lines: Why a Qualified "Clean Hands" Exception Should Preclude Suppression of Wiretap Evidence Under Title III of the Omnibus Crime Control and Safe Streets Act of 1968

Shaun T. Olsen

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READING BETWEEN THE LINES: WHY A QUALIFIED "CLEAN HANDS" EXCEPTION SHOULD PRECLUDE SUPPRESSION OF WIRETAP EVIDENCE UNDER TITLE III OF THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968

I. INTRODUCTION

With the increase in the use of electronic communication technologies, law enforcement officials have become increasingly reliant on the use of electronic surveillance techniques to aid the government in the detection and combat of terrorism and other forms of organized crime, as well as criminal prosecutions in general.¹ At the same time, given the potential for their misuse and the broad intrusion into an individual's privacy, significant concerns over the use of electronic surveillance methods have arisen.² These concerns are based on the

¹ See S. REP. NO. 90-1097, at 72 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2159-61; *see also* WHITFIELD DIFFIE & SUSAN LANDAU, *PRIVACY ON THE LINE: THE POLITICS OF WIRETAPPING AND ENCRYPTION* 153 (MIT Press 1998) (noting that "[e]lectronic surveillance is a tool that can detect criminal conspiracies and provide prosecutors with strong evidence - the conspirators' incriminating statements in their own voices - all without danger to law enforcement officials"); CRAIG R. DUCAT, *CONSTITUTIONAL INTERPRETATION: RIGHTS OF THE INDIVIDUAL* 815 (6th ed. 1996) (discussing the mix of the development of technology and systemic frustration with other methods of information gathering techniques leading to the development of the wiretap as a new tool for the enforcement of laws); William P. Rogers, *The Case for Wiretapping*, 63 *YALE L.J.* 792 (1954), *reprinted in* MONRAD G. PAULSEN, A.L.I., *THE PROBLEMS OF ELECTRONIC EAVESDROPPING* 16 (1977) (stating that "[w]iretapping by law enforcement officials is a necessary concomitant of our present day pursuit of spies, saboteurs, and other subversives [and] is no worse . . . than the use of informants, decoys, dictaphones, peeping, and the like - all of which have been accepted practices for many years").

² See DIFFIE & LANDAU, *supra* note 1, at 153. Commenting on dangers associated with the use of wiretapping techniques to obtain information, Diffie and Landau note "the very invisibility on which electronic surveillance depends for its effectiveness makes it evasive of oversight and readily adaptable to malign uses." *Id.* "Electronic surveillance can be and has been used by those in power to undermine the democratic process by spying on their political opponents." *Id.*; *see also* L. Schwartz, *On Current Proposals to Legalize Wiretapping*, 103 *U. PA. L. REV.* 157 (1954), *reprinted in* PAULSEN, *supra* note 1, at 11-12. In commenting on the chilling effect that wiretapping techniques can have for human, commercial, and political interaction, Schwartz notes:

Free conversation is often characterized by exaggeration, obscenity, agreeable falsehoods, and the expression of antisocial desires or views not intended to be taken seriously. The unedited equality of conversation is essential if it is to preserve its intimate, personal and

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emergence, development, and expansive use of an extensive landline telecommunications infrastructure, and more recently, the wireless telecommunications infrastructure within the United States.³ Starting in the early 1900s and extending through the 1960s, the United States Supreme Court struggled to define the proper use of electronic surveillance techniques by law enforcement officials, particularly wiretapping techniques.⁴ The Court concluded that the use of wiretaps implicated individuals' privacy interests to such a degree that the Fourth Amendment required law enforcement officials to obtain warrants in order to use information gathered from wiretaps as evidence in prosecutions.⁵

informal character. How anxious people are to preserve this unedited aspect of telephone conversations can be seen from the public reaction against the recording of telephone conversations even by one of the parties to the call The objection, of course, is even more serious when it becomes a matter of having one's telephone conversations recorded by police agents. Government officials and business and political leaders are beginning to hesitate to employ the telephone, so that we may be reaching a stage where the telephone's usefulness as an instrument of commerce and government is being impaired, without demonstrable gains in law enforcement.

Schwartz, *supra*, at 11-12.

³ See DIFFIE & LANDAU, *supra* note 1, at 1 (discussing some of the ways telecommunications have been established as an intrinsic element of modern society). In their observations on the pervasive and catalytic effect of telephonic communications on society, Diffie and Landau note:

[W]e now conduct more and more of our communications, whether personal, business, or civic, via electronic channels. The availability of telecommunication has transformed government, giving administrators real-time access to their employees and representatives in remote parts of the world. It has transformed commerce, facilitating worldwide enterprises and beginning the internationalization of business that is the byword of the present decade. It has transformed warfare, giving generals the ability to operate from the safety of rear areas and admirals the capacity to control fleets scattered across oceans. It has transformed personal relationships, allowing friends and family to converse daily even though the live thousands of miles apart To attempt to function in modern society without employing telecommunication is to be eccentric.

Id.

⁴ See *Katz v. United States*, 389 U.S. 347, 352 (1967). Writing for the majority, Justice Stewart noted the expansive role "the public telephone has come to play in private communication." *Id.*

⁵ *Id.* Justice Stewart, in writing the opinion of the Court, indicated that when individuals take the necessary steps to assure the privacy of their telephone conversation, they may "rely upon the protection of the Fourth Amendment." *Id.* Justice Stewart continued and stated that a person placing a call "is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world." *Id.* "To read the Constitution more

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In this context, Congress enacted Title III as a part of the Omnibus Crime Control and Safe Streets Act of 1968 (Act).⁶ In promulgating Title III, Congress attempted to provide law enforcement officials with the necessary electronic surveillance tools to detect and prosecute "serious" crimes while balancing society's interest in protecting the privacy of telephonic communications.⁷ At the core of this balancing of interests in Title III is Section 2515.⁸ Section 2515 operates to suppress any evidence directly or indirectly derived from actions violating the Act.⁹ In addition to Section 2515, Title III also provides for civil and criminal penalties for those who violate its strictures.¹⁰

On its face, Section 2515 appears to require the suppression of any evidence gathered in a manner that violates Title III.¹¹ However, the suppression of all offending wiretap derived evidence is not clearly

narrowly is to ignore the vital role" that telephone occupies in an individual's ability to communicate with others. *Id.*

⁶ See generally Stephen L. Sapp, *Private Interceptions of Wire and Oral Communications Under Title III: Rethinking Congressional Intent*, 16 AM. J. CRIM. L. 181, 184 (1989). The final product of Title III was drafted in light of the history of wiretapping and to comply with Supreme Court decisions. *Id.*

⁷ Sapp, *supra* note 6, at 185. Specifically, Congress intended to provide national standards and directions to law enforcement officials. *Id.* at 184. Additionally, Congress sought to protect personal privacy by prohibiting all unauthorized wiretaps by both government and private parties. *Id.* at 185. However, Congress limited the protection of privacy by permitting the use of wiretaps to combat organized and otherwise serious crime. *Id.*

⁸ *Fleming v. United States*, 547 F.2d 872, 873 (5th Cir. 1977); see also *United States v. Wuliger*, 981 F.2d 1497, 1506 (6th Cir. 1992) (noting Congress' view that Section 2515 largely reflects current exclusionary rule jurisprudence and is not intended to extend further than that body of law); *United States v. Cianfrani*, 573 F.2d 835, 855 (3d Cir. 1978) (stating that Section 2515 is Title III's statutory exclusionary rule).

⁹ 18 U.S.C. § 2515 (1994). The statutory exclusionary rule of Title III is found in 18 U.S.C. § 2515, which provides:

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of the information would be in violation of this chapter.

18 U.S.C. §2515.

¹⁰ See 18 U.S.C. § 2511(4)(a) (1994) (allowing a criminal penalty of up to five years imprisonment and a fine); 18 U.S.C. § 2511(5)(a)(ii)(B) (1994) (allowing a private individual to petition the courts for an injunction against the violator, along with a mandatory \$500 civil fine, and a \$500 civil fine for each violation of any injunctive order).

¹¹ See *infra* Part IV.A-B; see also *supra* note 9 and accompanying text (quoting the full text of Section 2515).

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commanded by the plain language of Section 2515.¹² Instead, the plain language of Section 2515 appears to make suppression a discretionary act of the judiciary.¹³ Consequently, difficulties arise in attempting to apply Section 2515's exclusionary rule to law enforcement officials using wiretap evidence obtained with "clean hands" because such evidence was procured by a private actor's wiretap.¹⁴ To date, many courts facing related issues have found that it is appropriate to preclude suppression under Section 2515 based on the "good faith" exception, the alter ego of the clean hands doctrine.¹⁵

Additionally, the legislative history of the Section 2515 exclusionary rule declares that the suppression of evidence is to be consistent with the application of the Fourth Amendment's exclusionary rule.¹⁶ Under the Fourth Amendment, evidence uncovered by a private search is never subject to suppression because the Fourth Amendment limits state, not private, action.¹⁷ Therefore, in situations where a clean hands exception may apply, namely when law enforcement officials receive information from private illegal wiretaps, the text of Section 2515 and Fourth Amendment jurisprudence conflict.¹⁸ While Section 2515 may require suppression, the Fourth Amendment poses absolutely no barrier to the admission of such wiretap evidence at trial.¹⁹ As such, if the intent behind Title III was to make Section 2515 applicable only when the Fourth Amendment requires suppression, applying Section 2515 to suppress wiretap evidence where the Fourth Amendment would not

¹² See *infra* Part IV.A.1; see also *supra* note 9 and accompanying text (quoting the full text of Section 2515).

¹³ See *infra* note 218 and accompanying text (discussing the distinctions in word choice that indicate legislative commands, such as in the use of the word "shall," mandating certain action, as opposed to the word "may," allowing discretion).

¹⁴ See S. REP. NO. 90-1097, at 96 (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2184-85. Specifically, Congress indicated that the exclusionary rule in Section 2515 was not intended "to press the scope of the suppression role beyond present search and seizure law." *Id.*

¹⁵ See *infra* notes 161-63 and accompanying text (noting a number of cases that have refused to apply the Section 2515 exclusionary rule where law enforcement officials obtained information via illegal wiretaps pursuant to a good faith analysis).

¹⁶ See S. REP. NO. 90-1097 (1968), at 96, reprinted in 1968 U.S.C.C.A.N. 2112, 2184-85. Congress declared that the Section 2515 exclusionary rule "largely reflected" the jurisprudence regarding the suppression of evidence under the Fourth Amendment's exclusionary rule. *Id.*

¹⁷ See *infra* notes 38-41 and accompanying text (discussing the limitations of the Fourth Amendment and its applicability to state action but not to action taken by private individuals).

¹⁸ See *infra* Part IV.A.2.

¹⁹ See *infra* Part IV.C.1.

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creates an absurd and contrary result to that intended by Congress.²⁰ In such cases, the judiciary should adhere to the legislative intent instead of the plain language.²¹

In light of these obscurities, courts have experienced difficulty in interpreting and applying Title III when prosecutors attempt to introduce information gathered from private wiretaps that law enforcement officials receive with clean hands.²² Reflecting the difficulty in resolving this issue, decisions over the past three decades lack uniformity.²³ For instance, compare the following decisions: a Fifth Circuit decision held that clean hands should automatically preclude Section 2515 suppression;²⁴ whereas a First Circuit decision indicated that a clean hands exception to Section 2515 may be appropriate given the circumstances of the case;²⁵ while a Third Circuit decision declared that clean hands should never prevent suppression under Section 2515.²⁶

²⁰ See *infra* Part IV.A.2.

²¹ See *infra* notes 159-60 and accompanying text (ignoring the plain language of a statute where the results of the plain language would create a result absurd or contrary to legislative intent).

²² See *infra* notes 24-26 (discussing current judicial conflict).

²³ See, e.g., *Gelbard v. United States*, 408 U.S. 41, 47 (1972) (holding that grand jury witnesses are entitled to invoke Title III's suppression provision to defend against contempt charges brought for refusing to testify); *Berry v. Funk*, 146 F.3d 1003, 1012 (D.C. Cir. 1998) (rejecting both a broad "clean hands" exception and a use and disclosure exception to Section 2515); *Chandler v. United States Army*, 125 F.3d 1296, 1302 (9th Cir. 1997) (holding that police may use and disclose contents of illegally intercepted communications when innocently received); *In re Grand Jury*, 111 F.3d 1066, 1077 (3d Cir. 1997) (rejecting an "unarticulated" clean hands exception to Section 2515's exclusionary rule); *United States v. Murdock*, 63 F.3d 1391, 1404 (6th Cir. 1995) (refusing to suppress illegally intercepted communication under Section 2515 because government officials were innocent recipients of the wiretap evidence); *Forsyth v. Barr*, 19 F.3d 1527, 1545 (5th Cir. 1994) (holding that police may use and disclose internally the contents of illegally intercepted communications when innocently received); *United States v. Vest*, 813 F.2d 477, 484 (1st Cir. 1987) (suppressing illegally intercepted communication under Section 2515 despite the innocence of government officials in a perjury prosecution); *United States v. Underhill*, 813 F.2d 105, 112 (6th Cir. 1987) (refusing to suppress illegally intercepted evidence when movant was perpetrator of illegal wiretap interception); *United States v. Caron*, 474 F.2d 506, 509-10 (5th Cir. 1973) (allowing prosecution to use illegally intercepted information for impeachment purposes).

²⁴ See *Murdock*, 63 F.3d at 1404 (refusing to suppress illegally intercepted communication under Section 2515 because government was innocent recipient).

²⁵ See *Vest*, 813 F.2d at 484 (suppressing illegally intercepted communication under Section 2515 despite the fact that the government was the innocent recipient of evidence in perjury prosecution).

²⁶ See *In re Grand Jury*, 111 F.3d at 1077 (rejecting an "unarticulated" clean hands exception to Section 2515's exclusionary rule).

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This Note discusses whether evidence procured in violation of Title III, but obtained with clean hands by the government, should be admitted at trial. Specifically, this Note asserts that a qualified clean hands exception is appropriate when law enforcement officials receive evidence from an illegal private wiretap with clean hands and that information is used to prosecute serious crimes enumerated within Title III. First, Part II examines the conceptual and legal history leading to the enactment of Title III.²⁷ Second, Part III explores the enactment of Title III, judicial exceptions to the implementation of Section 2515, and the conflicting circuit decisions.²⁸ Third, Part IV discusses why a qualified clean hands exception is appropriate given the text of Section 2515, its legislative history, and the congressional balancing of privacy and crime control interests.²⁹ Finally, Part V concludes that the judiciary should adopt a model qualified clean hands exception that precludes suppression of evidence from private illegal wiretaps if received by law enforcement officials with clean hands and used in the prosecution of the serious crimes enumerated in Title III.³⁰

II. HISTORICAL BACKGROUND LEADING TO THE ENACTMENT OF THE FEDERAL WIRETAP ACT

A. *The Fourth Amendment: The Background Infrastructure Regarding the Admissibility of Evidence in Criminal Proceedings*

The historical impetus of the Fourth Amendment to the United States Constitution reflected a recognition that abuses associated with searches and seizures, such as those conducted by English officials, were a fundamental source of conflict between the public and government.³¹

²⁷ See *infra* Part II.

²⁸ See *infra* Part III.

²⁹ See *infra* Part IV.

³⁰ See *infra* Part V.

³¹ See U.S. CONST. amend. IV. The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.; see, e.g., Navigation Act of 1662, 13 & 14 Car.II, c.11, § 5 (Eng.) (directing customs officials to: “[G]o into any House, Shop, Cellar, Warehouse or Room . . . and in case of resistance, to break open Doors, Chests, Trunks, and other Packages, there to seize and from thence to bring any Kind of Goods or Merchandise whatsoever, prohibited and uncustomed”); see also Omar Saleem, *The Age of Unreason: The Impact of Reasonableness, Increased Police Force, and Colorblindness on Terry “Stop and Frisk,”* 50 OKLA. L. REV. 451, 453-54 (1997). The abuse by English governmental officials of search and seizure powers and

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Consequently, the Fourth Amendment was ratified to protect the public against arbitrary and capricious intrusions by the government.³²

In an effort to give practical effect to the Fourth Amendment's proscription of unreasonable searches and seizures, the Supreme Court developed the "exclusionary rule."³³ The exclusionary rule, as established in *Weeks v. United States*,³⁴ operates by suppressing evidence obtained by law enforcement officials in a manner violative of the Fourth Amendment.³⁵ The Court adopted the exclusionary rule because it

the resultant resentment contributed to the movement towards the American Revolution. Saleem, *supra*, at 453-54.

³² See *Brinegar v. United States*, 338 U.S. 160, 180-81 (1949) (Jackson, J., dissenting). The detrimental impact of arbitrary and capricious governmental searches and seizures was described by Justice Jackson in an opinion written 138 years after the adoption of the Fourth Amendment:

[The rights of the Fourth Amendment are not] mere second class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowering a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. And one need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police.

Id.

³³ *Berger v. New York*, 388 U.S. 41, 50 (1967). As the Amendment did not articulate or allude to a remedy for its violation, the Supreme Court had, in *Weeks*, pronounced the exclusionary rule for its violations. *Id.* Justice Clark in commenting on the *Weeks* decision indicated:

The effect of the 4th Amendment is to put the courts of the United States . . . under limitations and restraints as to the exercise of such power . . . and to forever secure the people . . . against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving force and effect is obligatory on all The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.

Id. (quoting *Weeks v. United States*, 232 U.S. 383, 391-92 (1914)).

³⁴ 232 U.S. 383 (1914).

³⁵ See *Berger*, 388 U.S. at 50.

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considered the rule the most efficient method of deterring law enforcement misconduct in the future.³⁶

The exclusionary rule inherently operates to deter misconduct of law enforcement by denying prosecutors the use of improperly gathered information at trial.³⁷ A significant limitation to the exclusionary rule, first announced in *Weeks*, is that the rule's application is restricted solely to state actors.³⁸ To legally execute a search or seizure, law enforcement officials must ordinarily obtain advance judicial approval in the form of a warrant supported by probable cause.³⁹ Failure to seek a warrant is excused only in special circumstances.⁴⁰ Since the Fourth Amendment is

³⁶ See *Weeks*, 232 U.S. at 393. The Fourth Amendment's exclusionary rule was made applicable to the states by the Supreme Court's decision in *Mapp v. Ohio*, 367 U.S. 643 (1961). *Id.*; see also *United States v. Leon*, 468 U.S. 897, 922 (1984) (holding that suppression of evidence under the exclusionary rule is inappropriate in situations where law enforcement officials have an objectively-reasonable good faith belief that there is no violation of the Fourth Amendment because there is no improper activity to deter).

³⁷ See Sharon L. Davies, *The Penalty of Exclusion – A Price or Sanction?*, 73 S. CAL. L. REV. 1275, 1275-76 (2000); see also *Mapp*, 367 U.S. at 656 (stating that the exclusionary rule operates to promote police compliance with the Fourth Amendment's "constitutional guaranty in the only effectively available way – by removing the incentive to disregard it") (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960)).

³⁸ See *Burdeau v. McDowell*, 256 U.S. 465, 476 (1921) (holding that the Fourth Amendment is focused solely on state action and therefore the exclusionary rule is not applicable to suppress the fruits of private searches); see also *United States v. Jacobsen*, 466 U.S. 109 (1984). The Supreme Court reiterated the private search distinction of the Fourth Amendment in stating that the Fourth Amendment "is wholly inapplicable to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official." *Jacobsen*, 367 U.S. at 113 (internal quotation marks and citation omitted).

³⁹ See *Johnson v. United States*, 333 U.S. 10, 14 (1977). The United States Supreme Court indicated that search warrants are preferred because they require a detached and neutral magistrate to make probable cause determinations, which provides more safeguards against Fourth Amendment violations than if the determinations were solely left to law enforcement officials. *Id.*; accord *United States v. Chadwick*, 433 U.S. 1, 9 (1977). The Court indicated that it held a "strong preference for warrants." *Leon*, 468 U.S. at 914 (1984) (quoting *United States v. Ventresca*, 380 U.S. 102, 106 (1965)); see also *DUCAT & LANDAU*, *supra* note 1, at 745 (noting that "[i]t is clear that the general rule with regard to the conduct of searches and seizures is that they are to be executed pursuant to a warrant . . .").

⁴⁰ See William W. Greenhalgh & Mark J. Yost, *In Defense of the "Per Se" Rule: Justice Stewart's Struggle to Preserve the Fourth Amendment's Warrant Clause*, 31 AM. CRIM. L. REV. 1013, 1017-18 (1994); see also *Michigan v. Tyler*, 436 U.S. 499 (1978) (recognizing exigent circumstances of a burning building); *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) (allowing a search based on consent); *Terry v. Ohio*, 392 U.S. 1 (1968) (recognizing the propriety in allowing a stop and frisk for weapons); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1967) (permitting regulatory inspection of premises); *Warden v. Hayden*, 387 U.S. 294 (1967) (recognizing exigent circumstances of hot pursuit and immediate emergency); *Beck v. Ohio*, 379 U.S. 89 (1964) (allowing search incident to a lawful arrest); *United States v. Newell*, 506 F.2d 401 (5th Cir. 1973) (permitting border searches for contraband and illegal

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directed solely against state action and not the activities of private individuals, private searches are completely unfettered by the Fourth Amendment.⁴¹ However, because the development of electronic communications techniques presented a new forum for human interaction not contemplated when the Fourth Amendment was ratified, new challenges to the judiciary developed because it was not immediately clear whether wiretaps violated the Fourth Amendment.⁴²

B. Attempting to Splice the Cables of the Fourth Amendment and Wiretapping for Law Enforcement Purposes

With the advent of the telephone, as with the development of many other types of communications technology, new opportunities arose for criminals to conduct their nefarious deeds while enhancing the efficiency of their enterprises.⁴³ However, the development of technology assets also provided additional opportunities for law enforcement officials to detect, track, and prosecute criminal conduct.⁴⁴ In *Olmstead v. United*

aliens); *United States v. Moreno*, 475 F.2d 44 (5th Cir. 1973) (allowing airport searches for weapons and explosives); *Downing v. Kunzig*, 454 F.2d 1230 (6th Cir. 1972) (permitting searches of briefcases and purses upon entering a federal courthouse).

⁴¹ See WAYNE R. LAFAYE, 1 SEARCH & SEIZURE § 1.8 (3d ed. 1996); see also *United States v. Livesay*, 983 F.2d 135 (8th Cir. 1993) (allowing admission of evidence discovered when an airline company employee opened a freight shipment); *United States v. Mithun*, 933 F.2d 631 (8th Cir. 1991) (admitting evidence gathered by hotel employees who searched a car parked on a hotel ramp); *United States v. Ramirez*, 810 F.2d 1338 (5th Cir. 1987) (admitting evidence from a landlord's search of tenant's possessions); *United States v. Walsh*, 791 F.2d 811 (10th Cir. 1986) (allowing search by an airline employee of an unclaimed bag); *United States v. Miller*, 688 F.2d 652 (9th Cir. 1982) (permitting evidence gathered by victim searching for property taken from him); *United States v. Jackson*, 578 F.2d 1162 (5th Cir. 1978) (admitting defendant's business records taken by his ex-spouse and given to the IRS); *United States v. Manning*, 542 F.2d 685 (6th Cir. 1976) (finding a private search when a telephone company monitored calls to discover theft of services); *State v. Christensen*, 797 P.2d 893 (Mont. 1990) (admitting evidence police received for a burglar who discovered evidence of his victim's criminality); cf. *United States v. Reed*, 15 F.3d 928 (9th Cir. 1994) (finding the physical act of searching by a private person still governmental action if instigated by or in conjunction with the authorities); *State v. Hunt*, 280 S.W.2d 37 (Mo. 1955) (declaring a police search not a private search by the mere fact that a private person is a bystander in a position to see what the police have uncovered); *People v. Adams*, 422 N.E.2d 537 (N.Y. 1981) (stating a search by a police officer at the request of a private person is governmental action).

⁴² See *infra* Part II.B. (discussing the development of the Fourth Amendment jurisprudence relating to the constitutional implications of wiretaps).

⁴³ See *Berger v. New York*, 388 U.S. 41, 46 (1967) (noting examples of cases where newspapers 'raided' each others' communications to save time and money, and where bettors intercepted news of racing events before the official results arrived).

⁴⁴ See *id.* Justice Brandeis argued that the majority's decision in *Olmstead*, 277 U.S. 438, 474 (1928), was particularly shocking because newer techniques of surveillance would defeat the simplistic distinction that a search can only occur within the home. *Id.*; see also 114

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States,⁴⁵ the United States Supreme Court declined to extend the protections of the Fourth Amendment to telephonic communications.⁴⁶ In writing the opinion of the Court, Chief Justice Taft rigidly construed the Fourth Amendment to require a trespassory intrusion by government agents into the defendant's home or office.⁴⁷ Hence, since there was no trespassory intrusion, Taft reasoned that there was no "search" to trigger the Fourth Amendment's exclusionary rule.⁴⁸ However, this reasoning formed a basis for a conflict among the Justices regarding the true purpose of the Fourth Amendment.⁴⁹ Justice Brandeis' dissent contended that a physical, trespassory search is not necessary to substantiate a Fourth Amendment violation that can instead occur whenever one's privacy is intruded upon unreasonably.⁵⁰ In writing its opinion, the *Olmstead* majority indicated that Congress had the capacity via direct legislation to protect the secrecy of telephonic communications.⁵¹

CONG. REC. 14,480 (1968). Sen. Long of Missouri commented that there are significant concerns over the privacy interests of the general public and that many more law-abiding citizens use electronic communications methods than criminals. 114 CONG. REC. 14,480 (1968).

⁴⁵ 277 U.S. 438 (1928).

⁴⁶ *Id.* at 465.

⁴⁷ *Id.* at 466. Chief Justice Taft declared:

Neither the cases we have cited nor any of the many federal decisions brought to our attention hold the Fourth Amendment to have been violated as against a defendant, unless there has been an official search and seizure of his person or such a seizure of his papers or his tangible material effects or an actual physical invasion of his house 'or curtilage' for the purpose of making a seizure. We think, therefore, that the wire tapping here disclosed did not amount to a search or seizure within the meaning of the Fourth Amendment.

Id.

⁴⁸ *Id.* at 465 (holding that "[t]he intervening wires are not part of his house or office anymore than are the highways along which they are stretched).

⁴⁹ *Id.* at 478-79 (Brandeis, J., dissenting). Justice Brandeis argued that privacy, defined as "the right to be left alone," was, by itself, a right. *Id.* at 478. As such, the distinction between a search occurring within a physical location or via telephone lines was "immaterial." *Id.* at 479.

⁵⁰ See Michael S. Leib, *E-Mail and the Wiretap Laws: Why Congress Should Add Electronic Communication to Title III's Statutory Exclusionary Rule and Expressly Reject a "Good Faith" Exception*, 34 HARV. J. ON LEGIS. 393, 399 (1997); see also *Olmstead*, 277 U.S. at 474.

⁵¹ *Olmstead v. United States*, 277 U.S. 438, 465-66 (1928) (stating that "Congress may, of course, protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in federal criminal trials, by direct legislation, and thus depart from the common law of evidence").

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Six years later, in response to the Court's invitation in *Olmstead*, Congress enacted the Federal Communications Act of 1934 (FCA).⁵² The FCA was an effort by Congress to placate fears that government officials could freely intercept telephonic and other electronic communications by prohibiting the use of a wiretap under any circumstance.⁵³ An immediate concern regarding the FCA was that it barred all law enforcement officials from using wiretaps or any other form of electronic surveillance, even when attempting to investigate and prosecute the most serious of felonies.⁵⁴ However, while the FCA proscribed gathering information via wiretaps, Congress failed to include an exclusionary rule to suppress wiretap evidence when prosecutors attempted to enter such evidence in judicial proceedings.⁵⁵ Additionally, Congress passed the FCA with very little legislative history, making the judiciary's task of applying the FCA even more difficult.⁵⁶

Due to the FCA's lack of an internal statutory exclusionary rule in the event of a violation, the confusion created in the federal and state courts by the FCA led to a myriad of inconsistent decisions.⁵⁷ Due to the

⁵² 47 U.S.C. § 605 (1982) (current version at 47 U.S.C. § 705 (1994)). The pertinent part of the FCA declared that "[No] person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person." 47 U.S.C. § 605 (current version at 47 U.S.C. § 705).

⁵³ See JAMES G. CARR, *THE LAW OF ELECTRONIC SURVEILLANCE* § 1.3(b) (2d ed. 1986). Carr indicated that the FCA was passed in response to *Olmstead* as an attempt to outlaw wiretapping. *Id.*

⁵⁴ See Francis Marion Hamilton, III, Note, *Should 'Clean Hands' Protect the Government Against Section 2515 Suppression Under Title III of the Omnibus Crime Control and Safe Streets Act of 1968?*, 53 WASH & LEE L. REV. 1473, 1476 (1996).

⁵⁵ See CARR, *supra* note 53, at § 2.7 n.7.

⁵⁶ See CARR, *supra* note 53, at § 1.3(b).

⁵⁷ The confusion created in the federal courts was slight and quickly remedied by the Supreme Court. See *Nardone v. United States*, 302 U.S. 379, 382 (1937) (holding that while the FCA contained no exclusionary rule, suppression of the information gathered in violation of the Act was the only method available to give effect to the statute). Additionally, on rehearing, when the defendant was retried without the direct wiretap evidence but allowing evidence derived from that wiretap, the Court held that the exclusionary rule applied not only to evidence directly but also indirectly gathered from a violation of the Act. *Nardone v. United States*, 308 U.S. 338, 341 (1939). The Court has also held that evidence procured from a wiretap warrant pursuant to a state statute was inadmissible in a federal prosecution. *Benati v. United States*, 355 U.S. 96, 100 (1957). The confusion created in state judicial proceedings was much more profound. Originally, the Supreme Court held that all evidence obtained by state law enforcement agents from a wiretap was admissible in state court proceedings despite the FCA. *Schwartz v. Texas*, 344 U.S. 199, 201-02 (1952). Later, after the Court's decision in *Benati* put the future of *Schwartz* in question, the Second Circuit perpetuated the confusion in *Schwartz* by allowing wiretap evidence gathered via a state wiretap warrant to be admitted in a state court proceeding.

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lack of any substantial legislative history, three other situations commonly arose that further limited the applicability of the FCA.⁵⁸ The first exception to the FCA was that it did not bar the admission of evidence gathered from a telephone conversation when one of the parties consented to a law enforcement official overhearing the conversation.⁵⁹ A second common exception to the FCA arose when telephone companies acted pursuant to their interests, such as billing and systems maintenance, and law enforcement agents sought the records generated from such activities.⁶⁰ The third general exception to the FCA was the federal government's ability to conduct wiretaps in the interest of national security.⁶¹

The lack of a statutory exclusionary rule and the FCA's inherent limitations meant that its proscriptions against the government were applied on a narrow basis.⁶² Furthermore, contrary to the Court's intent to remedy the situation, the application of an exclusionary rule by the

See *Pugach v. Dollinger*, 277 F.2d 739, 743-44 (2d Cir. 1961). It was not until 1968 that the Court held that a violation of the FCA applied both to state actors and private citizens, and that evidence acquired from a wiretap was inadmissible in any court proceeding. See *Lee v. Florida*, 392 U.S. 378, 386 (1968).

⁵⁸ See *CARR*, *supra* note 53, at §§ 1.3(b)(3), 1.3(b)(3)(b)(c); see also *infra* notes 59-61 and accompanying text.

⁵⁹ *Rathburn v. United States*, 355 U.S. 107 (1957). Based on the consenting to surveillance principal, the Court held that various methods used by law enforcement officials to obtain the information were valid. *Id.*; see also *United States v. Cooper*, 365 F.2d 246, 250 (6th Cir. 1966) (allowing the use of a suction cup microphone to overhear a telephone conversation); *Ferguson v. United States*, 307 F.2d 787, 789 (10th Cir. 1962), *withdrawn on other grounds, per curiam*, 329 F.2d 923 (10th Cir. 1964) (allowing the use of a specially installed extension line to overhear telephone conversations); *State v. Carbone*, 183 A.2d 1, 5 (N.J. 1962) (allowing law enforcement officials to use the defendant's own telephone to overhear conversations when the connecting party consents).

⁶⁰ See, e.g., *United States v. Gallo*, 123 F.2d 229 (2d Cir. 1941) (implying consent of telephone companies' users to discover those using the telephone system to defraud the telephone company). The users of telephones were held to have impliedly consented to telephone companies overhearing their conversations based solely by their using the telephone system. *Id.*; accord *Bubis v. United States*, 384 F.2d 643 (9th Cir. 1969); *Brandon v. United States*, 382 F.2d 607 (10th Cir. 1967). Requests for information gathered by the telephone companies were generally held not to violate the FCA. See *Nolan v. United States*, 423 F.2d 1031, 1045 (10th Cir. 1970) (making telephone company records subject to grand jury subpoenas); *DiPiazza v. United States*, 415 F.2d 99, 102-03 (6th Cir. 1969) (allowing the IRS to summon telephone company records).

⁶¹ *United States v. Coplon*, 185 F.2d 629 (2d Cir. 1950). Initially, the federal government's ability to conduct wiretaps in the interests of national security was found to be in violation of the FCA. *Id.* However, in *United States v. Butenko*, the Third Circuit found that the *Coplon* court failed to take into consideration national security features and held that the FCA was not a barrier to national security related wiretapping. 494 F.2d 593 (1974).

⁶² See *CARR*, *supra* note 53, at § 1.3(b)(3).

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Supreme Court did not ultimately deter violations of the FCA by either public or private actors.⁶³ This situation led critics to state that the FCA was the "worst possible solution" in attempting to balance the privacy interests of law-abiding citizens with the government's interest in pursuing criminal offenders.⁶⁴ While Congress annually attempted to amend the FCA to rectify some of the concerns articulated, the states also enacted legislation to proscribe wiretapping.⁶⁵

In 1967, the Supreme Court decided two cases that effectively reversed the Court's stance on wiretapping: *Berger v. New York*⁶⁶ and *Katz v. United States*.⁶⁷ Prior to these cases, the Court struggled with the *Olmstead* distinction between trespassory actions that implicated the Fourth Amendment and non-trespassory actions that did not implicate the Fourth Amendment.⁶⁸ In overruling *Olmstead*, the *Katz* Court incorporated Justice Brandeis' reasoning that the Fourth Amendment applied to people and not just to physical places, thus rejecting the requirement of a trespassory action to 'trigger' a search under the Fourth Amendment.⁶⁹

The Court, in *Katz*, followed a recent line of cases discrediting the trespassory distinction and held that Fourth Amendment protections are

⁶³ See CARR, *supra* note 53, at §§ 1.3(b)(3), 2.1. Carr noted that "[p]rivate citizens and public officials could ignore the prohibition against wiretapping without fear of prosecution, while law enforcement officials could not use [wiretaps] to investigate and prosecute even the most serious crimes." *Id.* at § 2.1.

⁶⁴ See CARR, *supra* note 53, at § 2.1. Carr cites for this proposition mainly the statement of Attorney General Nicholas Katzenbach before the Senate Judiciary Committee. *Hearings on Criminal Laws and Procedures Before a Subcomm. of the Senate Comm. on the Judiciary*, 89th Cong. 38 (1966) (statement of Atty Gen. Nicholas Katzenbach).

⁶⁵ See CARR, *supra* note 53, at § 2.4. Prior to Title III's enactment, 34 states had enacted laws to outlaw any use of wiretapping. See CARR, *supra* note 53, at § 2.4 n.62 and accompanying text. Twelve other states had enacted legislation regarding wiretapping. See CARR, *supra* note 53, at § 2.4 n.62.1 and accompanying text.

⁶⁶ 388 U.S. 41 (1967).

⁶⁷ 389 U.S. 347 (1967).

⁶⁸ See *Goldman v. United States*, 316 U.S. 129, 135 (1940). The Supreme Court in *Goldman* indicated that it could find "no reasonable or logical distinction" between the method of applying a listening device against a wall at issue and the non-trespassory method involved in *Olmstead*. *Id.* Despite the Court's misgivings, it sustained this distinction in a several cases. See *Clinton v. Virginia*, 377 U.S. 158 (1964) (per curiam) (holding placement of a device that entered premises by a thumbtack's length was held violative of the Fourth Amendment); *Silverman v. United States*, 365 U.S. 505, 511 (1961) (holding placement of a "spike mike" that penetrated five-sixteenths of an inch violated Fourth Amendment); *Irvine v. California*, 347 U.S. 128, 131-32 (1954) (holding placement of a microphone in defendant's bedroom violated Fourth Amendment).

⁶⁹ See *supra* notes 44, 49 and accompanying text.

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applicable to “people, not places.”⁷⁰ The Court reasoned that in entering a telephone booth and closing the door, an individual has a justifiable expectation of privacy while using the telephone contained inside.⁷¹ In doing so, the Court recognized the new importance of “public telephone[s] . . . in private communications” and held that the use of a “bug” on the outside of a phone booth constituted an unreasonable search and seizure regardless of the fact that the bug did not penetrate into the telephone booth itself.⁷²

With the Court’s change in position, the critical question became what constituted a reasonable search and seizure.⁷³ Although it was decided months before the *Katz* decision, the Supreme Court had effectively answered this question in *Berger*.⁷⁴ In *Berger*, a state statute authorizing wiretaps required law enforcement officials to obtain wiretap warrants from a “neutral and detached authority” embodied by the New York judiciary.⁷⁵ While the Court approved of that

⁷⁰ *Katz*, 389 U.S. at 351; see also *Silverman*, 365 U.S. at 511 (holding expressly that the Fourth Amendment is applicable in recording oral statements without any “technical trespass under . . . local property law”); *Warden v. Hayden*, 387 U.S. 294, 304 (1967) (holding that “[t]he premise that property interests control the right of the Government to search and seize has been discredited”).

⁷¹ *Katz*, 389 U.S. at 351. In concurring, Justice Harlan reasoned: “[T]here is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’” *Id.* at 361 (Harlan, J., concurring).

⁷² *Id.* at 352-53.

⁷³ *Id.* at 353. In writing for the majority, Justice Stewart stated “[o]ver and again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes . . . and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions.” *Id.* at 356.

⁷⁴ *Berger v. New York*, 388 U.S. 41 (1967).

⁷⁵ *Id.* at 54. The relevant text of the challenged court procedure are as follows:

§813-a. *Ex parte* order for eavesdropping.

An *ex parte* order for eavesdropping as defined by subdivisions one and two of section seven hundred thirty-eight of the penal law may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney-general or on officer above the rank of sergeant of any police department of the state or any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overheard or recorded and the purpose thereof, and, in the case of a telegraphic or telephonic communication, identifying the particular telephone number or telegraph line involved. . . .

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requirement, it had several reservations concerning other aspects of the wiretap warrant procedure.⁷⁶

One concern was that the New York judiciary appeared to automatically issue warrants upon the affidavit of "higher level" law enforcement officials.⁷⁷ Further, law enforcement officials merely needed to state that there were "reasonable grounds" to believe that a wiretap would uncover evidence of a crime to obtain a warrant.⁷⁸ This troubled the Court because it suggested the possibility that warrants might be issued without a neutral and independent determination of probable cause.⁷⁹ Additionally, the Court held that the wiretap authorization statute was overbroad because it contained no "precise and discriminate" requirement as the warrant was not required to "particularly describe the place to be searched, and the persons or things to be seized."⁸⁰ The Court expounded on this issue by indicating that in the context of wiretaps, the intrusion on the subject's privacy was very broad.⁸¹ Consequently, a "heavy burden" for "particularity and evidence of reliability" must be met before the judiciary should authorize a wiretap warrant.⁸²

Additionally, the Court was concerned that the New York statute lacked limitations and safeguards that the Court required in wiretap warrant situations.⁸³ Finally, the Court found the wiretap authorization

N.Y. Code Crim. Proc. Section 813-a (McKinney) (repealed), reprinted in PAULSEN, *supra* note 1 at 48-49 n.1; see also N.Y. Penal Law Section 738 (McKinney) (repealed).

⁷⁶ See *infra* notes 77-84 and accompanying text (discussing the factors the *Berger* court found deficient in the New York wiretap warrant procedure).

⁷⁷ *Berger*, 388 U.S. at 54.

⁷⁸ *Id.* at 54-56.

⁷⁹ *Id.* Law enforcement officials competent to make such affidavits included the "the attorney general, the district attorney or any police officer above the rank of sergeant." *Id.*

⁸⁰ *Id.* at 58.

⁸¹ *Id.* at 56.

⁸² *Id.* In expounding on the situation of electronic communications, the Court approvingly addressed the admission of wiretap evidence in *Osborn v. United States*, where two judges jointly authorized a wiretap warrant upon "a detailed factual affidavit alleging the commission of a specific criminal offense directly and immediately affecting the administration of justice . . . for the narrow and particularized purpose of ascertaining the truth of the affidavit's allegations." *Id.* (quoting *Osborn v. United States*, 385 U.S. 323, 330 (1966)); see also ANTHONY A. ALBERTI, WIRETAPS: A COMPLETE GUIDE FOR THE LAW AND CRIMINAL JUSTICE PROFESSIONAL 1 (Austin & Winfield 1999) (noting that "[t]he average Affidavit and Application size can reach or exceed 100 pages, a product of the higher degree criterion required for the Courts agreement to authorization and issuance").

⁸³ *Berger v. New York*, 388 U.S. 41, 57-58 (1967); see also *supra* note 82 (discussing the Court's decision and requirements in *Osborn*). Included among these safeguards were a limitation on the scope of what the law enforcement officials could look for in terms of

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procedure deficient because, unlike other types of search warrants, the procedure did not require law enforcement officials to show "exigent circumstances."⁸⁴ According to the Court, exigent circumstances were required to justify the need for a wiretap search because, to be effective, the subject of the search would not be informed of the wiretap unlike other types of searches.⁸⁵ In light of the constitutional requirements to legally engage in wiretapping as articulated by the *Katz* and *Berger* decisions, Congress promulgated Title III of the Omnibus Crime Control and Safe Streets Act of 1968.⁸⁶

III. ENTERING THE SWITCHBOARD OF CONTROVERSY – THE LOSS OF CIRCUIT COHESIVENESS

In order to properly analyze why a qualified clean hands exception to Title III's statutory exclusionary rule is appropriate, it is first necessary to examine the impetus behind the creation of Title III, the underlying Fourth Amendment jurisprudence it rests upon, and the cases interpreting and applying Section 2515's exclusionary rule. Therefore, Subpart A begins by exploring the genesis of Title III as an attempt by Congress to respond to the problems of the FCA, as well as the changes in Fourth Amendment jurisprudence articulated by *Berger* and *Katz*.⁸⁷ Second, Subpart B discusses the establishment of exceptions to the Fourth Amendment's exclusionary rule, including the good faith exception and its alter ego: the clean hands exception.⁸⁸ Third, Subpart C explores the compatibility between the application of the exclusionary rules of the Fourth Amendment and Section 2515 of Title III.⁸⁹ Fourth, Subpart D examines the differing federal circuit court decisions on the

criminal activity and where they could 'look' in seeking the information. *Berger*, 388 U.S. at 57. Another safeguard was that the warrant authorized a one-time limited intrusion as opposed to a continuous series of intrusions. *Id.* Next, the Court held that the warrant requirement that the law enforcement officials return to the court to seek additional warrants. *Id.* The Court also approved of the expeditious manner that the law enforcement officials executed the warrants. *Id.* Finally, the Court found that "the danger of an unlawful search and seizure" was minimized because of the requirement that law enforcement officials return to court when finished to explain how the warrants were used and what evidence was uncovered. *Id.*

⁸⁴ *Berger*, 388 U.S. at 57.

⁸⁵ *Id.*; see also *supra* note 5 and accompanying text.

⁸⁶ See S. REP. No. 90-1097 at 75 (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2163. "Working from the hypothesis that any wiretapping and electronic surveillance legislation should include . . . constitution of standards, the subcommittee has used the *Berger* and *Katz* decisions as a guide in drafting Title III." *Id.*

⁸⁷ See *infra* Part III.A.

⁸⁸ See *infra* Part III.B.

⁸⁹ See *infra* Part III.C.

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applicability of a clean hands exception in situations involving violations of Title III.⁹⁰ Finally, Subpart E looks at the extent to which the good faith and clean hands exceptions have already permeated Title III's exclusionary rule as embodied in Section 2515.⁹¹

A. The New Effort to Integrate the Fourth Amendment and Wiretapping for Law Enforcement Purposes – The Passage of Title III

Title III is currently the most relevant piece of legislation on the availability of wiretap evidence for use by the government at trial.⁹² It also provides the foundation for the regulation of most other forms of electronic surveillance techniques.⁹³ In addition, Title III provides a template for state wiretap regulations.⁹⁴

Title III overcomes many of the deficiencies in the language and application of the FCA.⁹⁵ First, Title III provides for the legal use of wiretaps by law enforcement officials who are attempting to prosecute certain "serious" crimes.⁹⁶ Second, Title III contains a wiretap warrant procedure that encompasses the requirements of the *Katz* and *Berger* Courts, thus ensuring that the wiretap is permissible under the Fourth Amendment.⁹⁷ Finally, Title III includes a statutory exclusionary rule that purports to suppress any evidence at any judicial proceeding that is obtained in violation of Title III.⁹⁸

The fact that Title III allows the use of wiretaps to obtain evidence to assist in the prosecution of certain crimes is itself very significant.⁹⁹ It represents a shift from the prior FCA scheme to one which recognizes

⁹⁰ See *infra* Part III.D.

⁹¹ See *infra* Part III.E.

⁹² See CARR, *supra* note 53, § 1.1.

⁹³ See CARR, *supra* note 53, § 1.1.

⁹⁴ See Dorian L. Rowe, *Wiretapping and the Modern Marriage: Does Title III Provide a Federal Remedy for Victims of Interspousal Electronic Surveillance?*, 91 DICK. L. REV. 855, 859 (1987). See generally CARR, *supra* note 53, at § 2.4.

⁹⁵ See Rowe, *supra* note 92, at 857-58; see also *supra* notes 52-64.

⁹⁶ See 18 U.S.C. § 2516 (1994). Section 2516 of Title III contains a listing of offenses for which law enforcement officials may seek wiretap warrants to assist in the investigation and prosecution. *Id.*

⁹⁷ See 18 U.S.C. § 2518 (1994). Section 2518 of Title III provides the process that law enforcement officials must follow in order to successfully apply for a wiretap warrant. *Id.*

⁹⁸ See 18 U.S.C. § 2515; see also *supra* note 9 and accompanying text (quoting the full text of Section 2515).

⁹⁹ See 18 U.S.C. § 2516. Section 2516 of Title III contains a listing of offenses for which law enforcement officials may seek wiretap warrants to assist in the investigation and prosecution. *Id.*

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the need for law enforcement officials to use wiretapping techniques that is not superceded by individuals' right to privacy when using the telephone.¹⁰⁰ Congress struck a balance between these conflicting interests whereby law enforcement officials may only obtain a wiretap warrant to assist in the prosecution of several enumerated serious crimes.¹⁰¹ Even where serious crimes are implicated, Title III goes further than the FCA or the states' attempts to regulate the use of wiretaps in protecting constitutional prerogatives by ensuring that the government does not abuse wiretaps in two ways.¹⁰² First, Title III mandates heightened procedural and evidentiary requirements in applying for wiretap warrants.¹⁰³ Second, Title III specifies further limitations and restrictions on the issuance and scope of wiretap warrants.¹⁰⁴

To ensure legitimate wiretap use, Title III was drafted to meet the "basic requirements" of the Fourth Amendment set forth by the *Katz* and *Berger* Courts.¹⁰⁵ First, only "upper level" law enforcement officials or government officers principally involved in the prosecution of criminal conduct are able to authorize wiretap warrant applications.¹⁰⁶ Second,

¹⁰⁰ See *CARR*, *supra* note 53, at § 2.1. Public dissatisfaction with the FCA occurred because it typically failed to prohibit illegal private wiretapping yet denied law enforcement officials any opportunity to use wiretaps, even in situations where they were investigating serious crimes. *Id.* Two general themes existed in the legislative and political arena in drafting legislation to replace the FCA. *Id.* First, there was unanimous support to eliminate illegal wiretapping. *Id.* Second, there was great effort to develop a scheme to allow law enforcement officials to wiretap with appropriate controls. *Id.*

¹⁰¹ See, e.g., 18 U.S.C. § 2516(1) (indicating the enumerated crimes and conduct under which the Attorney General, Assistant Attorneys General, and Deputy Attorneys General may seek a wiretap); 18 U.S.C. § 2516(2) (indicating that state officials can seek a wiretap warrant for "the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses"); 18 U.S.C. § 2516(3) (permitting a federal criminal prosecutor to seek a wiretap warrant to aid in the prosecution of any federal felony); United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT ACT) of 2001, Pub. L. 107-56, § 203, 115 Stat. 272 (expanding the list of crimes for which a warrant could be obtained to include terrorism and chemical weapons related crimes).

¹⁰² See *infra* notes 101-02.

¹⁰³ See *infra* note 104.

¹⁰⁴ See, e.g., 18 U.S.C. §§ 2516, 2518 (1994).

¹⁰⁵ See *Sapp*, *supra* note 6 at 184; see also *supra* note 84 and accompanying text.

¹⁰⁶ See 18 U.S.C. § 2516. The relevant text of Title III pertaining to the government officers who are competent to authorize an application for a wiretap warrant is found at 18 U.S.C. § 2516, which provides:

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the requirements for seeking a wiretap warrant are more exacting in terms of identifying the persons and nature of places to be tapped, as well as the information that law enforcement officials expect to overhear.¹⁰⁷ Third, a magistrate with jurisdiction over the matter must

(1) The Attorney General, Deputy Attorney General, Associate Attorney General, or any Assistant Attorney General, any acting Assistant Attorney General, or any Deputy Assistant Attorney General or acting Deputy Assistant Attorney General in the Criminal Division specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications

(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire, oral, or electronic communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire, oral, or electronic communications

(3) Any attorney for the Government (as such term is defined for the purposes of the Federal Rules of Criminal Procedure) may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant, in conformity with section 2518 of this title, an order authorizing or approving the interception of electronic communications

Id.

¹⁰⁷ See 18 U.S.C. §§ 2518(1)(a)-(f). The relevant text of Title III pertaining to the information required to include in an application for a wiretap warrant is found at 18 U.S.C. §§ 2518(1)(a)-(f), which provides:

- (a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;
- (b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) except as provided in subsection (11), a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;
- (c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;
- (d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate

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make particularized findings in order to issue the wiretap warrant.¹⁰⁸ Finally, in issuing the wiretap order, the magistrate must place very strict limitations on law enforcement officers' conduct and must specify with particularity the scope of the wiretap warrant.¹⁰⁹ In following this

when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter; (e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire, oral, or electronic communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and (f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

Id.

¹⁰⁸ See 18 U.S.C. §§ 2518(3)(a)-(d). The relevant text of Title III pertaining to the findings the appropriate judge must make in order to issue a wiretap warrant is found at 18 U.S.C. §§ 2518(3)(a)-(d), which provides:

- (a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;
- (b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;
- (c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;
- (d) except as provided in subsection (11), there is probable cause for belief that the facilities from which, or the place where, the wire, oral, or electronic communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

Id.

¹⁰⁹ See 18 U.S.C. § 2518(4). The relevant text of Title III pertaining to the limitations and specifications a judge must include in issuing a wiretap warrant is found at 18 U.S.C. § 2518(4), which provides:

- Each order authorizing or approving the interception of any wire, oral, or electronic communication under this chapter shall specify-
- (a) the identity of the person, if known, whose communications are to be intercepted;
 - (b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;
 - (c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;
 - (d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

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procedure, Title III attempts to protect the privacy rights of individuals using telephones, while providing law enforcement officials with the tools to effectively prosecute serious crimes.¹¹⁰

In addition, Title III purports to disallow the use of information gathered from unauthorized wiretaps in any judicial proceeding.¹¹¹ Section 2515 was included in Title III to prevent the lack of uniformity created by the absence of an exclusionary rule that occurred under the FCA. It does so by permitting, but not commanding, the exclusion of information gathered in violation of Title III.¹¹² Title III also attempts to prohibit unauthorized interceptions by private individuals, as well as law enforcement officials.¹¹³ Section 2515 controls "whenever any wire or oral communication" is intercepted in a manner violative of Title III.¹¹⁴ However, a critical caveat of the Title III exclusionary rule is that Congress indicated that the application of Section 2515 was to be consistent with Fourth Amendment exclusionary jurisprudence.¹¹⁵

At the same time, Title III does not provide comprehensive protection for all types of interpersonal communications that employ telephone wires.¹¹⁶ One of the most common types of electronic surveillance devices used by law enforcement officials, known as a pen

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained

Id.

¹¹⁰ See *Gelbard v. United States*, 408 U.S. 41, 48 (1972) (holding that "although Title III authorizes invasions of individual privacy under certain circumstances, the protection of privacy is an overriding Congressional concern"); S. REP. No. 90-1097, at 70 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2157 (stating that "[t]he major purpose of Title III is to combat organized crime").

¹¹¹ See 18 U.S.C. § 2515 (1994); see also *supra* note 9 and accompanying text (quoting the full text of Section 2515).

¹¹² See 18 U.S.C. § 2515; see *infra* Part IV.A.1 (commenting on the importance of Congress' choice to use the word 'may' instead of 'shall'); see also *supra* note 9 and accompanying text (quoting the full text of Section 2515).

¹¹³ See 18 U.S.C. § 2515. This is accomplished by Section 2515's proscription against admitting "any" interception made in violation of Title III. *Id.*; see also *supra* note 9 and accompanying text (quoting the full text of Section 2515).

¹¹⁴ 18 U.S.C. § 2515; see also *supra* note 9 and accompanying text (quoting the full text of Section 2515).

¹¹⁵ See S. REP. No. 90-1097, at 96 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2184-85. Specifically, Congress did not intend "to press the scope of the suppression role beyond present search and seizure law." *Id.*

¹¹⁶ See *DIFFIE & LANDAU*, *supra* note 1, at 153-54.

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register, is not covered by Title III.¹¹⁷ A pen register is a passive mechanical device that reports the numbers dialed on a telephone without recording the contents of completed calls.¹¹⁸ The Supreme Court has held that the use of pen registers does not implicate Fourth Amendment prerogatives because individuals have no justifiable expectation of privacy in information they know the phone company collects.¹¹⁹

A related technology not covered by Title III, typically referred to as Caller ID, is properly known as trap-and-trace devices.¹²⁰ Trap-and-trace devices operate exactly like pen registers except they record the phone numbers of incoming calls, not outgoing calls.¹²¹ Finally, the interception of cordless phone radio signals was previously not covered by Title III.¹²² Although Congress acted to expand the coverage of Title III in 1986 to address these concerns,¹²³ the barriers Congress erected are nothing more than pro-forma restrictions on the government's use.¹²⁴

¹¹⁷ *United States v. New York Tel. Co.*, 434 U.S. 159, 161 n.1 (1977).

¹¹⁸ *Id.* "[Pen registers] disclose only the telephone numbers that have been dialed - a means of establishing communication. Neither the purport of any communication between the caller and the recipient of the call, their identities, nor whether the call was even completed is disclosed by pen registers." *Id.* at 167.

¹¹⁹ *See Smith v. Maryland*, 442 U.S. 735, 742 (1979). The Court noted that individuals in general do not entertain any expectation of privacy when dialing numbers with their telephone. *Id.* In support of this proposition, the Court stated that all persons who use a telephone must understand that they transmit the recorded information to the phone company simply to allow the company to complete their call. *Id.* Next, the Court pointed to telephone bills as a means of informing telephone users that equipment was specifically employed to track the use of telephones for billing purposes and to ensure that users were being billed the appropriate rates. *Id.* Finally, the Court noted that the telephone users are alerted to the use of pen registers via phone books where phone companies typically indicate that tracking of calls can be used to assist law enforcement officials of the "origin of unwelcome and troublesome calls." *Id.* at 743.

¹²⁰ *See* DIFFIE & LANDAU, *supra* note 1, at 117.

¹²¹ *See* DIFFIE & LANDAU, *supra* note 1, at 117.

¹²² *See United States v. Smith*, 978 F.2d 171 (5th Cir. 1992) (holding that a conversation over a cordless telephone did not fall within Title III's definition of wire communication, oral communication, or electronic communication nor was there a reasonable expectation of privacy in the use of cordless telephones due to the ease that such communications can be intercepted).

¹²³ *See, e.g.*, Communications Assistance for Law Enforcement Act, Pub. L. No. 103-414, Title I, 108 Stat. 4279 (1994); Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 (1986).

¹²⁴ *See* DIFFIE & LANDAU, *supra* note 1, at 180. Any government attorney may seek a court order to employ a pen register or a trap-and-trace device without any showing of probable cause. *Id.*

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B. The Addition of "Good Faith" to the Fourth Amendment Calculus Leading to the Severance of Circuit Cohesiveness.

At the time Title III and the overall Omnibus Crime Control and Safe Streets Act of 1968 were enacted, the analysis under Section 2515's exclusionary rule, if applied consistently with the intent of Congress, was practically equivalent to the Fourth Amendment's exclusionary rule.¹²⁵ Section 2515's suppression remedy for violations of Title III appears to be consistent with a majority of the jurisprudence regarding the suppression of evidence under the Fourth Amendment exclusionary rule; if the evidence was wrongfully obtained, the evidence was commonly excluded.¹²⁶

However, over time and prior to the enactment of Title III, the United States Supreme Court carved out several exceptions to its own judicially established Fourth Amendment exclusionary rule.¹²⁷ One such exception, developed in *Walder v. United States*,¹²⁸ is known as the impeachment exception.¹²⁹ Under the impeachment exception, the government is allowed to introduce evidence gathered in violation of the

¹²⁵ See S. REP. NO. 90-1097, at 96 (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2185. It states that Section 2515:

[L]argely reflects existing law. In applies to suppress evidence directly (Nardone v. United States, 58 S.Ct. 275, 302 U.S. 379 (1937)) or indirectly obtained in violation of the chapter. (Nardone v. United States, 60 S.Ct. 266, 308 U.S. 338 (1939)). There is, however, no intention to change the attenuation rule. See Nardone v. United States, 127 F.2d 521 (2d), certiorari denied, 62 S.Ct. 1296, 316 U.S. 698 (1942); Wong Sun v. United States, 83 S.Ct. 407, 371 U.S. 471 (1963). Nor generally to press the scope of the suppression rule beyond present search and seizure law. See Walter v. United States, 74 S.Ct. 354, 347 U.S. 62 (1954). But it does apply across the board in both Federal and State proceeding.

Id.

¹²⁶ See *supra* note 125.

¹²⁷ See WAYNE R. LAFAVE, 5 SEARCH & SEIZURE § 11.6 (3d ed. 1996). Generally there are three categories of exceptions to the Fourth Amendment's exclusionary rule: (1) use of the illegally gathered evidence to impeach a witness; (2) when the defense "opens the door"; and (3) in prosecutions for perjury. *Id.*; see also *Walder v. United States*, 347 U.S. 62 (1954) (allowing, for the limited purpose to impeach the defendant, the questioning of a defendant about illegally seized heroin following a denial that narcotics were taken from him); *United States v. Raftery*, 534 F.2d 854 (9th Cir. 1976) (incriminating statements suppressed as fruit of illegal arrest were later admissible in a trial for perjury later before a grand jury); *United States ex rel. Castillo v. Fay*, 350 F.2d 400 (2d Cir. 1965) (admitting evidence of illegally gathered facts previously excluded when defense counsel had opened the door by asking whether narcotics had been found).

¹²⁸ 347 U.S. 62, 65 (1954).

¹²⁹ See LAFAVE, *supra* note 127, at § 11.6(a).

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Fourth Amendment solely to impeach a witness.¹³⁰ Embedded in the *Walder* Court's opinion is the determination that the benefits of using illicitly obtained evidence to impeach a witness outweighs the cost of not deterring future misconduct by law enforcement officials.¹³¹

Following the logic in *Walder*, the Fifth Circuit in *United States v. Caron*¹³² held the application of Title III's exclusionary rule improper where illicitly recorded wiretap evidence was used for the sole purpose of impeaching a witness.¹³³ In *Caron*, the defendant was being prosecuted for perjuring himself before a grand jury.¹³⁴ Following the close of the prosecution's case, Caron was the sole witness presented

¹³⁰ *Walder*, 347 U.S. at 65; accord *United States v. Echavarría-Olarte*, 904 F.2d 1391 (9th Cir. 1990); *Anthony v. United States*, 667 F.2d 870 (1st Cir. 1981).

¹³¹ *Walder*, 347 U.S. at 65. Justice Frankfurter writing for the majority indicated:

It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. Such an extension of the *Weeks* doctrine would be a perversion of the Fourth Amendment.

Id. There was some dispute whether or not the *Walder* rationale remained viable after *Miranda v. United States*, 384 U.S. 436 (1966), under the theory that such statements were 'distorted' in a way to make prior statements self-incriminating. See *Harris v. New York*, 401 U.S. 222, 224 (1971). However, the *Harris* Court confirmed that *Miranda* did not prohibit the use of prior inconsistent statements to impeach the defendant's testimony. *Id.* at 226. Likewise, the *Harris* Court reiterated the position that use of such information, although gathered in violation of the Fourth Amendment, was not to be excluded, stating:

The impeachment process here undoubtedly provided valuable aid to the jury in assessing petitioner's credibility, and the benefits of this process should not be lost, in our view, because of the speculative possibility that impermissible police conduct will be encouraged thereby. Assuming that the exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief.

Id. at 225.

¹³² 474 F.2d 506 (5th Cir. 1973).

¹³³ *Id.* at 509.

¹³⁴ *Id.* at 507. Specifically, Caron was indicted for twice perjuring himself before a grand jury on April 7, 1971. *Id.* The first count of the indictment charged Caron with perjuring himself when he denied that he had ever participated in bookmaking. *Id.* The second count of the indictment came when he denied that he knew a person named Howard Gardner. *Id.* During the trial that began in 1972, Caron admitted that at the time of his grand jury appearance, he was 'mistaken' when he denied that he knew Gardner. *Id.* Caron and Gardner were well-acquainted. *Id.* However, Caron continued to deny that he was involved in any bookmaking operations. *Id.*

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during the defense's case-in-chief.¹³⁵ During Caron's cross-examination, Caron denied that he was a bookkeeper in an illegal gambling business or that he had any interaction with "bookies."¹³⁶ Following Caron's testimony, the government moved to enter into evidence information from an illegal wiretap to rebut Caron's testimony.¹³⁷ Without an evidentiary hearing to ascertain the validity of the wiretap itself, the district court allowed the wiretap evidence to be admitted solely for the purpose of impeachment. The court held that Caron "opened the door" for evidence probative of his truthfulness.¹³⁸

On appeal, the Fifth Circuit, again following the Court's logic in *Walder*, held that admission into evidence of the information from the assumingly illegal wiretap was appropriate.¹³⁹ In following the *Walder* analysis, the Fifth Circuit indicated that there was no violation of the Fourth Amendment.¹⁴⁰ The Fifth Circuit examined whether or not the result should differ from that arrived at in *Walder* because of the Title III exclusionary rule.¹⁴¹ After examining the legislative history of Title III, the Fifth Circuit concluded that exclusion of the evidence under Section 2515 would be inappropriate because suppression would defeat the intent behind Title III.¹⁴²

Another significant exception to the Fourth Amendment's exclusionary rule is "good faith."¹⁴³ In *United States v. Leon*,¹⁴⁴ the United States Supreme Court held it appropriate to admit at trial evidence

¹³⁵ *Id.*

¹³⁶ *Id.* at 507-08. During the cross-examination, Caron admitted that he was in contact with a Louis Figueredo and had placed some bets on "two or three" football games. *Id.* at 508. When further questioned by the prosecutor, Caron denied that Caron and Figueredo were involved in bookmaking operations. *Id.*

¹³⁷ *Id.* The tape recordings that were played to the court consisted of telephone conversations between Caron and Figueredo, the substance of which was characterized by an expert witness as "the argot of professional bookmakers." *Id.*

¹³⁸ *United States v. Caron*, 474 F.2d 506, 508 (5th Cir. 1973).

¹³⁹ *Id.* at 510; see also *infra* notes 140-42.

¹⁴⁰ *Caron*, 474 F.2d at 509; see also *supra* note 127 (indicating the Supreme Court's position that use of the exclusionary rule in a manner that precludes prosecutors from using evidence to dispute allegations of criminal defendants is contradictory to the purposes of the Fourth Amendment's exclusionary rule).

¹⁴¹ *Caron*, 474 F.2d at 509. The Fifth Circuit based its decision on both who could make a motion to suppress under 18 U.S.C. § 2518(10)(a) and the legislative history behind Section 2515's exclusionary rule. *Id.* at 509-10; see also *supra* note 125 (indicating the relevant text of Section 2515's legislative history that the Fifth Circuit refers to when arriving at its decision).

¹⁴² *Caron*, 474 F.2d at 509.

¹⁴³ See *United States v. Leon*, 468 U.S. 897, 922 (1984).

¹⁴⁴ 468 U.S. 897 (1984).

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obtained through a defective warrant when law enforcement officials held an objectively reasonable, "good faith" reliance on the validity of the warrant at the time it was executed.¹⁴⁵ In deciding *Leon*, the Court indicated that the propriety of suppression is contingent upon the costs and benefits of deterring future misconduct by law enforcement.¹⁴⁶ Under the *Leon* good faith analysis, courts are to deny law enforcement officials the use of illicitly obtained evidence whenever those officials acted inappropriately and suppression would deter similar misconduct in the future.¹⁴⁷

However, the good faith doctrine does not give carte blanche to law enforcement officials to disregard the requirements of the Fourth Amendment.¹⁴⁸ Law enforcement officials are required to have acted in an objectively reasonable manner for the good faith exception to adhere.¹⁴⁹ Thus, the good faith exception will not avert suppression of evidence in situations where the law enforcement officer knows, or

¹⁴⁵ *Id.* at 913; see *Arizona v. Evans*, 514 U.S. 1, 14-15 (1995) (extending the *Leon* good faith rationale for search warrants to include arrest warrants that were erroneously reported to law enforcement officials as still valid); see also *infra* note 146 (indicating the rationale behind the Court's decision in *Leon*).

¹⁴⁶ See *Leon*, 468 U.S. at 906-08. The Court first indicated that, despite the fact the evidence obtained was gathered in a way that violated the Fourth Amendment, the evidence was "inherently trustworthy." *Id.* at 907. The Court continued by stating the only reason there was a Fourth Amendment violation was because the magistrate, not the police, erred in granting the search warrant. *Id.* The Court indicated that the substantial social costs imposed by the exclusionary rule result in some guilty defendants going free or receiving lighter sentences. *Id.* When "law enforcement officers have acted in objective good faith or their transgressions have been minor," the benefits conferred on the defendants in such cases is disproportionately large. *Id.* at 908.

¹⁴⁷ *Id.* at 922. In reviewing the basis underlying the Fourth Amendment's exclusionary rule, the Court noted that:

The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, on in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.

Id. at 919 (quoting *United States v. Peltier*, 422 U.S. 531, 539 (1975)). Based on that line of reasoning, the Court "conclude[d] that the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion." *Id.* at 922.

¹⁴⁸ See *supra* notes 144-47 and accompanying text (discussing the limitations on the applicability of the good faith exception to the Fourth Amendment's exclusionary rule).

¹⁴⁹ See *supra* note 145 and accompanying text.

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should have known, that the search was illegal at the time the search or seizure took place.¹⁵⁰

The meaning and parameters of the good faith exception to the Fourth Amendment are reflected in the "clean hands" doctrine.¹⁵¹ The only difference between the two doctrines is who actually conducts the search or seizure.¹⁵² In instances where a state actor is involved in a legally questionable search or seizure, "good faith" is the proper terminology to use.¹⁵³ In situations involving questionable searches or seizures by a private actor, the proper term to use is "clean hands."¹⁵⁴

Because the difference between the good faith and clean hands doctrines are relatively minute, all of the requirements and parameters of the good faith doctrine apply equally to a clean hands analysis.¹⁵⁵ Therefore, clean hands should also only avert suppression of evidence where law enforcement officials have an objectively reasonable reliance on the validity of the private search or seizure at the time the information was received.¹⁵⁶ As such, clean hands will not prevent suppression in instances where law enforcement officials knew, or

¹⁵⁰ *Leon*, 468 U.S. at 922 (quoting *Peltier*, 422 U.S. at 542); see also *LAFAVE*, *supra* note 41, at § 1.3 (noting four different situations where the Supreme Court has specifically indicated that the *Leon* good faith exception will not avert suppression under the Fourth Amendment's exclusionary rule). The first situation is in cases where law enforcement officials procure a warrant by providing material information that is intentionally or recklessly untrue. *Leon*, 468 U.S. at 897 (quoting *Franks v. Delaware*, 438 U.S. 154 (1978)). The second situation is where the law enforcement officials are aware the magistrates have "wholly abandoned their judicial role." *Id.* (quoting *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979)). A third situation is when the warrant itself is so lacking of indicia of probable cause that any reasonable officer would know that the warrant is invalid. *Id.* (quoting *Brown v. Illinois*, 422 U.S. 590 (1975) (Powell, J., concurring)). The final situation arises where the warrant is so facially defective that any reasonable officer could not think that it is valid. *Id.* (comparing *Leon's* companion case, *Massachusetts v. Sheppard*, 468 U.S. 981, 988-991 (1984)).

¹⁵¹ See *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814-15 (1945) (holding that "clean hands" is essentially a vehicle for the implementation of the "good faith" doctrine); see also *Castle v. Cohen*, 840 F.2d 173, 178 (3d Cir. 1988) (holding that "clean hands" is simply another expression of "good faith").

¹⁵² See *supra* note 151.

¹⁵³ See *Leon*, 468 U.S. at 897.

¹⁵⁴ See *supra* note 151.

¹⁵⁵ See *supra* note 151.

¹⁵⁶ See *Leon*, 468 U.S. at 897.

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should have known, that the information from the private action could not be used in criminal prosecution.¹⁵⁷

C. Fourth Amendment and Section 2515 Exclusionary Rules - Is There Cross-Compatibility?

With the application of the good faith doctrine and the clean hands doctrine to the Fourth Amendment's exclusionary rule, the next question is whether such developments have any bearing on the applicability of Section 2515 of Title III. Ordinarily, as a matter of policy, courts are to give effect to the plain meaning of the laws they are asked to interpret.¹⁵⁸ However, in instances where the plain language of a statute requires an absurd result, or alternatively, a result contrary to the intent behind the legislation, courts are to give effect to the intent of the legislation rather than the plain language.¹⁵⁹ Therefore, for statutory analysis to be based on legislative intent rather than plain language, there must be a showing that the plain language, as applied in a particular situation, would defeat the legislative intent.¹⁶⁰

Before attempting to examine the cross-compatibility of the clean hands exception to Title III, it is important to note that, in examining the good faith exception, courts have clearly followed the legislative intent of Title III by refusing to apply Section 2515's exclusionary rule.¹⁶¹ In several cases, the good faith exception has been applied to Title III situations involving paperwork errors not implicating privacy interests.¹⁶² Therefore, it is fair to suggest that, in terms of wiretap

¹⁵⁷ See *supra* note 150 and accompanying text (discussing specific situations where the applicability of the good faith rationale has been disallowed because the law enforcement officials involved knew, or should have known, that the warrants they were executing were defective in some manner).

¹⁵⁸ See *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 543 (1940).

¹⁵⁹ *Id.*; see also *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982) (noting that a court may look at the intent of the legislature in place of the plain language in instances where "the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters"); *Ozawa v. United States*, 260 U.S. 178, 194 (1922) (holding that the plain language of a statute is not determinative when such language "leads to an unreasonable result plainly at variance with the policy of the legislation as a whole"); *Ecee, Inc. v. Fed. Energy Regulatory Comm'n*, 611 F.2d 554, 564 (5th Cir. 1980) (holding that "[a] construction of a statute leading to unjust or absurd consequences should be avoided").

¹⁶⁰ See *supra* note 159 and accompanying text.

¹⁶¹ See *infra* notes 162-71 and accompanying text (discussing cases where minor technical defects were found not to destroy the fruits of wiretap warrants executed with good faith by the executing law enforcement officials).

¹⁶² See *United States v. Donovan*, 429 U.S. 413, 439 (1977). In *Donovan*, the United States Supreme Court decided that suppression was not warranted under Title III's exclusionary rule in light of the good faith exhibited by the law enforcement officials in their inadvertent

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warrant requirements, the courts have applied the cost and benefit process behind the Fourth Amendment's exclusionary rule exceptions to Title III's statutory exclusionary rule.¹⁶³

In addition, the Sixth Circuit in *United States v. Underhill*¹⁶⁴ held that application of Title III's exclusionary rule is inappropriate in situations where defendants attempt to shield themselves from their own illegal wiretaps.¹⁶⁵ In *Underhill*, the defendants were charged as co-conspirators in an illegal gambling business in violation of state and federal laws.¹⁶⁶ In operating the gambling business, the defendants used a telephone to exchange gambling information and place bets.¹⁶⁷ In the course of

violation of two provisions of Title III. *Id.* The Court's decision was based on the assertion that the violated provisions were not central to the statutory purpose of protecting against unauthorized wiretapping. *Id.* at 437; see also *United States v. Chavez*, 416 U.S. 562, 572, 574-76 (1974) (holding that in the absence of bad faith on the part of law enforcement officials, suppression of evidence derived from technical violations of statutory provisions of Title III that are not "central" to the purpose of preventing unauthorized wiretapping is not warranted); *United States v. Moore*, 41 F.3d 370, 376 (8th Cir. 1994) (holding that the facial deficiency of a wiretap warrant not including the judicial officer's signature was a technical defect when the judge had made appropriate findings and intended to enter the appropriate wiretap order).

¹⁶³ See generally *Moore*, 41 F.3d at 374. Under the *Donovan* and *Chavez* rationale, every circuit asked to suppress wiretap information has refused to do so in instances of minor technical deficiencies. *Id.*; see also *United States v. Traitz*, 871 F.2d 368, 379 (3d Cir. 1989) (refusing to suppress wiretap evidence because wiretap warrant was missing a page that contained information required by Title III relating to the official authorizing the wiretap warrant application and the agency executing the wiretap); *United States v. Swann*, 526 F.2d 147, 149 (9th Cir. 1975) (declining to suppress evidence gathered from a wiretap when the wiretap application was signed by an official not designated by Title III but made with assent of the correct officials under the statutory scheme); *United States v. Joseph*, 519 F.2d 1068, 1071 (5th Cir. 1975) (refusing to suppress evidence gathered from a wiretap where the wiretap warrant application was approved by the Attorney General but signed by an official whose statutory authority to do so had lapsed); *United States v. Vigi*, 515 F.2d 290, 293 (6th Cir. 1975) (declining to suppress evidence gathered from a wiretap actually authorized by the Attorney General but signed for by an Acting Assistant Attorney General on the wiretap warrant application); *United States v. Acon*, 513 F.2d 513, 517-19 (3d Cir. 1975) (holding that although a wiretap warrant application is facially deficient when signed by an Acting Assistant Attorney General because such officials lack statutory authority under Title III, such a deficiency was insufficient to warrant suppression of evidence gathered under the wiretap warrant).

¹⁶⁴ 813 F.2d 105 (6th Cir. 1987).

¹⁶⁵ *Id.* at 112.

¹⁶⁶ *Id.* at 107. Defendants were charged with the violation of 18 U.S.C. 1955 (1982), which makes it a crime to operate a gambling business when the forum state's laws prohibit such operations. *Id.* at 108. Additionally, they violated TENN. CODE ANN. § 39-6602(e) (1982), which criminalizes the making and possession of gambling records. *Id.*

¹⁶⁷ *Id.* at 107. During the search of the alleged gambling den, the federal agents found large amounts of gambling paraphernalia, tape recorders attached to two telephones, and fifteen audiocassettes. *Id.*

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business, a few of the defendants used recording devices in wiretapping their telephone conversations.¹⁶⁸ These recordings were used to record bets in an effort to provide indisputable evidence to challenge bettors later contesting both the existence and the amounts of their bets.¹⁶⁹ The defendants, in attempting to suppress the recordings of the telephone conversations, contended that the recordings were made illegally and, therefore, had to be suppressed under Title III.¹⁷⁰ The Sixth Circuit refused to apply Section 2515's suppression remedy for an "aggrieved person" to shield people from their own consequences because the result would be directly at odds with the legislative intent.¹⁷¹

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* At trial, there was no dispute about the purpose of the tape recordings. One defendant, Daniel Rokitka, while in the presence of his attorney, indicated that the tapes were employed to serve two purposes. *Id.* at 108. First, the tapes were used to provide a record of bets made. *Id.* Second, the tapes were used in a loss-control effort to provide a record of the wager amount to prevent losing bettors from attempting to downplay their bets. *Id.* In fact, Underhill himself was recorded on one of the tapes explaining that he "recorded everything to correct the problem of bettors trying to change the amounts of their bets after losing." *Id.*

¹⁷⁰ *United States v. Underhill*, 813 F.2d 105, 108 (6th Cir. 1987). The government originally sought to have the audiocassettes admitted on the theory that there was no Title III violation to trigger Section 2515's suppression remedy. *Id.* In support of its position, the government suggested that the audiocassettes were legally made under 18 U.S.C. § 2511(2)(d), which states:

It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortuous act in violation of the Constitution or laws of the United States or of any State. . . .

18 U.S.C. §2511(2)(d) (1982). The district court, finding this language unambiguous, felt "compelled to comply with its command." *Underhill*, 813 F.2d at 108. The Sixth Circuit noted the district court judge's concern in applying the Title III exclusionary rule by stating: "During the evidentiary hearing the district judge noted the anomaly created by the defendants' motions: [T]his is the first time I've ever had defendants . . . come in and . . . say . . . I admit I was being unlawful and, therefore, you can't use the evidence. It's a little bit awkward." *Id.*

¹⁷¹ *Underhill*, 813 F.2d at 112. The reasoning of the Sixth Circuit was that it was "clear that Congress did not intend for § 2515 to shield the very people who committed the unlawful interceptions from the consequences of their wrongdoing." *Id.* The court's reasoning was based upon language in Title III's legislative history that "[t]he perpetrator must be denied the fruits of his unlawful actions in civil and criminal proceedings." *Id.* (quoting S. REP. No. 90-1097 at 72 (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2156).

D. The Breakdown in Telecommunications – Where the Circuits Split

The First Circuit initially examined whether governmental clean hands should preclude suppression of wiretap evidence at trial under Section 2515 in *United States v. Vest*.¹⁷² *Vest* involved a prosecution for making false statements before a federal grand jury.¹⁷³ The defendant sought to suppress a wiretap recording by arguing that one of the others charged in the bribery conspiracy made the recording in furtherance of their criminal motives.¹⁷⁴ The First Circuit advanced two theories in making its decision.¹⁷⁵ First, the *Vest* court opined that a clean hands exception is generally inappropriate in Title III scenarios based on the United States Supreme Court's decision in *Gelbard v. United States*,¹⁷⁶ which stated that the "protection of privacy was an overriding Congressional concern."¹⁷⁷ Second, the First Circuit rejected a clean

¹⁷² 813 F.2d 477, 477-79 (1st Cir. 1987).

¹⁷³ *Id.* at 479. After being granted immunity from his involvement in a bribery conspiracy, Vest testified that he did not participate in the conspiracy nor did he ever take any money from one of the participants. *Id.* Following those statements before the grand jury, the federal prosecutor played a recording that appeared to overhear Vest speaking with some of the conspirators, but Vest denied that it was his voice on the recording. *Id.* Following Vest's testimony, the grand jury indicted Vest on three counts of making false declarations before a grand jury, with one count directed towards Vest's denial that it was his voice recorded on the tape. *Id.*

¹⁷⁴ *Id.* As part of the conspiracy, Vest acted as an intermediary and was given \$35,000 by the principal target of the grand jury inquiry to give to the recipient of the bribe. *Id.* Without Vest's knowledge, his transaction and discussion was electronically recorded in an effort to generate a receipt in the event the recipient of the bribe claimed that he was never paid off. *Id.*

¹⁷⁵ *Id.* at 480-84.

¹⁷⁶ 408 U.S. 41 (1972). It may be questioned if *Gelbard* is an appropriate case to attempt to import and apply in the context of whether or not clean hands should preclude suppression, as *Gelbard* dealt with a situation where law enforcement officials themselves were involved in the illegal interception of wire communications. *Id.* at 43. Additionally, only three justices in the majority of the 5-4 plurality necessarily subscribed to the assertion many courts have subsequently ascribed to it. *Id.* at 41. In fact, Justice White in his concurring opinion decided the issue on the lack of good faith by law enforcement officials because they participated in the illegal wiretapping. *Id.* at 70 (White, J., concurring).

¹⁷⁷ *United States v. Vest*, 813 F.2d 477, 480 (1st Cir. 1987). In reaching this conclusion, the First Circuit acknowledges the District Court's decision to examine Title III's legislative history due to the appearance of a conflict between the legislative history and the plain language, specifically the Section 2515 exclusionary rule. *Id.* However, at first, the First Circuit appears to simply dismiss the need to examine the legislative history by noting the *Gelbard* Court's statement that "the protection of privacy was the overriding Congressional concern" at the time Title III was enacted. *Id.* at 481 (quoting *Gelbard*, 408 U.S. at 48). The *Vest* court also acknowledged the *Gelbard* Court's statement that the need for Section 2515 to provide "protection for 'the victim of an unlawful invasion of privacy' could not be more clear." *Id.* (quoting *Gelbard*, 408 U.S. at 50). According to the First Circuit's logic, because the disclosure of wire communications would necessarily entail another breach of a

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hands exception for use in the prosecution of a crime that the government, in its own investigation, could not have obtained a warrant to wiretap for in the first place.¹⁷⁸

It was not until eight years later, when *United States v. Murdock*¹⁷⁹ reached the Sixth Circuit, that the issue of the admissibility of evidence obtained with governmental clean hands arose again.¹⁸⁰ *Murdock* involved a situation of inter-spousal wiretapping when a wife became suspicious of her husband's personal and business affairs.¹⁸¹ Acting on her suspicions, the wife installed recording devices on two telephones - both attached to the business lines located in the Murdocks' residence.¹⁸² Later, based on public events and information gathered from her wiretaps, Mrs. Murdock believed that her husband was involved in a bribery scheme.¹⁸³ As a result, Mrs. Murdock anonymously sent a

person's privacy, even if the government were the innocent recipient of illegally intercepted information, the government cannot introduce the information at trial. *Id.*

¹⁷⁸ *Id.* at 481-84. In this part of the opinion, the First Circuit made an abrupt aboutface and decided to look into Title III's legislative history. *Id.* Specifically, the First Circuit noted that Congress did not intend "to press the scope of the suppression role beyond present search and seizure law." *Id.* (quoting S. REP. NO. 90-1097, at 96 (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2184-85). Then the First Circuit, in apparent contradiction of its earlier support of the *Gelbard* decision, decided to put Title III back within the context of the larger piece of legislation that includes Title III, the 1968 Omnibus Crime Control and Safe Streets Act. *Id.* It noted the legislative history stating "[b]ecause of the importance of privacy, such interceptions should be limited to major offenses." *Id.* All of the crimes for which law enforcement could obtain a wiretap warrant were selected "either because it is intrinsically serious or it is characteristic of organized crime." *Id.* (quoting S. REP. NO. 90-1097, at 97 (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2186). The First Circuit noted "by enumerating those crimes deemed serious enough to justify interception and disclosure of private communications, Congress intended to strike a balance between Title III's twin purposes of protecting privacy and recognizing the importance and legality of intercepting communications for the purpose of combating crime." *Id.* In concluding its analysis, the First Circuit simply looked to 18 U.S.C. § 2516 - the list of crimes for which law enforcement can obtain a wiretap warrant. *Id.* It did not find the offense Vest was charged for that would have provided a basis for appeal. *Id.* Because Congress had not decided that the need to prosecute that particular offense outweighed privacy concerns, the First Circuit declined to "upset the balance struck by Congress" or allow the government to use the illicitly gathered evidence at trial. *Id.*

¹⁷⁹ 63 F.3d 1391 (6th Cir. 1995).

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 1392.

¹⁸² *Id.*

¹⁸³ *Id.* at 1393. At the time of the interceptions Mr. Murdock was the President of the Detroit School Board. *Id.* at 1392. What piqued Mrs. Murdock's suspicion was a newspaper report describing actions taken by the school board involving a contract for milk from a local dairy. *Id.* at 1393. Mrs. Murdock suspected that her husband was involved in a bribery scheme based on her interceptions of telephone conversations between her husband and an official at the dairy farm. *Id.*

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portion of the recordings to the party disadvantaged by the bribery scheme, who in turn sent the recording to the county prosecutor and a local newspaper.¹⁸⁴ Upon receipt of the tapes, the newspaper investigated the situation and published a report outlining Murdock's bribery scheme.¹⁸⁵ Based on the newspaper report, federal agents began an investigation, and Murdock was eventually indicted for tax evasion for failing to include the bribes in his income tax filing.¹⁸⁶

Murdock moved to have the telephone recording sent to the newspaper suppressed under Section 2515.¹⁸⁷ The Sixth Circuit began by acknowledging that Mrs. Murdock's recordings of her husband's telephone conversations violated Title III.¹⁸⁸ The *Murdock* court then pointed to the decision in *Vest* and its underlying reliance on *Gelbard* and noted the Murdocks' situation was different than that in *Gelbard*, a situation in which the law enforcement officials could not have had clean hands because it was the officials themselves who executed the illegal wiretaps.¹⁸⁹ After determining that the plain language of Title III did not contemplate a clean hands scenario, the *Murdock* court examined Title III's legislative history.¹⁹⁰ Based on the legislative history, which

¹⁸⁴ *Id.*

¹⁸⁵ *United States v. Murdock*, 63 F.3d 1391, 1393 (6th Cir. 1995).

¹⁸⁶ *Id.* Specifically, the indictment charged Mr. Murdock failed to include the \$90,000 bribe he received from the winning dairy farm who won the dairy contract in his income tax filings. *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 1400. In reaching this conclusion, the Sixth Circuit first concluded that an interception had occurred under Title III. *Id.* at 1395. Then the Sixth Circuit determined that Mrs. Murdock's recordings were not protected by the telephone extension exemption. *Id.* at 1396. The *Murdock* Court continued by noting that the 'Ordinary Course of Business' exemption to Title III found at 18 U.S.C. § 2510(5)(a)(i) was not applicable to the case, as Mrs. Murdock made indiscriminate recordings of incoming and outgoing telephone calls. *Id.* at 1397. Finally, the Sixth Circuit noted the line of cases that clearly operated against the establishment of an inter-spousal exception to Title III. *Id.* at 1397-99.

¹⁸⁹ *Id.* at 1401. Specifically, the Sixth Circuit opined:

The point of *Gelbard* was that if the government was eventually shown to have illegally intercepted the conversations, then the witness was entitled under Title III to have that evidence suppressed and completely excluded from any line of questioning in any proceeding, including the grand jury proceeding. To cite *Gelbard* as standing for the proposition that the entire purpose of Title III is to prevent victimization in the form of invasion of privacy goes too far.

Id.; see also *supra* note 175 (noting other criticisms of the majority decision in *Gelbard*).

¹⁹⁰ *Murdock*, 63 F.3d at 1402. The Sixth Circuit also observed that the Supreme Court had noted approvingly that the legislative history of Section 2515 indicated that the suppression remedy was not intended "generally to press the scope of the suppression role beyond present search and seizure law." *Id.* (quoting S. REP. No. 90-1097, at 96 (1968), *reprinted in*

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indicated that the suppression of evidence was to be applied consistently with Fourth Amendment jurisprudence, the Sixth Circuit examined the facts under a Fourth Amendment analysis.¹⁹¹ In doing so, the Sixth Circuit found that suppression was unwarranted because there was no risk of encouraging future law enforcement misconduct.¹⁹² As such, the Sixth Circuit grafted a clean hands exception into Title III's exclusionary rule.¹⁹³

*In re Grand Jury*¹⁹⁴ is the latest case to analyze whether a clean hands exception allows wiretap evidence gathered in violation of Title III to be admissible at trial when the government took no part in the illegal interception.¹⁹⁵ In *In re Grand Jury*, the appellant was the target of a grand jury investigation.¹⁹⁶ Over time, the grand jury became aware that an individual had taped the appellant's telephone conversations using an illegal wiretap.¹⁹⁷ The grand jury then sought to obtain those tapes through a subpoena duces tecum.¹⁹⁸ The individual refused to surrender the tapes and was held in contempt.¹⁹⁹

The Third Circuit advanced two theories in rejecting the clean hands exception to preclude suppression.²⁰⁰ First, the Third Circuit noted that the plain language of a statute could be displaced if at odds with the

1968 U.S.C.A.N. 2112, 2159-61); see also *Scott v. United States*, 436 U.S. 128, 139 (1978); *Alderman v. United States*, 394 U.S. 165, 175-76 (1969).

¹⁹¹ See *Murdock*, 63 F.3d at 1402-03. In deciding that it was appropriate to examine the situation under a Fourth Amendment analysis, the *Murdock* court indicated that "[t]here is nothing in the legislative history which requires that the government be precluded from using evidence that literally falls into its hands." *Id.*

¹⁹² *Id.* "We note . . . that government agents are charged with no wrongdoing and that to suppress here would have no impact on the future conduct of law enforcement officials . . . these are factors that counsel against the necessity of suppression." *Id.* at 1402 (quoting *United States v. Baranek*, 903 F.2d 1068 (6th Cir. 1990) (emphasis omitted)).

¹⁹³ *Id.* at 1403.

¹⁹⁴ 111 F.3d 1066 (3d Cir. 1997).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 1068. Because the investigation was still ongoing in the grand jury and no formal charges had been announced, the Third Circuit appropriately declined to indicate the charges the target of the investigation was suspected of committing. *Id.*

¹⁹⁷ *Id.* at 1069. Apparently, the individual had installed recorders on the telephones in her household. *Id.* Using the recorders, the individual was able to record conversations of telephone calls originating from and coming into her home. *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *In re Grand Jury*, 111 F.3d 1066, 1078 (3d Cir. 1997).

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intent behind the statute.²⁰¹ However, the Third Circuit stated that there was, in fact, no conflict between the legislative history of Section 2515 and its plain language.²⁰² Second, the Third Circuit argued that even if there was a conflict, there was no legislative history that would provide a basis to infer a clean hands exception.²⁰³ Absent, however, from the Third Circuit's analysis of the legislative history was any mention that Congress did not intend the application of the Act's exclusionary rule "to press the scope of the suppression role beyond present search and seizure law."²⁰⁴

E. *Finding the Links Between the Lines and Restoring Connectivity Among the Circuits*

The three cases at the Federal Appellate Court level have yielded three different results.²⁰⁵ On one hand, while arguing that there is no overarching clean hands exception to Section 2515, the *Vest* court appears to suggest it would find an exception to the suppression of evidence for certain specified crimes enumerated in 18 U.S.C. § 2516.²⁰⁶ On the other hand, based on its reading of the legislative intent behind Section 2515, the *Murdock* court clearly found a bright-line clean hands exception to Section 2515 whenever the government innocently receives information via an illegal wiretap.²⁰⁷ Finally, the *In re Grand Jury* decision stands for the proposition that the mere suggestion of a clean

²⁰¹ *Id.* at 1078; see also *supra* note 159 and accompanying text (listing cases supporting the proposition that the plain language of a statute can be displaced if it will produce a result defeating the intent of the legislation).

²⁰² *In re Grand Jury*, 111 F.3d at 1077. In arguing that there was no conflict between the plain language and the legislative intent, the Third Circuit relies on the assertion of legislative intent advanced by *Gelbard*. *Id.* at 1078.

²⁰³ *Id.* The Third Circuit commented on the legislative intent without looking at the legislative history of Title III that "[e]ven if we were prepared to ignore the literal language of the statute . . . we find no other indication that Congress intended the clean hands exception the government would have us read into §§ 2515 and 2511(1)(c)." *Id.* at 1077. "The statutory structure makes it clear that any interceptions of communications and invasions of individual privacy are prohibited unless expressly authorized in Title III." *Id.*

²⁰⁴ *Id.* (finding no mention of the quoted legislative history found at S. REP. No. 90-1097, at 96 (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2184-85).

²⁰⁵ See *supra* Part III.B.

²⁰⁶ See *supra* note 178 and accompanying text (discussing the second analysis in the *Vest* decision).

²⁰⁷ See *supra* notes 179-93 and accompanying text (discussing the decision and rationales behind the Sixth Circuit's action in *Murdock*).

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hands exception to Section 2515 should be rejected based on the plain language of the Section.²⁰⁸

However, there is a middle road between the two 'hard-line' positions of *Murdock* and *In re Grand Jury* that follows along the lines of the second analysis pursued in *Vest*. It is possible to identify, and appropriate for the judiciary to apply, a model qualified clean hands exception that satisfies both the plain language of Title III and the legislative intent behind Section 2515.²⁰⁹ Such a qualified clean hands exception would admit wiretap evidence from private wiretaps only where law enforcement officials have clean hands and the wiretap is probative of a crime enumerated by Section 2516.

IV. CONNECTING THE LINES - WHY A QUALIFIED CLEAN HANDS EXCEPTION IS AN APPROPRIATE UPGRADE TO THE CURRENT TITLE III SYSTEM

An analysis into the appropriateness of a model qualified clean hands exception to Section 2515's exclusionary rule must examine two factors. First, it is necessary to explore why a clean hands exception to Section 2515 is appropriate.²¹⁰ Second, it is important to examine the totality of Title III to determine if any additional limitations on a clean hands exception should be observed.²¹¹ Once the proper scope of a qualified clean hands exception is defined, it is appropriate to explore why evidence admissible under this exception satisfies the requirements of the Fourth Amendment.²¹² In doing so, it will become clear that evidence proffered by law enforcement officials consistent with a qualified clean hands exception to Title III should be admitted at trial, despite concerns about the practical consequences of its application to the exclusionary rule.²¹³ As such, the model qualified clean hands exception advocated in this Note should be read into the Section 2515 exclusionary rule.²¹⁴

²⁰⁸ See *supra* notes 194-203 and accompanying text (discussing the decision and rationales behind the Third Circuit's decision in the case *In re Grand Jury*).

²⁰⁹ See *infra* Part IV.

²¹⁰ See *infra* Part IV.A.

²¹¹ See *infra* Part IV.B.

²¹² See *infra* Part IV.C.1.

²¹³ See *infra* Part IV.C.2.

²¹⁴ See *infra* Part IV.D.

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A. A Clean Hands Exception is Appropriate Given the Text and Legislative History of Section 2515

In exploring why a clean hands exception to the statutory exclusionary rule of Section 2515 is appropriate, one can travel two different paths. The first path examines both the actual language of Section 2515's exclusionary rule, which makes suppression discretionary, and cases which use that discretion to refuse to suppress evidence gathered in violation of Title III.²¹⁵ The second path looks at the legislative history of Title III's exclusionary rule, which commands that Section 2515 be applied in a manner consistent with the Fourth Amendment's exclusionary rule.²¹⁶

1. The Text of Section 2515 and the Judiciary's Application of a Good Faith Exception

The plain language of the exclusionary rule permits judicial discretion in suppressing evidence because Congress elected to use the word "may" instead of "shall" in Section 2515.²¹⁷ Evidence obtained from an illegal wiretap does not face mandatory suppression because Congress made the conscious choice to refuse imposition of the mandatory application of Section 2515's exclusionary rule.²¹⁸ Instead, the exclusionary rule displays flexibility in situations involving Title III violations, much like the Fourth Amendment's exclusionary rule, which necessarily includes the application of the good faith doctrine and its alter ego, the clean hands exception. This appraisal of the language of Section 2515 is appropriate given the legislative intent to adhere to the then current search and seizure law.²¹⁹ Based on the plain language of Section 2515, a clean hands exception to Section 2515's exclusionary rule should apply.

²¹⁵ See *infra* Part IV.A.1.

²¹⁶ See *infra* Part IV.A.2.

²¹⁷ See 18 U.S.C. § 2515 (1994); see also *supra* note 9 and accompanying text (quoting full text of Section 2515).

²¹⁸ See *Haig v. Agee*, 453 U.S. 280 (1981). The *Haig* Court indicated that the term "may" "expressly recognizes substantial discretion." *Id.* at 294 n.26; see also *Koch Refining Co. v. Dep't of Energy*, 504 F. Supp. 593 (1980). "May" is a term of permission and is construed "to vest discretionary power." *Koch*, 504 F. Supp. at 596.

²¹⁹ See S. REP. No. 90-1097, at 96 (1968), reprinted in 1968 U.S.C.A.N. 2112, 2184-85. Congress declared that the Section 2515 exclusionary rule "largely reflected" the jurisprudence regarding the suppression of evidence under the Fourth Amendment's exclusionary rule. *Id.* Specifically, in the legislative history of Section 2515, Congress indicated that the exclusionary rule was not intended "to press the scope of the suppression role beyond present search and seizure law." *Id.*

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Following this logic, the judiciary has refused to order the suppression of wiretap evidence gathered in every situation involving a violation of Title III.²²⁰ Most of the refusals have arisen in situations involving the application of a good faith analysis.²²¹ Additionally, these decisions consider the deterrance of misconduct by law enforcement officials as an important factor. Inherent in these judicial determinations is that clean hands is an appropriate factor given the discretionary nature of Section 2515's exclusionary rule and that its application should be like the Fourth Amendment's exclusionary rule. Therefore, it is appropriate to read a clean hands exception into Section 2515 based on the discretionary nature of the suppression remedy directed by the plain language of the Act.

2. A Clean Hands Exception is Appropriate Since Application of Section 2515's Exclusionary Rule Would be Absurd and Contrary to Congressional Intent

If, in the context of clean hands scenarios, the plain language of Section 2515's exclusionary rule was interpreted to require the unbending application of suppression, such a reading would produce an absurd and contrary result to that intended by Congress. In such a situation, the judiciary is to apply the legislative intent rather than the plain language of the Act.²²² For the judiciary to implement the legislative intent, it must first be demonstrated that application of the plain language, in a way rejecting a clean hands exception to Title III, would create a result absurd or contrary to congressional intent. If the analysis shows that rejection of a clean hands exception is contrary or absurd, a clean hands exception to the Section 2515 exclusionary rule must, *ipso facto*, be appropriate.

First, it must be recalled that the legislative intent of Section 2515 commands the judiciary to consistently apply the statutory exclusionary rule with the Fourth Amendment's exclusionary rule.²²³ Therefore, if the

²²⁰ See *supra* Part III.C.

²²¹ See *supra* notes 161-63 and accompanying text (discussing the cases refusing to apply Section 2515's exclusionary rule despite a clear violation of Title III).

²²² See *supra* notes 159-60 and accompanying text (discussing the line of cases that allow a court to ignore the plain language of a statute where the plain language would create an absurd or contrary result in light of the legislative intent).

²²³ See S. REP. No. 90-1097, at 96 (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2184-85. Congress declared that the Section 2515 exclusionary rule "largely reflected" the jurisprudence regarding the suppression of evidence under the Fourth Amendment's exclusionary rule. *Id.* Specifically, in the legislative history of Section 2515, Congress

Section 2515 exclusionary rule were to be applied in a manner strictly consistent with the Fourth Amendment's exclusionary rule, then Section 2515 would not bar the admission of any evidence gathered by law enforcement officers with clean hands.²²⁴ This is because a private actor conducted the illegal search.²²⁵ If the Section 2515 exclusionary rule were read to preclude the application of a clean hands exception to Title III situations, there would be an obvious conflict. Because the intent behind Title III was to make the Section 2515 exclusionary rule applicable only when the Fourth Amendment's exclusionary rule requires suppression, applying Section 2515 to suppress wiretap evidence, where the Fourth Amendment would not, creates an absurd and contrary result to that intended by the legislature.

Where an absurd and contrary result is achieved, one solution is to "import" much of the Fourth Amendment's exclusionary rule jurisprudence into the interpretation and application of the Section 2515 exclusionary rule. Along with this annexation of Fourth Amendment jurisprudence follows one of the most significant aspects of that jurisprudence, the good faith exception. As the good faith exception operates as a function of the underlying premise behind the Fourth Amendment's exclusionary rule, it should be recognized as being part of the search and seizure law at the time of Title III's enactment.²²⁶ Thus, if the application of Section 2515's exclusionary rule were applied in a manner consistent with congressional intent, which followed Fourth Amendment exclusionary jurisprudence, the good faith exception, and necessarily a clean hands exception, would be appropriate in the application of the Section 2515 exclusionary rule.

Seemingly contrary to the reading of congressional intent and the plain language of Section 2515 is the declaration by the *Gelbard* Court that the "protection of privacy was the overriding congressional intent" behind Section 2515's exclusionary rule.²²⁷ Reliance on the statement in

indicated that the exclusionary rule in Section 2515 was not intended "to press the scope of the suppression rule beyond present search and seizure law." *Id.*

²²⁴ See *supra* note 223 and accompanying text.

²²⁵ See *supra* notes 38-41 and accompanying text (discussing *Burdeau* and its progeny, which hold that the admissibility of the fruit of private searches is unfettered by the Fourth Amendment's exclusionary rule because the Fourth Amendment is focused only on state, not private, action).

²²⁶ See *supra* notes 144-47 and accompanying text (noting the development and application of the good faith exception to the Fourth Amendment's exclusionary rule is based upon its purpose of deterring police misconduct).

²²⁷ *Gelbard v. United States*, 448 U.S. 41, 48 (1972); see *supra* note 176 and accompanying text (noting the relevant statement from the *Gelbard* majority decision).

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Gelbard is largely misplaced for two reasons. First, only three justices writing the majority opinion in a 5-4 plurality supported this assertion.²²⁸ Second, the statement is dicta because the issue before the *Gelbard* court was simply whether Section 2515's exclusionary rule provides a basis for witnesses to refuse to answer questions based on information gathered from an illegal wiretap conducted by law enforcement officials.²²⁹

One of the concurring opinions did not stray but limited itself exclusively to the determination of whether a grand jury witness may raise Title III in refusing to answer questions.²³⁰ Interestingly, in his concurring opinion, Justice White engaged in a good faith analysis by weighing the appropriateness of the admissibility of wiretap evidence at grand jury hearings.²³¹ Justice White ultimately voted with the majority to reverse the contempt adjudications because of the police malfeasance in executing the illegal wiretaps.²³² Additionally, the majority opinion in *Gelbard* deviates from the analysis of whether Section 2515 provides a basis for grand jury witnesses to refuse to respond to questions based on information gathered from an illegal wiretap.²³³ The majority decision tends to extend beyond the true scope of *Gelbard* and, instead, address the case of police malfeasance.²³⁴

Thus, it is disingenuous to primarily rely on the "judicially-articulated" assertion of legislative intent by only three justices writing the *Gelbard* majority opinion as a counter-argument to the actual legislative history of the Act. Section 2515 was not intended "to press the scope of the suppression role beyond present search and seizure law."²³⁵ Additionally, this judicially asserted legislative history of Section 2515 is

²²⁸ See *supra* note 176 (questioning the relevancy and precedential effect of statements contained in the *Gelbard* majority opinion).

²²⁹ See *supra* note 176 (questioning any reliance on the majority's averring to the judicial assertion of legislative intent behind Title III).

²³⁰ See *Gelbard*, 408 U.S. at 69-71 (White, J., concurring).

²³¹ *Id.* at 71.

²³² *Id.* at 70. Justice White in his concurring opinion indicated "that at least where the United States has intercepted communications without a warrant in circumstances where court approval was required, it is appropriate . . . not to require the grand jury witness to answer and hence further the plain policy of the wiretap statute." *Id.*

²³³ See *infra* note 234 and accompanying text.

²³⁴ See generally *Gelbard v. United States*, 408 U.S. 41 (1972).

²³⁵ See S. REP. No. 90-1097, at 96 (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2184-85. In the legislative history of Section 2515, Congress indicated that the exclusionary rule in Section 2515 was not intended "to press the scope of the suppression role beyond present search and seizure law." *Id.*

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nothing more than dicta.²³⁶ Although heavily relied upon by cases such as *In re Grand Jury* and the first analysis of *Vest*, the argument founded on these judicially-asserted presumptions of legislative intent do not carry much, if any, precedential weight. Therefore, this opposing assertion should not alone prevent the application of a clean hands exception to Section 2515's exclusionary rule. A clean hands exception is appropriate. Indeed, it is necessary to faithfully apply the congressional intent behind the Section 2515 exclusionary rule.

B. Qualifying the Rule – Recognizing the Proper Limitations of a Clean Hands Exception by other Legislative Commands of Title III

Because a clean hands exception to the Section 2515 exclusionary rule is appropriate, the next step is to determine the corresponding scope of the exception. First, an examination of the overall congressional purpose in enacting Title III must occur. The second step is to examine the text and legislative history of Title III to determine if any other factors should limit the applicability of a clean hands exception. In addition, it is helpful to examine case law applying Title III, which provides additional insight on appropriate limitations of a clean hands exception. In exploring the underlying policies in conjunction with the text and legislative history of Title III, an examination of the differing approaches and results of the three federal circuit decisions reveals that there is an appropriate "middle road." This middle road supports the application of a qualified clean hands exception where law enforcement officials have clean hands and the evidence is probative of crimes enumerated under Section 2516.

The overarching policy embodied by Title III is the need to provide law enforcement officials with tools, such as wiretaps, that are necessary to combat criminal activity.²³⁷ This policy innately recognizes the importance and legality of using wiretaps in the prosecution of criminal activity.²³⁸ Title III should be read in the context of the larger piece of crime-fighting legislation, the Omnibus Crime Control and Safe Street Acts of 1968. Such a reading indicates that the legislators decided that, in certain situations, the privacy interest implicated is overridden by the

²³⁶ See *supra* notes 176, 227 (noting that the judicially asserted legislative intent behind Section 2515 had nothing to do with the true issue involved in *Gelbard*).

²³⁷ See *supra* note 1 and accompanying text (noting the broad support there was at the time Congress enacted Title III to allowing law enforcement officers to use wiretapping techniques to combat crime).

²³⁸ See *United States v. Vest*, 813 F.2d 477, 485 (1st Cir. 1987).

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need to provide law enforcement officials with the ability to gather information using wiretaps.²³⁹

Title III attempts to satisfy this competing privacy interest in essentially two different ways.²⁴⁰ First, the plain language of Section 2515 makes the application of suppression of evidence discretionary.²⁴¹ Second, Section 2516 inherently asserts that wiretap evidence may only be used in criminal prosecutions where wiretap evidence is probative of a crime enumerated in that section.²⁴² Therefore, it can be deduced that the privacy interests of individuals outweigh the need to provide law enforcement officials with wiretaps to prosecute certain criminal acts. Thus, individuals possess an unfringeable privacy interest that cannot be overcome by the interest of combating crimes in relation to crimes not enumerated by Section 2516.²⁴³

As noted before, the three circuits in *Vest*, *Murdock*, and *In re Grand Jury* have attempted to balance privacy and investigatory interests.²⁴⁴ However, the three conflicting circuits arrived at opposing positions. The only practical difference between the three decisions is that each gives too much effect to one interest to the detriment of the competing social interests.

In many ways, the *Murdock* decision can be seen as deferring too much to the law enforcement interest in wiretapping; *Murdock* suggests that anytime law enforcement officials have clean hands, the illegally gathered wiretap evidence should be admitted regardless of the crime involved.²⁴⁵ Such an approach appears too expansive because it fails to take into consideration Congress' limitation of situations where a wiretap is an appropriate investigative technique, thus ignoring the balancing of interests embodied in Section 2516. As such, *Murdock's*

²³⁹ See *supra* notes 100-02 (discussing the legislative choice that overturned Congress' previous stance that an individual's privacy interest absolutely superceded the need for wiretapping in criminal investigation).

²⁴⁰ See *supra* note 2 and accompanying text (noting the opposition and apprehensiveness in allowing law enforcement officials the ability to implement wiretapping techniques as part of a criminal investigation).

²⁴¹ See 18 U.S.C. § 2515 (1994); see also *supra* note 9 and accompanying text (quoting the full text of Section 2515).

²⁴² See 18 U.S.C. § 2516 (1994).

²⁴³ See 18 U.S.C. § 2516.

²⁴⁴ See *supra* Parts III.D-E (discussing the three federal appellate court decisions attempting to interpret and apply Section 2515).

²⁴⁵ See *supra* notes 179-93 and accompanying text (discussing the rationales behind the *Murdock* decision).

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broad clean hands exception under Section 2515's exclusionary rule is not an appropriate statement of the law when considering the congressional intent behind Title III.

In re Grand Jury can be read as giving too much weight towards the policy of protecting individual privacy interests by stating that no clean hands exception is ever appropriate.²⁴⁶ *In re Grand Jury* asserts that at no time will any information gathered with clean hands by law enforcement officials from an illegal wiretap be admitted into evidence despite congressional intent indicating otherwise.²⁴⁷ *In re Grand Jury* clearly infringes on the interest in providing law enforcement officials with the tools necessary to combat crime. Such an interest necessarily precludes an absolute individual privacy interest. Additionally, the *In re Grand Jury* decision inaccurately depicts how the Section 2515 exclusionary rule should be applied in light of the congressional intent in enacting Title III.

Similar to *In re Grand Jury*, the *Vest* court, in its first analysis, affords too much emphasis on the policy of protecting individual privacy interests by finding a clean hands exception inappropriate.²⁴⁸ The second analysis in *Vest* follows an appropriate approach in illuminating a middle road between the two inflexible positions established by *Murdock* and *In re Grand Jury*. This second *Vest* analysis suggests a clean hands exception should be appropriate only in situations where the police can obtain a wiretap warrant to investigate crimes enumerated in Section 2516.²⁴⁹ In making this second analysis, the *Vest* court indicates that, by enumerating crimes for which a wiretap may be used, Congress struck the appropriate balance between these two competing interests.²⁵⁰

Section 2516 commands that no wiretap evidence should be allowed unless probative of the crimes enumerated therein.²⁵¹ The plain language of the statute controls because there is no contrary legislative intent.²⁵² As the second analysis in *Vest* suggests, Congress balances the two competing interests by denying the use of wiretaps in situations not

²⁴⁶ See *supra* notes 194-204 and accompanying text (discussing the rationales behind the *In re Grand Jury* decision).

²⁴⁷ See *supra* note 200 and accompanying text.

²⁴⁸ See *supra* notes 172-78 and accompanying text (discussing the first analysis in the *Vest* decision).

²⁴⁹ See *supra* note 178 and accompanying text (examining the second analysis in the *Vest* decision).

²⁵⁰ *United States v. Vest*, 813 F.2d at 477, 483 (1st Cir. 1987).

²⁵¹ See 18 U.S.C. § 2516 (1994).

²⁵² See generally S. REP. NO. 97-1097, reprinted in 1968 U.S.C.C.A.N. 2112.

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enumerated in Section 2516. Congress acquiesced to the needs of law enforcement officials by permitting the use of wiretaps in investigations of certain crimes. Section 2516 thus operates to limit the scope of any clean hands exception to Section 2515's statutory exclusionary rule implicitly due to abrogating an absolute privacy interest by enumerating certain crimes where wiretaps may be used legally. Therefore, the proper scope of a qualified clean hands exception would only admit evidence at trial where law enforcement officials have clean hands at the time the information was received and the evidence is probative of a crime enumerated in Section 2516.

C. A Qualified Clean Hands Exception Satisfies the Search and Seizure Requirements of the Fourth Amendment and Other Fairness Concerns

After satisfying the qualified clean hands exception criteria under Title III, the question remains whether wiretap information is admissible. The proper approach in resolving this question is articulated by *Berger* and *Katz*.²⁵³ Additionally, it is important to examine what impact the adoption of a model qualified clean hands exception to the Section 2515 exclusionary rule would have on the number of private illicit wiretaps.

1. A Qualified Clean Hands Exception to Title III's Exclusionary Rule Inherently Complies with the Fourth Amendment

Under a Fourth Amendment analysis, wiretap evidence gathered pursuant to a qualified clean hands exception should be admitted into evidence at trial because of its nature as a private search. This is because private searches are completely unfettered by the Fourth Amendment.²⁵⁴ The only exception to this proposition occurs when the private actor is influenced or acting on behalf of the state.²⁵⁵ However, in a qualified clean hands scenario, no danger of the private wiretapper acting as a state agent arises because the law enforcement officials would know or have reason to know that evidence was gathered from an illegal wiretap. With such knowledge of the illegality of the wiretap, the law enforcement officials involved would be deprived of their clean hands. As such, wiretap evidence obtained under a qualified clean hands

²⁵³ See *supra* notes 66-84 and accompanying text (discussing the current approach of the Court towards the implications of wiretaps on Fourth Amendment privacy interests).

²⁵⁴ See *supra* notes 38, 41 and accompanying text (discussing *Burdeau* and its progeny, which recognize the limitation on the application of the Fourth Amendment to state actors).

²⁵⁵ See *supra* note 41 (comparing *Burdeau* and its progeny with cases involving private actors acting on behalf of the state where an individual's Fourth Amendment privacy interest is violated).

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exception to Section 2515's statutory exclusionary rule should be admitted into evidence as the exception satisfies the requirements of the Fourth Amendment.

2. The Adoption of this Model Qualified Clean Hands Exception to Section 2515's Exclusionary Rule Should Not Provide Incentives to Increase Illicit Private Wiretapping

Despite the appropriateness of a qualified clean hands exception, one concern is that application of the exception to Title III's exclusionary rule creates an incentive for private parties to illegally intercept wire communications.²⁵⁶ The basis of the concern is that by adopting an exception, the judiciary will encourage more illicit wiretaps by private actors in light of the weak civil and criminal penalties available against the private interceptor.²⁵⁷ This rationale further suggests that, in practice, prosecutors will plea bargain with private interceptors to get the illicitly obtained information and civil juries are reluctant to punish private actors who merely fulfill their "civic duty" by reporting crimes to law enforcement officials.²⁵⁸

While troubling on its face, this concern fails for two distinct reasons. First, civil and criminal remedies provide alternative remedies that are not factors taken into account in a Fourth Amendment good faith analysis.²⁵⁹ Second, and more significantly, prosecutors will not enter into plea agreements to obtain illegal private wiretap evidence because then those prosecutors will have knowledge that the evidence was gathered illegally when they "obtain it," thereby destroying their clean hands.

The alternative civil and criminal remedies are not factors considered in the good faith analysis as a part of the Fourth Amendment's exclusionary rule calculus announced through *Leon*.²⁶⁰ The Fourth Amendment does not apply to private search and seizures, leaving only the question as to what extent will suppression deter future misconduct by law enforcement officials.²⁶¹ Therefore, the question of

²⁵⁶ See Hamilton, *supra* note 54, at 1506-11.

²⁵⁷ See Hamilton, *supra* note 54, at 1506-11; see also *supra* note 10 (noting the civil and criminal penalties for violating Title III).

²⁵⁸ See Hamilton, *supra* note 54, at 1511.

²⁵⁹ See *supra* note 32.

²⁶⁰ See *supra* note 144-46 and accompanying text (discussing the good faith analysis determinative factor as being the deterrence of police misconduct).

²⁶¹ See *Burdeau v. McDowell*, 256 U.S. 465, 476 (1921).

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the availability and efficiency of civil and criminal remedies against the private interceptor should not be examined in a clean hands context.

Even though civil and criminal penalties do not factor into a clean hands analysis, they still act to deter private illegal wiretapping. Title III imposes a mandatory civil penalty on a private interceptor for engaging in illegal wiretapping.²⁶² Additionally, Title III provides for severe criminal penalties that allow incarceration up to five years for private interceptors of illegal wiretapping.²⁶³

Finally, equally difficult to uphold is the position that criminal prosecutors would plea bargain with private interceptors to obtain illicitly gathered information. Such a transaction would necessarily deprive law enforcement officials of clean hands because they would have knowledge that the information was illicitly obtained in violation of Title III.²⁶⁴

D. The Model Qualified Clean Hands Exception to the Section 2515 Exclusionary Rule Should be Applied by the Judiciary

Therefore, because of the discretionary nature of suppressing evidence gathered in violation of Title III and the clear legislative intent commanding that Title III's statutory exclusionary rule be applied consistent with Fourth Amendment exclusionary rule jurisprudence, the use of a qualified clean hands exception is appropriate to determine whether suppression is warranted in the context of Title III violations.²⁶⁵ In determining the proper scope of a clean hands exception, courts should consider Section 2516. Then, evidence from an illegal private wiretap will only be admitted where law enforcement officials have clean hands and when the information is probative of a crime enumerated in Section 2516.²⁶⁶ When these conditions are complied with, wiretap evidence gathered under a qualified clean hands exception to Section 2515's statutory exclusionary rule should be admitted into evidence at trial as such evidence satisfies the requirements of the Fourth Amendment.²⁶⁷ Additionally, adoption of a qualified clean hands

²⁶² See *supra* note 10 (pointing out the civil penalties associated with violating Title III's strictures).

²⁶³ See *supra* note 10 (pointing out the criminal penalties associated with violating Title III's strictures).

²⁶⁴ See 18 U.S.C. § 2511(1) (1994).

²⁶⁵ See *supra* Part IV.A.

²⁶⁶ See *supra* Part IV.B.

²⁶⁷ See *supra* Part IV.C.1.

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exception to Section 2515 should not create any improper incentives to increase illicit private wiretapping.²⁶⁸ Consequently, it is appropriate for the judiciary to apply a qualified clean hands exception to the Section 2515 exclusionary rule to admit wiretap evidence from private wiretaps only where law enforcement officials have clean hands and when the wiretap is relevant to crimes enumerated by Section 2516.

V. CONCLUSION

At the time Title III of the Omnibus Safe Streets and Crime Control Act of 1968 was established, the drafters of the Act were careful to make sure that the wiretap regulations were consistent with the guidance provided by the United States Supreme Court in *Berger* and *Katz*. In drafting Title III, Congress attempted to ensure that Title III adequately protected individual privacy interests in using telephones but allowed law enforcement officials to use wiretaps in their efforts to combat crime in a manner consistent with the Fourth Amendment. By drafting a statutory exclusionary rule to coincide with the dual intent behind Title III, Congress declared that Section 2515 was to be applied in a manner that was consistent with the Fourth Amendment's exclusionary rule. However, largely due to over-reliance on an unsupported judicial assertion of legislative intent in *Gelbard*, a conflict between federal circuits has developed in applying the Title III statutory exclusionary rule. That decision extended too broadly and inappropriately implemented the intent of Congress at the expense of both privacy and crime control interests.

In recognizing and applying a qualified clean hands exception to Title III's statutory exclusionary rule, the judiciary should return to the "middle" and apply Section 2515's exclusionary rule in the manner that was originally contemplated by Congress. It is appropriate for the judiciary to apply a qualified clean hands exception to Section 2515's exclusionary rule to admit wiretap evidence from private wiretaps only where law enforcement officials have clean hands and only when the wiretap is probative of crimes enumerated by Section 2516. Only in applying a qualified clean hands exception to the Title III's statutory exclusionary rule can the judiciary correctly implement the congressional intent behind Title III. In so doing, the judiciary will appropriately balance individual privacy interests and law enforcement officials' efforts combat crime.

Shaun T. Olsen

²⁶⁸ See *supra* Part IV.C.2.

