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Comment

THE SUPPRESSION SANCTION UNDER THE ELECTRONIC COMMUNICATIONS PRIVACY ACT FOR VIOLATIONS¹ OF THE PRIVATE ONE-PARTY CONSENT EXCEPTION

I. INTRODUCTION

Roughly twenty years ago, Congress sought to rectify, through legislation, an alarming set of problems that were and are by-products of major technological achievements in the area of communications.² Congress saw as troubling the potential impingement on privacy that would occur if communications technology were to be used to intercept or "eavesdrop" upon oral or wire communications between persons.³ In response to this threat, Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Title III).⁴ Title III imposed civil and criminal liability⁵ for interceptions of wire or oral com-

1. In this Comment, a "violation" of the private one-party consent exception to Title III means a failure to fall within the exception because the interception was made for an improper purpose. For a further discussion of this exception, see *infra* notes 57-80 and accompanying text.

2. Congress found a troubling problem in the growth of scientific and technological developments that enabled the widespread use and abuse of electronic surveillance techniques. S. REP. NO. 1097, 90th Cong., 2d Sess. 9, reprinted in 1968 U.S. CODE CONG. & ADMIN. NEWS 2112, 2154.

However, while recognizing this problem, Congress additionally observed the need for law enforcement personnel to intercept, with proper supervision, communications necessary to obtain evidence of organized crime. Act of June 19, 1968, Pub. L. No. 90-351 § 801(c), 1968 U.S. CODE CONG. & ADMIN. NEWS 237, 253.

3. Extensive wiretapping and other modern devices were being used to monitor private conversations without the control of legal sanctions. Act of June 19, 1968, Pub. L. No. 90-351 § 801(a), 1968 U.S. CODE CONG. & ADMIN. NEWS 237, 253. As a result, Congress sought legislation to alleviate the problem. *Id.* § 801(b).

4. Act of June 19, 1968, Pub. L. No. 90-351, 82 Stat. 197 (1968) (codified at 18 U.S.C. §§ 2510-2520 (1968), amended by 18 U.S.C. §§ 2510-2520 (1982 & Supp. IV 1986)) [hereinafter Title III].

This act also contains four other titles. Title I deals with federal grant programs for law enforcement assistance. Title II contains provisions regarding inadmissibility of voluntary confessions in state and federal courts as well as the admissibility of eyewitness testimony. *See id.* Title IV authorizes assistance to the states for the control of firearms. *See id.* §§ 2113-2114. Title V is a general separability provision. *See id.* § 2114.

5. Title III provides for recovery of civil damages for "any person whose wire, oral or electronic communication is intercepted, disclosed or intentionally used in violation of [Title III] . . ." 18 U.S.C. § 2520(a) (Supp. IV 1986). This

munications⁶ unless the interceptions fell within one of the statutory exceptions.⁷ Title III was amended extensively by the Electronic Communications Privacy Act of 1986,⁸ to update and clarify Title III in light

section further provides liquidated damages in the event actual damages can not be shown. *Id.* § 2520(c).

In order to recover under § 2520, the plaintiff must prove a violation of § 2511 of the statute. Section 2511 prohibits an individual from willfully intercepting or attempting to intercept wire or oral communications, and willfully disclosing or using the contents of wire or oral communications that the individual knew were obtained in violation of Title III. 18 U.S.C. § 2511 (1986). *See generally* Note, *Wiretapping and Electronic Surveillance—Title III of the Crime Control Act of 1968*, 23 RUTGERS L. REV. 319 (1969) (comprehensive discussion of Title III in entirety as originally enacted).

For a discussion of private actions under Title III, see Fourth Circuit Review, *Statutes of Limitations and Private Actions Under Title III of the Omnibus Crime Control and Safe Streets Act of 1968*, 41 WASH. & LEE L. REV. 614, 614-24 (1984). Additionally, Title III provides criminal penalties for one who violates the provisions of § 2511. 18 U.S.C. § 2511(4).

6. An "interception" occurs under Title III upon "the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device." 18 U.S.C. § 2510(4) (Supp. IV 1986). "'Wire communication' means any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception. . . ." *Id.* § 2510(1). "'Oral communication' means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but such term does not include any electronic communication[.]" *Id.* § 2510(2).

Under the 1986 amendments to the Act, interceptions of "electronic communications" are also prohibited. *See id.* § 2511(1)(a). With a few exceptions, "'electronic communication' means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted . . . by a wire, radio, electromagnetic, photoelectric or photo-optical system that affects interstate . . . commerce. . . ." *Id.* § 2510(12). "Electronic communication" does not include wire or oral communications. *Id.* § 2510(12)(b).

7. The exceptions to Title III include the following: (1) a communication carrier intercepting communications in the normal course of employment, 18 U.S.C. § 2511(2)(a) (Supp. IV 1986); (2) an agent of the Federal Communications Commission intercepting a communication in the normal course of employment, *id.* § 2511(2)(b); (3) a person acting under color of law intercepting a communication if he is a party to the communication and has given his prior consent, *id.* § 2511(2)(c); (4) a person not acting under color of law intercepting a communication if one of the parties has given his prior consent provided that the interception is not committed for a criminal or tortious purpose, *id.* § 2511(2)(d); (5) an officer, employee or agent of the United States conducting electronic surveillance in the ordinary course of his official duty, *id.* § 2511(2)(e); (6) the acquisition of foreign intelligence information, which is governed by the Foreign Intelligence Surveillance Act of 1978, *id.* § 2511(2)(f); (7) the interception of electronic communications which are readily accessible to the general public, *id.* § 2511(2)(g); and (8) the use of a pen register or a trap and trace device, *id.* § 2511(2)(h).

8. Act of Oct. 21, 1986, Pub. L. No. 99-508, 100 Stat. 1848 (1986) (amendments codified at 18 U.S.C. §§ 2510-2520 (Supp. IV 1986)) (effective January 20, 1987).

of technological advances in the field of electronic communications.⁹ These amendments were also intended to clarify statutory ambiguities that resulted from judicial interpretations of Title III.¹⁰

Title III was designed to balance the governmental interests of crime control¹¹ against the need to protect the privacy of individuals from unauthorized interception of their communications.¹² To this end, Congress included two major exceptions to Title III's general prohibi-

9. S. REP. NO. 541, 99th Cong. 2d Sess., *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 3555 [hereinafter S. REP. 99-541]. As a result of technological advancements, improved surveillance devices are easily accessible. The use of computers and new telecommunication systems have led to a revolution in methods of obtaining information. For a discussion of the technological advancements requiring an update of Title III, see Landever, *Electronic Surveillance, Computers, and the Fourth Amendment—The New Telecommunications Environment Calls for Reexamination of Doctrine*, 15 U. TOL. L. REV. 597 (1984). See also Carr, *Privacy and Electronic Communications under Title III*, 14 SEARCH AND SEIZURE L. REP. 105, 109 (discussion of amendments of Electronic Communications Privacy Act of 1986 whose principal purpose is response to technological advancements).

10. Carr, *supra* note 9, at 110 (amendment to § 2511(2)(d) designed to relieve ambiguities caused by judicial interpretation of this section). Other effects of the Electronic Communications Privacy Act of 1986 are to broaden the scope of privacy protection under Title III to include private communications carriers, cellular telephones, electronic mail, computer transmissions and certain types of radio paging devices. S. REP. 99-541, *supra* note 9. See also Wiley & Liebowitz, *Electronic Privacy Act is Progress—But It Still Is Not a Panacea*, NAT'L L.J. Jan. 12, 1987, at 21, 22. Other amendments include legislation enabling law enforcement officials to conduct roving surveillance and execute changes in surveillance orders. Carr, *supra* note 9, at 109-10. See also J. CARR, *THE LAW OF ELECTRONIC SURVEILLANCE* (2d ed. 1987).

11. Section 801(c) of Title III "recognizes the extensive use made by organized crime of wire and oral communications." S. REP. NO. 1097, 90th Cong. 2d Sess., *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 2112, 2177. It also acknowledges that "the ability to intercept such communications is indispensable in the evidence gathering process in the administration of justice in the area of organized crime." *Id.* See also *United States v. Phillips*, 540 F.2d 319, 324 (8th Cir.) (legislation attempted to strike balance between need to protect persons from unwarranted electronic surveillance and preservation of law enforcement tools needed to fight organized crime), *cert. denied*, 429 U.S. 1000 (1976).

12. Section 801(b) of Title III recognizes that:

to protect the privacy of wire and oral communications, to protect the integrity of court and administrative proceedings and to prevent the obstruction of interstate commerce, it is necessary for Congress to define on a uniform basis the circumstances and conditions under which the interception of wire or oral communications may be authorized.

S. REP. NO. 1097, 90th Cong. 2d Sess., *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 2112, 2177.

State courts have also recognized the privacy protection purposes of Title III. See *Halpin v. Superior Court*, 6 Cal. 3d 885, 495 P.2d 1295, 101 Cal. Rptr. 375 (purpose of Title III is to protect privacy of wire and oral communications and to establish uniform guidelines for when lawful interceptions can occur), *cert. denied*, 409 U.S. 982 (1972); *State v. DeMartin*, 171 Conn. 524, 370 A.2d 1038 (1976) (purpose of section is to protect privacy of oral and wire communications while establishing uniform basis for valid electronic surveillance); *State v. Howard*, 235 Kan. 236, 242, 679 P.2d 197, 201 (1984) (Title III was intended to serve as guideline, detailing conditions and circumstances requisite for

tion against the interception of oral, wire or electronic communications. These exceptions are: 1) court authorized interceptions¹³ and 2) interceptions when one party to the conversation has given consent to the interception.¹⁴ The legality of the one-party consent for private participation monitoring situations is qualified, however, in that the interception is not lawful if intentionally¹⁵ effected to commit a crime or tort,

proper interception of conversations in which one has protected privacy interest).

13. 18 U.S.C. § 2511(2)(a)(ii)(A) (1982 & Supp. IV 1986).

14. 18 U.S.C. §§ 2511(2)(c) & (d) (Supp. IV 1986). Section 2511(2)(c) allows an exception for persons intercepting their own conversations under color of law. For the text of and further discussion of this section, see *infra* note 40 and accompanying text.

Section 2511(2)(d) allows a "private party" one-party consent exception. This section states:

It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic 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 tortious act in violation of the [C]onstitution or laws of the United States or of any state.

18 U.S.C. § 2511(2)(d) (Supp. IV 1986).

The "unless" clause was missing from this section when the bill was first reported but was added at the urging of Senators Hart and McClellan. *United States v. Phillips*, 540 F.2d 319 (8th Cir. 1976) (citing 114 CONG. REC. 14,695 (1968)). This section was added to prohibit a one-party consent tap where the monitoring is not conducted under color of law, with an exception for private persons who act in a defensive fashion. 114 CONG. REC. 14,694 (1968).

Section 2511(2)(d) was amended in 1986 by striking the words "or other injurious act." For further discussion of this change, see *infra* notes 64-68 and accompanying text. This amendment was precipitated by judicial interpretation of that section which held that the recording of a conversation was illegal if committed for an "improper purpose," a term which Congress found to be overly broad and vague. S. REP. 99-541, § 101(b), *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS at 3571.

It is not the subject matter of the communication that must be criminal or tortious for an interception to violate § 2511(2)(d); rather, it is the purpose behind the interception that determines whether a violation of the section has occurred. *United States v. Truglio*, 731 F.2d 1123, 1131 (4th Cir. 1984).

The result of this exception is the authorization of consensual electronic surveillance in certain limited circumstances. *See, e.g., Moore v. Teflon Communications Corp.*, 589 F.2d 959, 966 (9th Cir. 1978) (Title III not intended to prohibit party from recording conversation with another when recorder was acting out of legitimate desire to protect himself); *United States v. Jones*, 542 F.2d 661 (6th Cir. 1976) (Title III was enacted to curtail electronic surveillance and to protect privacy of all parties to intercepted conversation); *United States v. Hodge*, 539 F.2d 898 (6th Cir. 1976) (purpose of Act "was to allow consensual interception of telephone conversations without a warrant"), *cert. denied*, 429 U.S. 1091 (1977); *In re Evans*, 452 F.2d 1239, 1243 (D.C. Cir. 1971) (purpose of Title III was to combine "a grant of power to intercept communications with [a] . . . set of safeguards to deter abuse"), *cert. denied*, 408 U.S. 930 (1972).

15. It has been held that willfulness is a central element of a violation of Title III and that civil or criminal liability under that chapter can not be established against any defendant without showing that he acted intentionally or with

such as recording a conversation for purposes of blackmailing the other party to the communication.¹⁶

An aspect of Title III which has proven troublesome to courts is section 2515, which requires that evidence obtained in violation of Title III be suppressed in any criminal or civil trial or hearing.¹⁷ The scope of this section is a common issue in state¹⁸ and federal courts.¹⁹ At issue is

reckless disregard of his legal obligations. *Citron v. Citron*, 539 F. Supp. 621 (S.D.N.Y. 1982), *aff'd*, 722 F.2d 14 (2d Cir. 1983), *cert. denied*, 466 U.S. 973 (1984). *See also* *United States v. Harpel*, 493 F.2d 346 (10th Cir. 1974) (consent means actual consent as distinguished from implied consent).

16. *See* 18 U.S.C. § 2511(2)(d) (Supp. IV 1986). *See also* *By-Prod Corp. v. Armen-Berry Co.*, 668 F.2d 956, 959-60 (7th Cir. 1982) (purpose of recording determines whether interception violates Title III; if not for criminal or tortious purpose, one may intercept phone call to which one is party); *United States v. Phillips*, 540 F.2d 319, 325 (8th Cir.) (effect of Title III is to prohibit interceptions when done for criminal or tortious purpose, and determination of that purpose is done on case-by-case basis), *cert. denied*, 429 U.S. 1000 (1976); *Meredith v. Gavin*, 446 F.2d 794, 798 (8th Cir. 1971) (permits recording unless purpose for making is "evil"). *Meredith*, however, dealt with "injurious acts" which are no longer grounds for a violation of § 2511(2)(d). For a further discussion of this deletion, see *infra* notes 64-68 and accompanying text.

For a further analysis of the language and history of the one-party consent exception, see Note, *Does the "One-Party Consent" Exception Effectuate the Underlying Goals of Title III?*, 18 AKRON L. REV. 495 (1985).

Interceptions by a party to the communication will generally be referred to in this Comment as "participant monitoring" interceptions. For a further discussion of the "participant monitoring" exception under Title III, see Annotation, *Interception of Telecommunication by or with Consent of Party as Exception Under 18 U.S.C.S. § 2511(c) and (d), to Federal Proscription of Such Interceptions*, 67 A.L.R. FED. 429 (1984).

17. 18 U.S.C. § 2515 (1982). Section 2515 states in full:

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 that information would be in violation of [Title III].

Id. This section thus imposes an evidentiary sanction to compel compliance with other prohibitions of Title III. *Gelbard v. United States*, 408 U.S. 41 (1972).

For a discussion of suppression of evidence obtained in violation of Title III, see *infra* notes 81-104 and accompanying text. *See also* Note, *supra* note 16.

18. For state cases discussing the scope of Title III, see, e.g., *Ex parte O'Daniel*, 515 So. 2d 1250 (Ala. 1987) (relationship of §§ 2515 and 2511(2)(d) in divorce proceeding); *Daniels v. State*, 381 So. 2d 707 (Fla. Dist. Ct. App. 1979) (§§ 2516(2) and 2518(1)(c) preempted state statute authorizing assistant district attorney to apply for wiretap where district attorney not "principal prosecuting attorney"), *aff'd*, 389 So. 2d 631 (Fla. 1980); *State v. Jock*, 404 A.2d 518 (Del. Super. Ct. 1979) (state statute paralleling Title III applies to inter-spousal communications); *Rickenbaker v. Rickenbaker*, 290 N.C. 373, 226 S.E.2d 347 (1976) (husband's interception of wife's conversation violated Title III and was suppressed under § 2515). *See generally* Note, *Wiretapping and the Modern Marriage*, 91 DICK. L. REV. 855 (1987) (analysis and additional cases dealing with interpretations of § 2515, particularly as it relates to marital interceptions).

Section 2515, as it is applied to the states, recently withstood a constitu-

the section's apparently over-broad language which would, if literally interpreted, not permit the government to introduce an illegal recording, or any evidence obtained through an illegal recording, against any "aggrieved person,"²⁰ including the maker of that recording, for any pur-

ditional attack. See *Michigan v. Meese*, 666 F. Supp. 974 (E.D. Mich. 1987), *aff'd without opinion*, 830 F.2d 692 (6th Cir. 1988). In *Meese*, the state of Michigan sought a declaration that § 2515, as applied to the states, violated the tenth amendment. *Id.* at 975. The state argued that the Act exceeded the limits of the Commerce Clause but this claim was dismissed. *Id.* at 975-76. The section was found to be necessary and proper to execute Congress' other intentions in Title III. *Id.* at 979. The Sixth Circuit affirmed the district court by holding that there was no case or controversy to be resolved. 830 F.2d at 692.

19. For federal cases discussing the scope of Title III, see, e.g., *United States v. Giordano*, 416 U.S. 505 (1974) (illegally intercepted evidence suppressed under § 2515 when proper motion made under procedural requirement of § 2518(10)); *Gelbard v. United States*, 408 U.S. 41 (1972) (grand jury witness entitled to protection of § 2515 as defense to civil contempt); *United States v. Mora*, 821 F.2d 860 (1st Cir. 1987) (discussion of relationship between §§ 2515 and 2518(10)(a) grounds for suppression); *United States v. Vest*, 813 F.2d 477 (1st Cir. 1987) (discussion of relationship between §§ 2515 and 2511(2)(d)); *United States v. Underhill*, 813 F.2d 105 (6th Cir. 1987) (same); *United States v. Truglio*, 731 F.2d 1123 (4th Cir. 1984) (same); *Anthony v. United States*, 667 F.2d 870 (10th Cir. 1981) (defendant precluded from using intercepted tapes to impeach government witness), *cert. denied*, 457 U.S. 1133 (1982); *Hussing v. Warden*, 623 F.2d 1185 (7th Cir. 1980) (violation of § 2515 can be raised in habeas corpus petition); *United States v. Phillips*, 540 F.2d 319 (8th Cir. 1976) (discussion of relationship between §§ 2515 and 2511(2)(d)); *United States v. Caron*, 474 F.2d 506 (5th Cir. 1973) (unlawful wiretap evidence allowed for impeachment purposes); *In re Grand Jury Proceedings*, 450 F.2d 199 (3d Cir. 1971) (§ 2515 prevents use of unlawfully recorded evidence to question witness in grand jury proceeding), *aff'd sub nom.* *United States v. Egan*, 408 U.S. 41 (1972); *United States v. Traficant*, 558 F. Supp. 996 (N.D. Ohio 1983) (discusses relationship between §§ 2511(2)(d) and 2515).

For a general discussion of Supreme Court cases addressing Title III, see Goldsmith, *The Supreme Court and Title III: Rewriting the Law of Electronic Surveillance*, 74 J. CRIM. L. & CRIMINOLOGY 1 (1983).

20. See 18 U.S.C. § 2518(10)(a) (Supp. 1986). This section provides the mechanism for a motion to suppress evidence obtained in violation of Title III. It states that any "aggrieved person may move to suppress the contents of any intercepted wire, oral or electronic communication . . . or evidence derived therefrom" if the communication is made in violation of Title III. *Id.* This section also outlines the procedure to make the motion. See *id.* "[A]ggrieved person' means a person who was a party to any intercepted wire, oral, or electronic communication or a person against whom the interception was directed." 18 U.S.C. § 2510(11) (Supp. IV 1986). One must be a victim of a search and seizure to have standing to suppress illegally obtained evidence. See *Jones v. United States*, 362 U.S. 257, 261 (1960) (in order to qualify as person aggrieved by unlawful search and seizure, one must have been victim of search or seizure—one against whom search was directed as distinguished from one who claims prejudice only through use of evidence gathered as consequence of search or seizure of another); *United States v. Turk*, 526 F.2d 654, 663 (5th Cir. 1976) ("[O]nly those whose rights have been violated should be able to reap the unavoidable benefits to criminals which accompany the judicial attempt to deter future police illegality.") (footnote omitted), *cert. denied*, 429 U.S. 823 (1976). But see *Gelbard v. United States*, 408 U.S. 41 (1972) (grand jury witness need not follow procedure of § 2518(10)(a) to have protection of § 2515).

pose.²¹ In spite of the literal language of section 2515, in certain circumstances courts have interpreted the legislative history to permit the introduction of evidence which would otherwise be barred.²²

Two federal courts of appeals have recently adopted different approaches to suppression of evidence in cases involving privately recorded conversations where disclosure is not permitted by a literal interpretation of the "participant monitoring" exception of section 2511(2)(d). In *United States v. Underhill*,²³ the Sixth Circuit held that tape recordings made for a criminal purpose by a private individual were admissible against that individual even though a literal interpretation of the Act would preclude such admissibility.²⁴ The First Circuit, however, in *United States v. Vest*,²⁵ reached a contrary conclusion regarding the admissibility of tapes when the tapes, which were recorded for an illegal purpose, were offered as evidence against a third-party victim of the interception.²⁶ This Comment will examine the reasoning of these cases and focus on the circumstances which require suppression of evidence obtained by private party consent interceptions which do not fall within

See generally Note, *supra* note 5, at 373-80 (discussion of mechanism for suppression).

21. *United States v. Giordano*, 416 U.S. 505, 524-27 (1974) (congressional intent and policy is key to availability of suppression remedy); *United States v. Mora*, 821 F.2d 860, 865 (1st Cir. 1987) (same).

22. *See, e.g.*, *United States v. Vest*, 813 F.2d 477 (1st Cir. 1987) (resort to legislative history enabled introduction of tape recordings against perpetrator of violation and his confederates); *United States v. Phillips*, 540 F.2d 319 (8th Cir. 1976) (illegally made recordings may be used for impeachment purposes); *United States v. Turk*, 526 F.2d 654 (5th Cir.) (interpretation of "intercept" does not include police seizure of cassette tapes), *cert. denied*, 429 U.S. 823 (1976); *United States v. Caron*, 474 F.2d 506 (5th Cir. 1973) (Congress did not intend Title III to prevent use of unlawfully obtained evidence in impeachment proceedings); *In re Marriage of Lopp*, 378 N.E.2d 414 (Ind. 1978) (statutory interpretation allowed use of spousal interception in marital action), *cert. denied*, 439 U.S. 1116 (1979).

23. 813 F.2d 105 (6th Cir.), *cert. denied*, 107 S. Ct. 2484 (1987).

24. *Id.* at 111. In *Underhill*, the criminal defendant taped conversations with his co-conspirators regarding an illegal gambling operation. The making of the tapes violated Tennessee law, TENN. CODE ANN. §§ 39-6-601(7), 39-6-602(e) (1982), and thereby violated § 2511(2)(d). *Id.* at 108.

For a further discussion of *Underhill*, see *infra* notes 135-51 and accompanying text.

25. 813 F.2d 477 (1st Cir. 1987).

26. *Id.* In *Vest*, the defendant was involved in a criminal transaction. The other party to the transaction recorded the conversation for the separate criminal purpose of blackmailing the defendant and later turned the tapes over to the government who sought to use them in a perjury prosecution. *Id.* at 479.

The district court in *Vest* found that the interception was committed in violation of §§ 2511(1)(a) and (2)(d). 639 F. Supp. 899, 908 (D. Mass. 1986). This finding was not challenged on appeal to the First Circuit. *Vest*, 813 F.2d at 480 n.2.

For a further discussion of *Vest*, see *infra* notes 105-34 and accompanying text.

the exception under section 2511(2)(d) of the statute because they were made for an illegal purpose.

In the course of the discussion, the intent of Congress in enacting sections 2511(2)(d) and 2515 will be analyzed²⁷ and the courts' role in interpreting the statute to effectuate the purposes and policies of Congress will be addressed.²⁸ In addition, the interaction of sections 2511(2)(d) and 2515 will be examined in light of the overall purposes of Title III.²⁹ This Comment will also analyze the similarities and differences between *Vest* and *Underhill*, and will discuss how the decisions of the First and Sixth Circuits are consistent in light of the intent of Congress.³⁰ Finally, this Comment will suggest an approach that simplifies the task of interpreting the statute consistently with the intention of its drafters.

II. PURPOSES OF TITLE III

Title III was a response to the inherent deficiencies in the Federal Communications Act of 1934,³¹ which prohibited the disclosure of protected communications. Under the previous Act, private citizens were free to ignore the restrictions set forth in its provisions without apprehension of prosecution.³² Furthermore, law enforcement officers could not use electronic surveillance as an investigative tool, no matter how

27. For a discussion of the legislative history of § 2511(2)(d), see *infra* notes 57-69 and accompanying text. For a discussion of the legislative history of § 2515, see *infra* notes 81-87 and accompanying text.

28. For a discussion of the role of legislative history in statutory interpretation, see *infra* note 131.

29. For a discussion of Congressional intent and purposes in enacting Title III, see *infra* notes 34-36 & 57-69 and accompanying text. See also Fishman, *The Interception of Communications Without a Court Order: Title III, Consent, and the Expectation of Privacy*, 51 ST. JOHN'S L. REV. 41 (1976).

30. For this analysis, see *infra* notes 152-210 and accompanying text. Both *Underhill* and *Vest* involved § 2515 of Title III as it applies to a violation of § 2511(2)(d) of that chapter. *Vest*, however, dealt with an innocent third party victim, whereas *Underhill* involved an attempt by an intercepting party to suppress evidence obtained from his own illegal recordings. See *United States v. Cantley*, crim. nos. 86-00293-02 -06 (E.D. Pa. 1987) (1987 WL 13668) (*Vest* and *Underhill* address different aspects of suppression requirement).

31. 47 U.S.C.A. § 605 (West 1962 & Supp. 1988). The Act provides in part that:

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof except through authorized channels of transmission or reception

Id. This section was amended after the enactment of Title III to supply all of the necessary restrictions on the interception of wire and oral communications not referred to in the new Act. *Id.*

32. J. CARR, *supra* note 10, § 2.1 (private persons were free to ignore restrictions because Act only applied to governmental interceptions).

serious the crime under investigation.³³

Title III was designed to provide protection for the privacy of wire and oral communications and to protect the integrity of court and administrative proceedings.³⁴ As noted previously, it was a legislative attempt to strike a balance between the need to protect persons from unwarranted electronic surveillance and the need for law enforcement tools necessary in the fight against organized crime.³⁵ This balance was achieved by making the surreptitious monitoring of communications unlawful except in certain circumstances.³⁶ Thus, in order to protect individuals from unauthorized interceptions of communications, the warrantless interception of communications was made a criminal offense³⁷ as well as the proper basis for a suit in civil damages.³⁸ The statute also imposed an evidentiary sanction to ensure compliance with the other provisions of the chapter.³⁹

“Participation monitoring” interceptions by a person acting under color of law are governed by section 2511(2)(c)⁴⁰ and court authorized

33. See *id.* Title III remedied this flaw by specifically identifying which crimes were subject to surveillance. See 18 U.S.C. § 2516 (Supp. IV 1986).

34. Act of June 19, 1968, Pub. L. 90-351 § 801(b), 1968 U.S. CODE CONG. & ADMIN. NEWS 237, 253. See also S. REP. NO. 1097, 90th Cong., 2d Sess. reprinted in 1968 U.S. CODE CONG. & ADMIN. NEWS 2112, 2177 [hereinafter S. REP. NO. 1097]. For a discussion of the purposes of the other Titles under the Omnibus Crime Control Act, see *supra* note 4.

35. S. REP. NO. 1097, *supra* note 34, at 2153-58; *Gelbard v. United States*, 408 U.S. 41 (1972) (protection of privacy was overriding Congressional concern in enactment of Title III, but Act also delineated circumstances under which interception of wire and oral communications may be authorized); *Newcomb v. Ingle*, 827 F.2d 675 (10th Cir. 1987) (protection of privacy was an overriding Congressional concern in enacting Title III) (citing *Gelbard*); *United States v. Vest*, 813 F.2d 477 (1st Cir. 1987) (Congress did not intend Title III suppression sanction to incorporate every change in fourth amendment exclusionary rule even though protection of privacy was of major concern); *United States v. Underhill*, 813 F.2d 105 (6th Cir. 1987) (Congress intended to protect innocent parties to conversation from risk that other party will record and divulge contents; Congress did not intend to protect criminals who recorded their own conversations); *United States v. Phillips*, 540 F.2d 319 (8th Cir.) (legislation was intended to balance need to protect individuals from intrusive electronic surveillance and need to preserve law enforcement tools to fight organized crime), *cert. denied*, 429 U.S. 1000 (1976); *United States v. Traficant*, 558 F. Supp. 996 (N.D. Ohio 1983) (reference to legislative history shows intended balance between protection of privacy and equipping law enforcement officials with modern technology).

36. See 18 U.S.C. § 2511 (1982 & Supp. IV 1986). For further discussion of this provision, see *supra* notes 5-7.

37. See 18 U.S.C. § 2511(4) (Supp. IV 1986).

38. See 18 U.S.C. § 2520 (Supp. IV 1986).

39. *Id.* § 2515. For the text of this provision, see *supra* note 17. For a further discussion of § 2515, see *infra* notes 81-104 and accompanying text.

40. Section 2511(2)(c) states:

It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral or electronic communication,

interceptions are governed by section 2516.⁴¹ Because Title III was enacted to provide a method by which law enforcement agencies would be given standards and authority to conduct wiretapping or electronic surveillance, a great deal of cases and scholarly works on Title III have dealt with these two aspects of the statute.⁴² This Comment, however, will focus on private interceptions which fall within the ambit of Title III under section 2511(2)(d).

The suppression rule under Title III⁴³ applies to both private interceptions which violate section 2511(2)(d) of the statute as well as to interceptions made for the purpose of law enforcement.⁴⁴ Sections 2515 and 2511(2)(d)⁴⁵ are not to be considered standing alone, but must be construed in the context of the entire act and its purposes.⁴⁶ According to the Supreme Court, a statute should be interpreted in a manner consistent with the congressional purpose.⁴⁷ If the language of section

where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception. 18 U.S.C. § 2511(2)(C) (Supp. IV 1986). For a discussion of interceptions by a person acting under color of law, see Fishman, *supra* note 29. See also Annotation, *supra* note 16. For a discussion of evidence obtained by law enforcement personnel in violation of Title III, see Note, *The Suppression Sanction in the Federal Electronic Surveillance Statute*, 62 WASH. U.L.Q. 707 (1984-85).

41. Section 2516 states the criminal activities for which law enforcement personnel may seek authorization for the interception of wire, oral or electronic communications. See 18 U.S.C. § 2516 (1982 & Supp. IV 1986). These authorizations in turn must be given in conformity with § 2518 of the chapter. *Id.*

For a discussion of additional situations in which the interception of communications is lawful, see *supra* note 7.

42. See, e.g., Note, *Constitutional Law—Criminal Procedure—Eavesdropping—Title III of the Omnibus Crime Control and Safe Streets Act of 1968: A Search Without a Warrant?* Dalia v. United States, 441 U.S. 238 (1979), 9 U. BALT. L. REV. 308 (1980) (survey of history of eavesdropping law developed by Supreme Court); Note, *Judicial Interpretation of Title III—Should Privacy Yield in the Wake of Congressional Silence on Entries to Install Bugs?*, 29 CATH. U.L. REV. 697 (1980) (advocating legislative reform of Title III to protect persons from police entry to install bugs).

43. 18 U.S.C. § 2515 (1982). This provision must be read in light of § 2518(10)(a) which defines the class of persons entitled to make a motion to suppress. Section 2515 prohibits the use of any evidence which was directly or indirectly obtained in violation of the chapter. 18 U.S.C. § 2515 (1982). For the full text of § 2515, see *supra* note 17. For a further discussion of § 2515, see *infra* notes 81-104 and accompanying text.

44. 18 U.S.C. § 2511(2)(c) (Supp. IV 1986). For an analysis of the suppression rule found in § 2515 as it relates to interceptions authorized for law enforcement purposes or made under color of law, see Note, *supra* note 40.

45. For the text of § 2511(2)(d), see *supra* note 14. For the text of § 2515, see *supra* note 17.

46. United States v. Traficant, 558 F. Supp. 996, 1002 (N.D. Ohio 1983); see also United States v. Giordano, 416 U.S. 505 (1974) (discussion of procedure for obtaining authorization to intercept as it is affected by suppression rule of § 2515); Gelbard v. United States, 408 U.S. 41 (1972) (discussion of relationship between different sections of Title III).

47. See generally Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571

2515 is interpreted literally, any evidence obtained through an interception made for an improper purpose is inadmissible in any trial or hearing against any person.⁴⁸ However, such a literal interpretation of the statute should not be upheld since it leads to an absurd result.⁴⁹

In response to Title III, state legislatures enacted statutes regulating electronic surveillance. A few states amended existing laws⁵⁰ while others instituted new legislation following the guidelines of Title III.⁵¹ While state laws may be more restrictive than federal laws, they may not be less so and Title III thus provides the minimum circumstances under which wire, oral or electronic surveillance or interception is permissible.⁵²

(1982) (if literal application of statute would produce result demonstrably at odds with intention of its drafters, those intentions must control). For a further discussion of statutory interpretation, see *infra* notes 131-32 and accompanying text.

48. See 18 U.S.C. § 2515 (1982).

49. For a further discussion of congressional intent in the enactment of § 2515, see *infra* notes 81-87 and accompanying text.

50. ARIZ. REV. STAT. ANN. § 13-3010 (1978 & Supp. 1986); GA. CODE ANN. § 16-1162 (1988); MASS. GEN. LAWS ANN. ch. 272, § 99 (West 1972); NEV. REV. STAT. ANN. § 179.470 (Michie 1986); N.Y. [CRIM. PROC.] LAW § 700.20 (McKinney 1984); OR. REV. STAT. § 133.724 (1983); WASH. REV. CODE ANN. § 9.73.130 (1988).

51. COLO. REV. STAT. § 16-15-102(2) (1986); CONN. GEN. STAT. ANN. § 54-41c (West 1985); DEL. CODE ANN. tit. 11 § 1336(h) (Supp. 1984); D.C. CODE ANN. § 23-547 (1981); FLA. STAT. ANN. § 934.07 (West 1985); HAW. REV. STAT. § 803-46 (1985 & Supp. 1987); IDAHO CODE § 18-6706 (1987); KAN. STAT. ANN. § 22-2515 (1981); LA. REV. STAT. ANN. § 15:1308 (West Supp. 1988); MD. [CTS. & JUD. PROC.] CODE ANN. § 14-408 (1984 & Supp. 1986); MINN. STAT. ANN. § 626A.06 (West 1983 & Supp. 1988); NEB. REV. STAT. § 86-705 (1987); N.H. REV. STAT. ANN. § 570-A:7 (1986 & 1988 Supp.); N.J. STAT. ANN. § 2A:156A-9 (West 1985); N.M. STAT. ANN. § 30-12-3 (1978); OKLA. STAT. ANN. tit. 13, § 176.9 (West 1983); 18 PA. CONS. STAT. ANN. § 5709 (Purdon 1983); R.I. GEN. LAWS § 12-5.1-2 (1956 & Supp. 1988); S.D. CODIFIED LAWS ANN. § 23A-35A-4 (1988); TEX. CODE CRIM. PROC. ANN. § 8 (Vernon Supp. 1986); UTAH CODE ANN. § 77-23a-10 (1982); VA. CODE ANN. § 19.2-68 (1983); WIS. STAT. ANN. § 968.30 (West 1985). For a further discussion of the states' ability to regulate electronic surveillance, see J. CARR, *supra* note 32, § 2.4.

52. *United States v. Mora*, 821 F.2d 860, 863 n.11 (1st Cir. 1987) (states are free to impose more rigorous requirements than Title III but may not water down federally created safeguards); J. CARR, *supra* note 32, § 2.4(a). See also S. REP. NO. 1097, *supra* note 34. Evidence obtained by federal authorities in violation of state law, however, is admissible in federal court. *United States v. Keen*, 508 F.2d 986 (9th Cir. 1974), *cert. denied*, 421 U.S. 929 (1975).

The fourth amendment is limited to governmental searches or violations as the Constitution only applies to governmental searches and not to private parties. See *United States v. Jacobsen*, 466 U.S. 109 (1984). It has been held that if evidence falls into government hands following a private search and seizure, then no constitutional violation arises. *United States v. Traficant*, 558 F. Supp. 996, 999 (N.D. Ohio 1983). Congress is free, however, to provide more protection than the Constitution requires and Title III provides this protection because it applies to private parties as well as governmental entities. See 18 U.S.C. §§ 2510-2520 (1982 & Supp. IV 1986).

Title III's stated purposes are to effectively protect "the privacy of wire and oral communications, to protect the integrity of court and administrative proceedings, and to prevent the obstruction of interstate commerce" ⁵³ It is mainly designed to safeguard the privacy of innocent persons. ⁵⁴ While furthering these goals, Congress sought to preserve the use of interception of communications as law enforcement tools needed to fight organized crime. ⁵⁵ However, most of Title III's provisions are legislative efforts to restrict very narrowly the use of electronic surveillance in order to safeguard the privacy of individuals. ⁵⁶

A. Section 2511(2)(d)

1. Legislative History

Section 2511(2)(d), as originally enacted, provided an exception to the general prohibitions of 2511 by allowing a private person who was a party to a communication to intercept the communication unless the purpose of the interception was to commit a criminal, tortious or "any other injurious act." ⁵⁷ This section, as well as section 2511(2)(c), replaced what was originally proposed as subsection 2(c), which read: "It shall not be unlawful under this chapter for a party to any wire or oral communication, or a person given prior authority by a party to the communication to intercept such communication." ⁵⁸ The statute was amended at the urging of Senator Hart who stated that "[section 2511(2)(c) as proposed] is totally permissive with respect to surreptitious monitoring of a conversation even though the monitoring may be for an insidious purpose such as blackmail, stealing business secrets, or other criminal or tortious acts in violation of federal or state laws." ⁵⁹

53. Pub. L. 90-351, 82 Stat. 197 § 801(b), reprinted in 1968 U.S. CODE CONG. & ADMIN. NEWS 237, 253.

For the Legislative history of the Electronic Communications Privacy Act of 1986, see S. REP. NO. 99-541, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 3555.

54. See Pub. L. 90-351, 82 Stat. 197 § 801(d).

55. *Id.* § 801(c). Section 801(c) states: Organized criminals make extensive use of wire and oral communications in their criminal activities. The interception of such communications to obtain evidence of the commission of crimes or to prevent their commission is an indispensable aid to law enforcement and the administration of justice. *Id.* See also S. REP. NO. 1097, *supra* note 34.

56. See, e.g., *United States v. United States District Court*, 407 U.S. 297, 301-02 (1972) (Title III authorizes use of electronic surveillance, and much of Title III was enacted to meet constitutional requirements for electronic surveillance); see also *United States v. King*, 478 F.2d 494, 498 (9th Cir.) (Title III provides "elaborate" and "generally restrictive" detail for permissible wiretaps), *cert. denied*, 414 U.S. 846 (1973); *Application of United States*, 427 F.2d 639, 643 (9th Cir. 1970) ("meticulous provision[s]" are made regarding electronic surveillance in Title III).

57. For the current text of section 2511(2)(d) and a discussion of the recent amendments thereto, see *supra* note 14.

58. 114 CONG. REC. 14,694 (1968).

59. 114 CONG. REC. 14,694-95 (1968).

Senator Hart further stated that the use of such outrageous practices was widespread at the time and that he "believe[d] they constitute a serious invasion of privacy."⁶⁰

The amendments proposed by Senator Hart were adopted without change in order to fill the perceived "gaping hole" in the statute as originally proposed.⁶¹ Sections 2511(2)(c) and (d) thus allowed one-party consent taps only when made by a person acting under color of law or when made by a private person acting in a *defensive* fashion to protect his or her own legitimate interests.⁶² Thus, under section 2511(2)(d) as originally enacted, whenever a private person recorded or otherwise intercepted a communication with an unlawful, tortious or injurious motive, he violated the criminal provisions of Title III and was also subject to civil liability for those violations.⁶³

2. Section 2511(2)(d) as a limit to Section 2515

Section 2511(2)(d) has recently been amended by the striking of the phrase "or for the purpose of committing any other injurious act."⁶⁴ The specific reasoning behind dropping these words from section 2511(2)(d) was that Congress saw courts misconstruing this terminology to allow civil liability in any case where a party could show any detrimental effect.⁶⁵ Particularly troubling to Congress were attempts by parties to chill the exercise of first amendment rights through the use of civil remedies under Title III.⁶⁶ For example, a zealous reporter or newsman could be held civilly or criminally liable for exposing the wrongdoing of a public figure if the embarrassment caused by that exposure could be interpreted as injurious.⁶⁷ The remedy Congress chose to alleviate this

60. *Id.* at 14,694.

61. *Id.*

62. *Id.* See also *Meredith v. Gavin*, 446 F.2d 794, 798 (8th Cir. 1971) (purpose of amendment is to bring one party consent interceptions which were made with "evil" purpose within prohibitions of Title III). Section 2511(2)(c), another participant monitoring exception, allows one-party consent taps which involve law enforcement officials. For the text of this provision, see *supra* note 40.

63. 18 U.S.C. § 2520 (Supp. IV 1986). For a discussion of private actions under Title III, see Englander, *Statutes of Limitations and Private Actions Under Title III of the Omnibus Crime Control and Safe Streets Act of 1968*, 41 WASH. & LEE L. REV. 614 (1984).

64. Pub. L. 99-508, 100 Stat. 1848 (codified at 18 U.S.C. §§ 2510-2520 (Supp. IV 1986)). For the text of amended § 2511(2)(d), see *supra* note 14.

65. See S. REP. NO. 99-541, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 3555, 3571.

66. *Id.*

67. This was the situation presented in *Boddie v. American Broadcasting Co.*, 731 F.2d 333 (6th Cir. 1984), which Congress specifically referred to as an example of an attempt to chill the exercise of First Amendment rights. In *Boddie*, the plaintiff, whose conversations were recorded by a journalist, sued for damages that resulted from that recording. 731 F.2d at 335. The plaintiff claimed that the defendants' purpose in recording the conversation was to cause her "insult and injury." *Id.* at 338. The Sixth Circuit remanded the case for a factual

perceived problem was to limit the situations where a one-party consent interception constitutes a violation of Title III.⁶⁸ With the impact of section 2511(2)(d) lessened, the impact of the Title III "suppression" section, section 2515, is also indirectly limited.⁶⁹ Similarly, decisions under section 2511(2)(d) which place the burden of establishing that a recording was made for an improper purpose on the defendant in a suppression motion can be seen as indirectly limiting section 2515.

In *United States v. Phillips*,⁷⁰ a defendant was convicted of perjury over his motion to suppress tapes of conversations in which he was a participant.⁷¹ The defendant argued that the government held the ultimate burden of proving that the conversations were not recorded for an improper purpose, and since no evidence was offered on this issue at trial, the tapes should have been suppressed.⁷²

The Eighth Circuit held that the burden of proof to show that a recording was made for an improper purpose under section 2511(2)(d) was on the party seeking to suppress the recording under section 2515.⁷³ The court found that the legislative history behind sections 2511(2)(d) and 2515 reflected no desire on the part of Congress to change the traditional burden of proof, which places the burden on the suppressing party, with regard to electronically gathered evidence under

determination as to whether the defendant intended injury to Boddie, or whether the defendant acted in good faith. *Id.* Congress felt that interpreting § 2511(2)(d) as imposing liability in this situation would place a "stumbling block in the path of even the most scrupulous journalist." S. REP. NO. 99-541, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 3555, 3571. For a further discussion of the decision in *Boddie*, see Note, *supra* note 16, at 511-14; Annotation, *supra* note 16.

68. 18 U.S.C. § 2511(2)(d) (Supp. IV 1986). For the text of § 2511(2)(d) as amended, see *supra* note 14.

69. See 18 U.S.C. § 2515 (1982). Because it is no longer a violation of Title III for a private person who is a party to a communication to intercept that communication for an injurious purpose which is neither criminal nor tortious, there will be fewer situations when suppression is required under § 2515 and thus the impact of that section is necessarily reduced.

70. 540 F.2d 319 (8th Cir.), *cert. denied*, 429 U.S. 1000 (1976).

71. *Id.* at 323-24. The defendant, Phillips, denied before a grand jury investigating a conspiracy that he had ever stated to anyone that he could arrange protection from local law enforcement officials. *Id.* at 323. On the basis of these statements, he was prosecuted for knowingly making false statements before a grand jury in violation of 18 U.S.C. § 1623. *Id.* The critical evidence admitted at trial was a tape recorded meeting attended by Phillips in which Phillips stated that he could control the district attorney. *Id.* at 324. The purpose of the recording of the conversation was unknown. *Id.* The defendant moved to suppress this evidence under § 2515 as, he alleged, it was obtained in violation of § 2511(2)(d). *Id.* This motion was denied and Phillips was convicted. *Id.*

72. *Id.* at 324.

73. *Id.* at 325. The *Phillips* court found that due process was not offended by requiring the defendant to shoulder the burden of establishing that the recording was made for an improper purpose because the purpose of the recording had no relationship to the perjury with which the defendant was charged. *Id.* at 326.

Title III.⁷⁴ Similar holdings have been made by other federal courts prior to the *Phillips* decision.⁷⁵ This may signal a further intent to use the provisions of section 2511(2)(d) to limit the suppression of evidence under section 2515.⁷⁶

3. Summary of Section 2511(2)(d)

Under section 2511(2)(d) as it now stands, a violation may be supported upon proof that the person making the recording did so for the purpose of committing a criminal or tortious act.⁷⁷ The burden is on the party alleging such a violation to prove the criminal or tortious act. If this burden is met, the recording/interception violates Title III and the criminal⁷⁸ and civil⁷⁹ remedies under that chapter will apply. Additionally, suppression of evidence is available for evidence unlawfully obtained under Title III if a violation of section 2511(2)(d) is shown.⁸⁰ However, court-imposed and statutory limitations on proving section 2511(2)(d) "violations" indirectly limit the impact of section 2515.

74. *Id.* at 324 (citing S. REP. NO. 1097, reprinted in 1968 U.S. CODE CONG. & ADMIN. NEWS at 2153-58).

75. *See, e.g.*, *United States v. Truglio*, 731 F.2d 1123, 1131-32 (4th Cir.) (defendant must establish that recording was made for criminal or tortious act), *cert. denied*, 469 U.S. 862 (1984); *United States v. Traficant*, 558 F. Supp. 996, 1000 (N.D. Ohio 1983) (burden on defendant to show impermissible purpose of recording); *Consumer Elec. Prod. v. Sanyo Elec., Inc.*, 568 F. Supp. 1194, 1196 (D. Colo. 1983) (burden of proof is on asserting party on issue of whether one party exception to Title III is negated on ground that interception was made for purpose of committing criminal or tortious act).

76. If the burden were on the party seeking to admit the evidence to prove that it was not obtained for a criminal or tortious purpose, suppression would necessarily be easier to obtain under § 2515.

Further § 2515 is not self executing. Instead, § 2518(10)(a) provides that any aggrieved person may file a motion to suppress the contents of any unlawfully intercepted communication. 18 U.S.C. § 2518(10)(a) (1982). This section provides the remedy for the right created by § 2515. S. REP. NO. 90-1097, *supra* note 34. *See Phillips*, 540 F.2d at 325 (§ 2518(10)(a) provides remedy for right created by § 2515). *But see Gelbard v. United States*, 408 U.S. 41, 59-60 (1972) (§ 2518(10)(a) authorizes any aggrieved person in specified types of proceedings to move to suppress contents of any intercepted wire or oral communication or evidence derived therefrom but it does not follow from omission of grand jury proceedings from the suppression provision that grand jury witnesses cannot invoke § 2515 as a defense in contempt proceedings).

Additionally, under traditional search and seizure law, the burden is on the accused in the first instance to prove to the trial court's satisfaction that wiretapping was unlawfully employed. *Phillips*, 540 F.2d at 325 (citing *Nardone v. United States*, 308 U.S. 338 (1939)).

77. *See By-Prod Corp. v. Armen-Berry Co.*, 668 F.2d 956, 959 (7th Cir. 1982) (it is use of interception with intent to harm, rather than fact of interception of a telecommunication that is critical to liability under § 2511(2)(d)).

78. 18 U.S.C. § 2511(4) (Supp. IV 1986).

79. *Id.* § 2520.

80. 18 U.S.C. § 2515 (1982). For a further discussion of § 2515, see *infra* notes 81-104 and accompanying text.

B. Section 2515

As previously noted, section 2515 imposes an evidentiary sanction to compel compliance with other prohibitions of the chapter.⁸¹ In enacting this section, however, Congress did not intend to expand the scope of the suppression sanction beyond the then existing search and seizure law.⁸² However, while "Title III's suppression remedy has its roots in the Fourth Amendment exclusionary rule, it is not simply coextensive with that rule."⁸³ In *United States v. Gelbard*,⁸⁴ the Supreme Court, after surveying the legislative history of Title III,⁸⁵ emphasized that section 2515, besides protecting the privacy of communications, ensures that courts do not become parties to illegal conduct.⁸⁶ The Court stated that the disclosure or use of information obtained through an invasion of privacy under Title III amounts to a *separate* injury to the vic-

81. *Id.* For the text of § 2515, see *supra* note 17 and accompanying text. The Senate Report on § 2515 states:

Section 2515 of [Title III] imposes an evidentiary sanction to compel compliance with the other provisions of the chapter. . . . The provision must, of course, be read in light of section 2518(10)(a) . . . which defines the class entitled to make a motion to suppress. It largely reflects existing law. It applies to suppress evidence directly (*Nardone v. United States*, 302 U.S. 379 (1937)) or indirectly obtained in violation of the chapter. (*Nardone v. United States*, 308 U.S. 338 (1939)). There is, however, no intention to change the attenuation rule. Nor generally to press the scope of the suppression rule beyond present search and seizure law. But it does apply across the board to both Federal and State proceedings. And it is not limited to criminal proceedings. Such a suppression rule is necessary and proper to protect privacy. The provision thus forms an integral part of the system of limitations designed to protect privacy. Along with the criminal and civil remedies, it should serve to guarantee that the standards of [Title III] will sharply curtail the unlawful interception of wire and oral communications.

S. REP. NO. 1097, *supra* note 34 (citations omitted).

82. S. REP. NO. 1097, *supra* note 34. See also *United States v. Dorfman*, 690 F.2d 1217, 1227 (7th Cir. 1982) (legislative history of Title III indicates that statutory suppression was meant largely to reflect existing law); S. REP. NO. 1097, *supra* note 34 (citing *Walder v. United States*, 347 U.S. 62 (1954)).

83. *United States v. Dorfman*, 690 F.2d 1217, 1227 (7th Cir. 1982). The *Dorfman* court noted that the significant difference between Title III suppression and the fourth amendment exclusionary rule is that the former bars use of illegally seized evidence in any trial or hearing, not just criminal trials. *Id.* at 1227. According to the *Dorfman* court, a second difference relates to the scope of the respective purposes of Title III and the fourth amendment exclusionary rule. The court stated: "[U]nder Title III, unlike the fourth amendment, the invasion of privacy is not simply 'over and done with' when an unlawful intrusion has been effected. Rather, the disclosure or use of information obtained through such an intrusion amounts to a separate injury to the victim's privacy interest." *Id.* at 1228 (citing *Gelbard v. United States*, 408 U.S. 41, 51-52 (1972)).

84. 408 U.S. 41 (1972). For a further discussion of the facts and holding in *Gelbard*, see *infra* notes 98-102 and accompanying text.

85. 408 U.S. at 46-50.

86. *Id.* at 51.

tim's privacy interest.⁸⁷

Section 2515 does not prohibit the use of illegally recorded communications for impeachment purposes.⁸⁸ The Title III exclusionary rule is thus similar to the fourth amendment exclusionary rule in this respect.⁸⁹ In *United States v. Raftery*,⁹⁰ the Ninth Circuit found, in a perjury prosecution case, that under the fourth amendment the government was not precluded from using evidence which had been illegally obtained in a prior investigation to prove the *separate* offense of perjury where the alleged perjury took place after the illegal search and seizure and after the evidence had previously been suppressed by the state court.⁹¹ *Raftery* was not a Title III case; rather it was a fourth amendment case wherein the court held that the fourth amendment exclusionary rule should not be extended to prevent a conviction for perjury occurring after the illegal seizure had taken place.⁹² The court stated that there is no justification for allowing a defendant to "affirmatively resort to perjurious testimony in reliance on the government's disability to challenge the credibility of an issue."⁹³ The court also addressed the deterrent purpose behind the fourth amendment exclusionary rule.⁹⁴ While *Raftery* did not address the Title III exclusionary sanction, its rationale is useful in examining the application of that rule. The *Raftery* decision supports the proposition that suppression is intended to rectify the wrong of the illegal search or interception; it does not grant the injured party a substantive right of immunity from prosecution for a wrongful act.

87. *Id.* at 51-52.

88. *United States v. Caron*, 474 F.2d 506 (5th Cir. 1973) (evidence obtained by unlawful wiretap may be used to impeach witness that testifies on direct examination with regard to testimony of defendant). *See also* *United States v. Vest*, 813 F.2d 477, 484 (1st Cir. 1987) (exception to § 2515 allowing unlawfully intercepted communications for impeachment purposes does not support exception for use of those communications in perjury prosecutions); S. REP. NO. 1097, *supra* note 34, at 2184-85 (citing *Walder v. United States*, 347 U.S. 62 (1954)). For a further discussion of the use of illegally obtained evidence for impeachment purposes, see *infra* note 116.

89. *Caron*, 474 F.2d at 506. In *Caron*, the Fifth Circuit found that, as with the fourth amendment, unlawfully intercepted communications may be used for impeachment purposes. *Id.* at 508-09 (citing *Walder v. United States*, 347 U.S. 62 (1954)).

90. 534 F.2d 854 (9th Cir.), *cert. denied*, 429 U.S. 862 (1976).

91. *Id.* at 857.

92. *Id.*

93. *Id.* (citing *Walder v. United States*, 347 U.S. 62, 65 (1954)).

94. *Id.* The court noted that the deterrent effect of excluding the evidence resulting from an illegal search would be minimal if the government was prevented from using the evidence to prove a separate offense after the illegal search and seizure and suppression of the evidence in the state court. *Id.* Title III was not intended to extend the scope of the judicially created suppression rule and therefore the limits imposed on that rule are relevant in interpreting the meaning of Title III. For a discussion of Congressional intent with respect to the scope of Title III, see *supra* notes 81-83 and accompanying text.

The fourth amendment exclusionary rule does not apply to non-governmental searches,⁹⁵ but the suppression rule of Title III does.⁹⁶ Title III, while similar to fourth amendment suppression in the actual suppression rights afforded, therefore covers a broader scope of searches than is covered by the fourth amendment.⁹⁷

An example of the broad scope of section 2515 is found in *United States v. Gelbard*⁹⁸ in which section 2515 protection was extended to a grand jury witness.⁹⁹ In *Gelbard*, the Supreme Court held that when a grand jury witness is adjudicated in contempt for refusing to testify, he may invoke the protection of section 2515 as a defense.¹⁰⁰ The Court recognized that the perpetrator of the invasion must be denied the fruits of his unlawful actions and that Title III's importance as a protection for the *victim* of an unlawful invasion of privacy is central to the legislative scheme.¹⁰¹ Thus, the Court held that the purpose of section 2515, and Title III as a whole, would be subverted if a grand jury witness was not able to invoke section 2515 protections under these circumstances.¹⁰²

95. *United States v. Jacobsen*, 466 U.S. 109 (1984) (private carrier opening and examining package does not violate fourth amendment and government's invasion of privacy is tested by degree to which it exceeds scope of private search); *Anthony v. United States*, 667 F.2d 870, 879 (10th Cir. 1981) (fourth amendment search and seizure rules apply to governmental searches not those of private individuals), *cert. denied*, 457 U.S. 1133 (1982).

96. *United States v. Donovan*, 429 U.S. 413, 432 n.22 (1977) (availability of suppression for statutory, as opposed to constitutional, violations turns on provisions of Title III rather than judicially fashioned exclusionary rule); *Anthony v. United States*, 667 F.2d 870, 878 (10th Cir. 1981) (Title III applies to tapping by private individuals as well as illegal court-authorized wiretaps), *cert. denied*, 457 U.S. 1133 (1982). See generally 18 U.S.C. § 2511 (1982 & Supp. IV 1986).

97. *United States v. Calandra*, 414 U.S. 338, 347-48 (1974). The *Calandra* court stated that "[t]he purpose of the [fourth amendment] exclusionary rule is not to redress the injury to the privacy of the search victim . . ." *Id.* The *Calandra* court further stated that the "prime purpose" of the exclusionary rule is to deter future police conduct and thereby protect fourth amendment rights against unreasonable searches and seizures. *Id.*

The Title III suppression rule, however, has an added purpose: the protection of privacy. Thus, different interests are implicated by a violation of Title III. For a discussion of these additional privacy interests, see *supra* notes 12 & 35 and accompanying text.

98. 408 U.S. 41 (1972).

99. In *Gelbard*, the petitioners were adjudicated in civil contempt of court for refusing to comply with a court order to testify. *Id.* at 42-43. The witnesses refused to testify on the grounds that the questioning was based upon information obtained from the witnesses' communications, allegedly intercepted by federal agents in violation of Title III. *Id.* at 43. The question before the Court was whether the witnesses were entitled to invoke § 2515 prohibitions as a defense to the contempt charge. *Id.*

100. *Id.* at 47, 61.

101. *Id.* at 50.

102. *Id.* at 51.

Despite the seemingly broad scope of § 2515, the Supreme Court has held that not every violation of Title III requires suppression of the intercepted conversation. *Id.* at 51-52. See, e.g., *United States v. Chavez*, 416 U.S. 562 (1974)

Many of the cases involving suppression under section 2515 concern the failure of law enforcement officials to satisfy a series of prescribed procedural requirements when applying for and executing surveillance warrants, and judges' failures to make certain required findings before issuing such warrants.¹⁰³ However, suppression of evidence obtained in violation of Title III is also required when a private person has committed an interception in violation of section 2511(2)(d).¹⁰⁴ The following two sections will discuss two circuit court decisions that have addressed the question of suppression in the context of a 2511(2)(d) violation in different factual settings.

III. SUPPRESSION BY VICTIM OF INTERCEPTION

In *United States v. Vest*,¹⁰⁵ the defendant and Francis Tarantino agreed to "fix" the sentencing of Jesse Waters, who was charged with various offenses stemming from the shooting of Tarantino. The scheme required Waters to pay Tarantino a total of \$300,000. The defendant, Vest, was used as a conduit for these payments.¹⁰⁶ Vest met with Waters and Waters gave him \$35,000 to be delivered to Tarantino. Without Vest's knowledge, Waters recorded the transaction and

(suppression inappropriate for violations of sections which were not intended to serve "substantive" role); *United States v. Giordano*, 416 U.S. 505 (1974) (violation of procedure occupying "central role" in the statutory scheme warrants suppression of intercepted communications).

For a discussion of the violations which do not warrant suppression, see Note, *supra* note 40. Cf. J. CARR, *supra* note 10, at 354-55 (availability of suppression determined by analyzing *Chavez* and *Giordano*).

103. See 18 U.S.C. § 2518(1) & (2) (1982 & Supp. IV 1986) (detailing required contents of application to a authority for approving interception of communication); *Id.* § 2518(3) (specifying findings judge must make before issuing search warrant); *Id.* § 2518(4) (specifying content of surveillance order); *Id.* § 2516 (delineating procedures for judicial approval of applications for electronic surveillance). For a discussion of cases that have addressed the issue of when suppression is required for failure to meet these requirements, see Note, *supra* note 40.

104. 18 U.S.C. §§ 2511(2)(d), 2515 (1982 & Supp. IV 1986). For the text of these sections, see *supra* notes 14 & 17 and accompanying text. Cases finding a criminal or tortious purpose behind the recording include: *Simpson v. Simpson*, 490 F.2d 803 (5th Cir.), *reh'g denied*, 493 F.2d 664, *cert. denied*, 419 U.S. 897 (1974); *United States v. Vest*, 813 F.2d 477 (1st Cir. 1987); *United States v. Underhill*, 813 F.2d 105 (6th Cir. 1987).

For examples of cases finding that a criminal or tortious (or other injurious) purpose was not shown, see *United States v. Phillips*, 540 F.2d 319 (8th Cir.), *cert. denied*, 429 U.S. 100 (1976); *United States v. Turk*, 526 F.2d 654 (5th Cir.), *cert. denied*, 429 U.S. 823 (1976); *United States v. Truglio*, 731 F.2d 1123 (4th Cir. 1984); *By-Prod Corp. v. Armen-Berry Co.*, 668 F.2d 956 (7th Cir. 1982); *Meredith v. Gavin*, 446 F.2d 794 (8th Cir. 1971); *Woodson v. State*, 579 S.W.2d 893 (Tenn. Ct. App. 1979); *People v. Strohl*, 57 Cal. App. 3d 347, 129 Cal. Rptr. 224 (1976).

105. 813 F.2d 477 (1st Cir. 1987).

106. *Id.* at 479.

accompanying discussion.¹⁰⁷ Waters later turned the tape over to federal law enforcement officers who began an investigation of the payoff scheme.¹⁰⁸

Vest testified before a grand jury that he had not participated in Waters' payment of money to Tarantino. At this point, the tape recording of his conversation with Waters was played.¹⁰⁹ On the basis of these statements, the grand jury indicted Vest on three counts of making false declarations before a grand jury.¹¹⁰

Prior to trial, Vest moved to suppress the tape arguing that Waters had made the tape in violation of section 2511(1)(a) of Title III¹¹¹ and that the recording fell outside of the exception of section 2511(2)(d).¹¹² Vest therefore argued that introduction of the tape into evidence would violate section 2515 of that chapter.¹¹³

The district court found that Waters' recording of the conversation was made for a criminal purpose.¹¹⁴ The district court rejected the government's argument that tape recordings made for the purpose of furthering illegal activities were admissible in a perjury prosecution.¹¹⁵ However, the court held that the tapes could be used for impeachment

107. *Id.* According to Waters' testimony at the suppression hearing, his reason for making the recording was to create a "receipt" in case Tarantino later claimed that Waters had failed to make the payment. *Id.* at 479.

108. *Id.*

109. *Id.*

110. *Id.* Making false declarations before a grand jury is a criminal offense in violation of 18 U.S.C. § 1623 (1982).

111. 813 F.2d at 479. Section 2511(1)(a) provides: "Except as otherwise specifically provided in this chapter any person who . . . willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication . . . shall be fined not more than \$10,000 or imprisoned not more than 5 years, or both." 18 U.S.C. § 2511(1)(a) (1982).

The current version of § 2511(1)(a) also prohibits the interception of electronic communications. *See* 18 U.S.C. § 2511(1)(a) (Supp. IV 1986).

112. 813 F.2d at 479. For the text of § 2511(2)(d), see *supra* note 14.

113. 813 F.2d at 479. For the text of § 2515, see *supra* note 17.

114. 639 F. Supp. 899 (D. Mass. 1986). The district court concluded that § 2511(2)(d) forbids the recording of communications between private persons by or with the consent of one of the parties when it is shown that either: (1) the primary motivation; or (2) a determinative factor in the actor's motivation for intercepting the conversation was to commit a criminal, tortious, or other injurious act. *Id.* at 904. It should be noted that "or other injurious act" is no longer a violation of the act. For a discussion of the reasons why Congress chose to delete this phrase, see *supra* notes 64-67 and accompanying text.

The court further found that the "receipt" motive presented by Waters encompassed the impermissible purpose of acting in furtherance of a criminal conspiracy in that Waters hoped to cause Tarantino to perform his function in the alleged conspiracy by use of the recordings. *Id.* at 907. The issue as to the illegal purpose behind the recording was not addressed on appeal to the First Circuit.

115. *Id.* at 912.

purposes.¹¹⁶

The issues on appeal in *Vest* were: 1) whether there was an exception to section 2515 for an illegally intercepted communication which falls into the hands of the government as an "innocent recipient" after a private search,¹¹⁷ and 2) whether there was an exception permitting the use of illegally intercepted communications in a perjury prosecution.¹¹⁸ The First Circuit answered both questions in the negative, holding that courts in general do not have authority to create exceptions to section 2515¹¹⁹ and that there is no indication of congressional intent to permit the use of unlawfully intercepted communications in perjury prosecutions.¹²⁰

As to the first issue, the court noted that section 2515 was not only aimed at deterring violations of Title III's other provisions but was also aimed at protecting privacy.¹²¹ The court stated that section 2515's "importance as a protection for 'the victim of an unlawful invasion of privacy' could not be more clear."¹²² According to the court, the protection of privacy from invasion by illegal private interception as well as

116. *Id.* at 911-12. This use has been allowed as an exception to Title III by other courts. *See, e.g.,* *United States v. Winter*, 663 F.2d 1120 (1st Cir. 1981) (court authorized wiretap which violates Title III may be used on cross-examination for impeachment purposes), *cert. denied*, 460 U.S. 1011 (1983); *United States v. Caron*, 474 F.2d 506 (5th Cir. 1973) (unlawful wiretap may be used to impeach defendant in perjury trial).

For examples of cases not involving Title III where illegally seized evidence has been allowed for impeachment purposes, see *United States v. Havens*, 446 U.S. 620 (1980) (illegally seized t-shirt may be used to impeach defendant on cross-examination); *Oregon v. Hass*, 420 U.S. 714 (1975) (statements obtained in violation of *Miranda* warnings, not admissible in government's case-in-chief, are admissible for impeachment); *Harris v. New York*, 401 U.S. 222 (1971) (defendant's statements are admissible for impeachment even though obtained in violation of *Miranda*); *Walder v. United States*, 347 U.S. 62 (1954) (once defendant asserts on direct that he never possessed narcotics, door left open to introduce illegally seized evidence for impeachment purposes).

117. *Vest*, 813 F.2d at 480. *See also* *United States v. Shearson Lehman Bros.*, 650 F. Supp. 490 (E.D. Pa. 1986) (tape recordings of conversations made by defendants as part of illegal gambling operations which were subsequently obtained by government under valid search warrant were not acquired in violation of Title III); *United States v. Liddy*, 354 F. Supp. 217 (D.D.C. 1973) (where communications unlawfully intercepted not by government but by defendants and where disclosure came only as result of prosecution of defendants, disclosure of contents of intercepted communications not prohibited under Title III).

118. *Vest*, 813 F.2d at 480. *See also* *United States v. Phillips*, 540 F.2d 319 (8th Cir.) (illegal tape recording of conversation not independently admissible in perjury prosecution merely because government had no part in that recording), *cert. denied*, 429 U.S. 1000 (1976). For a further discussion of cases that have decided this issue, see *supra* notes 88-89.

119. *Vest*, 813 F.2d at 482-84.

120. *Id.*

121. *Id.* at 483.

122. *Id.* at 481 (quoting *Gelbard v. United States*, 408 U.S. 41, 50 (1972) (quoting S. REP. No. 1097, 90th Cong., 2d Sess. 69 (1968))).

unauthorized governmental interception plainly “play[s] a central role in the statutory scheme. . . .”¹²³ The court, referring to the purpose behind Title III, found that even where the government is the innocent recipient of a recording which was illegally intercepted, that recording should be suppressed; allowing its introduction would compound the invasion of the privacy of the victim.¹²⁴ The court noted that Vest was the innocent *victim* of the illegal recording; introducing it as evidence would violate his privacy regardless of the fact that the government did not participate in that recording.¹²⁵ Thus, the court declined to read into section 2515 an exception permitting the introduction of a communication intercepted in violation of Title III by an “innocent recipient” of the communication.¹²⁶

The First Circuit also affirmed the decision of the district court¹²⁷ in holding that neither the text nor the legislative history of section 2515 support an exception to the Title III exclusionary rule for perjury prosecutions.¹²⁸ The First Circuit recognized that “Congress intended to strike a balance between the twin purposes of protecting privacy and recognizing the importance and legality of intercepting communications for the purpose of combatting crime.”¹²⁹ The court refused to upset this balance by creating a judicial exception to section 2515.¹³⁰

123. *Vest*, 813 F.2d at 481 (quoting *United States v. Giordano*, 416 U.S. 505, 528 (1974)).

124. *Id.*

125. *Id.* The court stated: “The impact of this second invasion is not lessened by the circumstance that the disclosing party (here the government) is merely the innocent recipient of a communication illegally intercepted by the guilty interceptor (here, Waters).” *Id.*

126. *Id.*

127. *Id.* at 484.

128. *Id.* See *United States v. Vest*, 639 F. Supp. 899, 912 (D. Mass. 1986). The district court had also found that Title III permits the government to use the illegally recorded tape for impeachment purposes. *Id.* at 911. For a list of cases where courts have reached the same conclusion, see *supra* note 116.

Many courts have interpreted the legislative history of Title III to allow exceptions for the use of illegally made recordings for impeachment purposes while not allowing them for perjury prosecutions. S. REP. NO. 1097, *supra* note 34, at 96.

The First Circuit in *Vest* recognized that *Walder v. United States*, 347 U.S. 62 (1954) provided an exception to the suppression rule for the use of unlawfully seized evidence for impeachment purposes but that nothing in the statute dealt with perjury prosecutions. Furthermore, fourth amendment suppression requirements did not extend to perjury prosecutions in 1968 when Title III was enacted. The court stated: “[W]e note that Congress, acting in 1968, specified its intent not to press the scope of the suppression rule . . . beyond present search and seizure law.” *Vest*, 813 F.2d at 482.

For a further discussion of *Walder*, see *infra* notes 158-62 and accompanying text.

129. *Vest*, 813 F.2d at 483.

130. *Id.* at 481-83. Other federal courts have reached the same result. See *United States v. Phillips*, 540 F.2d 319 (8th Cir.) (no exception under section 2515 for use of illegally intercepted communications in perjury prosecution),

The First Circuit in *Vest* recognized the government's theory of statutory interpretation: where the plain meaning is disclosed by reading the text of the statute and application of that meaning does not produce results that are absurd or at variance with the policy of the enactment as a whole, the inquiry ends.¹³¹ The government argued that a literal reading is inappropriate where the result would be plainly at variance with the policy of the legislation as a whole stating, as an example, that Congress could not have intended to forbid the use of an illegal recording under section 2511 in a prosecution against the maker of that recording.¹³² However, the court stated that section 2515 has a dual purpose—the deterrence of Title III violations and the protection of

cert. denied, 429 U.S. 1000 (1976); *United States v. Caron*, 474 F.2d 506 (5th Cir. 1973) (same). *But cf.* *United States v. Raftery*, 534 F.2d 854 (9th Cir.) (government not precluded under fourth amendment from using illegally intercepted evidence before grand jury in perjury prosecution where perjury occurred after illegal search and seizure and after evidence had been suppressed by state court), *cert. denied*, 429 U.S. 862 (1976).

The First Circuit also rejected the conclusion reached in *United States v. Traficant*, 558 F. Supp. 996, 1001-02 (N.D. Ohio 1983), that “§ 2511(2)(d) does not operate to ban the disclosure of illegally intercepted communications where the communications were made to further ‘illegal activities.’” *Vest*, 813 F.2d at 483 n.4. For further discussion of the *Traficant* decision, see *infra* notes 165-76 and accompanying text.

131. 813 F.2d at 480. See *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982) (in rare cases, literal application of statute will produce results demonstrably at odds with intention of drafters and those intentions control); *United States v. American Trucking Ass'ns Inc.*, 310 U.S. 534, 543 (1940) (when acceptance of literal meaning of statute leads to results which are “absurd or futile” or plainly at odds with the policy of the legislation, then congressional purpose will be followed).

The Supreme Court in *Griffin* did not find that a literal interpretation of the statute in question, 46 U.S.C. § 596, would thwart its obvious purpose or produce an absurd and unjust result which Congress could not have intended. 458 U.S. at 571. Justice Stevens' dissenting opinion disagreed, stating, “the will of the legislature is not reflected in a literal reading of the words it has chosen.” *Id.* at 577 (Stevens, J., dissenting). The dissent stated:

It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. . . . This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislature intended to include the particular act.

Griffin, 458 U.S. at 577-78 n.1 (Stevens, J., dissenting) (quoting *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892)). The courts' role in statutory interpretation is thus one of following the intent of the drafters.

132. *Vest*, 813 F.2d at 480. See S. REP. NO. 1097, *supra* note 34, at 99-100 (disclosure of illegally intercepted communications may be authorized in prosecution of violator of Title III); see also *United States v. Liddy*, 354 F. Supp. 217, 221 (D.D.C. 1973) (paradox results when persons who violated statute by intercepting communications are immune to prosecution because statute prohibits

privacy.¹³³ Thus, exclusion of the illegally-obtained recording in order to protect Vest's privacy was not an absurd result.¹³⁴

IV. SUPPRESSION BY PERPETRATOR OF INTERCEPTION

In *United States v. Underhill*,¹³⁵ the criminal defendants recorded conversations involving gambling information while operating an illegal gambling business.¹³⁶ The recording of these conversations violated federal and state law.¹³⁷ The federal government lawfully seized the tapes and offered them into evidence against the defendants who made them and against their co-conspirators in a trial for conspiracy and for substantive gambling offenses.¹³⁸ The defendants moved to suppress the tapes on the basis of the general prohibition of section 2515 against the use of illegally intercepted communications.¹³⁹ The defendants also argued that the situation did not fall within the exception of section 2511(2)(d).¹⁴⁰

The District Court for the Western District of Tennessee granted the defendants' motions to suppress the tapes on the ground that they

disclosure of evidence of intercepted communications). *Cf. United States v. Underhill*, 813 F.2d 105 (6th Cir.), *cert. denied*, 107 S. Ct. 2484 (1987).

133. *Vest*, 813 F.2d at 480-81.

134. *Id.* at 481.

135. 813 F.2d 105 (6th Cir.), *cert. denied*, 107 S. Ct. 2484 (1987).

136. *Id.* at 107.

137. *Id.* at 108, 111. The court noted that taping the conversations constituted the making of a "gambling record" as defined by TENN. CODE ANN. § 39-6-601(7) (1982), in violation of TENN. CODE ANN. § 39-6-602(e) (1982 & Supp. 1987), which makes it a misdemeanor to knowingly make, possess, or store a gambling record. *Underhill*, 813 F.2d at 111. Furthermore, the recordings violated 18 U.S.C. § 1955 (1982 & Supp. IV 1986) which makes it a crime to carry on a gambling business in violation of the law of the state in which it is conducted. *Underhill*, 813 F.2d at 108.

138. *Underhill*, 813 F.2d at 107.

139. *Id.* at 107-08. The general prohibition against the admission into evidence of illegally intercepted wire and oral communications is contained in 18 U.S.C. § 2515 (1982). For the text of § 2515, see *supra* note 17.

140. *Underhill*, 813 F.2d at 107-08. For the text of § 2511(2)(d), see *supra* note 14. This was the "only exception which could render the tapes legal and therefore admissible." *Id.* at 107.

The defendants were in the unique position of having to argue that the tapes they recorded were made for an illegal purpose under § 2511(2)(d). The government argued that the tapes were made "merely to preserve an accurate record of their transactions to prevent later distortions by the other parties to the conversations" and that this defensive act was not "for the purpose of committing any criminal or tortious act" under § 2511(2)(d). *Id.* at 109-10. If this were true, the interception would have fallen within the exception and would not have been subject in any case to the suppression requirements of § 2515.

The Sixth Circuit held that the tapes were made for the purpose of making a "gambling record," a misdemeanor under TENN. CODE ANN. §§ 37-6-601(7) (1982) and 39-6-602(e) (1982 & Supp. 1987). *Id.* at 111. Thus, the court concluded that the communications were intercepted for the purpose of committing a criminal act. *Id.*

were recordings of telephone conversations that had been illegally intercepted.¹⁴¹ The issue on appeal was whether a defendant who makes a recording for a criminal purpose is entitled to have that recording suppressed as illegal evidence under Title III.¹⁴² The Sixth Circuit analyzed the legislative history of Title III¹⁴³ and found that Congress did not intend to deprive prosecutors of evidence recorded in contravention of the Act.¹⁴⁴ The court stated that Congress did not intend section 2515 to “shield” the very people who committed the unlawful interceptions from the consequences of their wrongdoing.¹⁴⁵ The government argued, and the Sixth Circuit agreed, that in the case at hand, suppression would not fulfill the purpose of the statute and it would be a “per-
version of the Act” to permit criminals to benefit from violating the Act.¹⁴⁶

The court of appeals stated that congressional intent controls the interpretation of a statute if “the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters”¹⁴⁷ The court noted that an absurd situation would result if a defendant were allowed to suppress tape recordings which he had made in furtherance of an illegal act.¹⁴⁸ Nevertheless, the district court had found the language of the statute unambiguous and granted the defendant’s motion to suppress.¹⁴⁹

The Sixth Circuit concluded that when the literal meaning of a statute produces *unreasonable* results “plainly at variance with the policy of the legislation as a whole,” the court may follow the purpose of the statute rather than the literal words.¹⁵⁰ The court stated that a literal application of the language of Title III to the makers of the illegal recordings would produce an absurd result that Congress could not have intended.¹⁵¹

141. See *Underhill*, 813 F.2d at 107-08.

142. *Id.* at 107.

143. The Sixth Circuit noted Senator Hart’s comments on the exception as originally proposed. For further discussion of these comments, see *supra* notes 59-62 and accompanying text. The court noted: “The entire focus of Senator Hart’s comments was on protecting an innocent party from injury or embarrassment.” *Underhill*, 813 F.2d at 110.

144. *Id.* at 112.

145. *Id.*

146. *Id.* at 109.

147. *Id.* at 111 (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)).

148. *Id.* at 108, 111.

149. *Id.*

150. *Id.* at 111 (quoting *United States v. American Trucking Assocs., Inc.*, 310 U.S. 534, 543 (1940) (quoting *Ozawa v. United States*, 260 U.S. 178, 194 (1922))).

151. *Id.* at 112. A literal interpretation of §§ 2511(2)(d) and 2515 would enable defendants to suppress evidence of their own wrongdoing and thus shield themselves from the consequences of their acts. *Id.*

V. ANALYSIS

A literal interpretation of section 2515 would require suppression of any evidence obtained through an illegal interception regardless of who made the interception or whom it was to be used against,¹⁵² provided that the defendant had followed the proper procedures to obtain that suppression.¹⁵³ By examining legislative history, however, courts have found exceptions to the broad suppression requirement.¹⁵⁴ In *United States v. Caron*,¹⁵⁵ for example, the Fifth Circuit, quoting the Senate Report on section 2515, allowed the use of illegally intercepted communications for the purpose of impeachment.¹⁵⁶ This Report stated that there was no intention to "press the scope of the suppression rule beyond present search and seizure law."¹⁵⁷ The Senate Report cited *Walder v. United States*¹⁵⁸ as an example of the fourth amendment suppression/exclusionary rule.¹⁵⁹

The court further held that a confederate of the perpetrator, as a member of the conspiracy that effected the interception, was bound by the acts of his co-conspirators and thereby "waived" his right of privacy in communications which were made in furtherance of the purposes of the conspiracy. *Id.*

The Sixth Circuit noted that all of the appellees were charged with conspiracy and were in fact members of a conspiracy. The court stated: "As a member of the conspiracy [a co-conspirator who did not participate in the actual recording] . . . may be held to have waived his right of privacy in communications made in furtherance of the purposes of the conspiracy." *Id.* (citing *Pinkerton v. United States*, 328 U.S. 640, 646-48 (1946)); *United States v. Bowers*, 739 F.2d 1050 (6th Cir.), *cert. denied*, 469 U.S. 861 (1984)).

152. 18 U.S.C. § 2515 (1982). For the text of § 2515, see *supra* note 17.

153. 18 U.S.C. § 2510(11) defines who has standing to seek suppression pursuant to 18 U.S.C. § 2518(10)(a)(i). For the text of §§ 2510(11) and 2518(10)(a)(i), see *supra* note 20.

154. For example, courts have found a 'marital exception' to the requirement of suppression when one spouse records the other's conversation without first obtaining consent. *In re Marriage of Lopp*, 268 Ind. 690, 704, 378 N.E.2d 414, 421 (1978), *cert. denied*, 439 U.S. 1116 (1979) (wiretapped conversations of spouse admissible in marital action because literal application of § 2515 in this situation would lead to illogical and absurd result).

Courts have also found a 'marital exception' to the general prohibitions against interceptions of communications under Title III. See *Simpson v. Simpson*, 490 F.2d 803, 809 (5th Cir.) (Title III does not apply to spouse recording other spouse's conversation within marital home because Congress did not intend to extend Act to marital conflicts), *cert. denied*, 419 U.S. 897 (1974); *Contra United States v. Jones*, 542 F.2d 661, 673 (6th Cir. 1976) (no marital exception under Title III when tap occurs after one party to marriage has left marital home); *Pulawski v. Blais*, 506 A.2d 76, 77 n.2 (R.I. 1986) (no marital exception under Title III). For a further discussion of the marital exception under Title III, see Note, *Wiretapping and the Modern Marriage*, 91 DICK. L. REV. 855 (1987).

155. 474 F.2d 506 (5th Cir. 1973).

156. *Id.* at 509-10.

157. *Id.* at 509 (quoting S. REP. NO. 1097, 90th Cong., 2d Sess. (1968), reprinted in 1968 U.S. CODE CONG. & ADMIN. NEWS 2112, 2185).

158. 347 U.S. 62 (1954).

159. S. REP. NO. 1097, *supra* note 34.

In *Walder*, a pre-Title III case, the testimony of an officer who had participated in an illegal search and seizure was allowed solely for impeachment purposes, and the defendant was found to have opened the door to the use of that illegally obtained evidence by testifying on direct examination.¹⁶⁰ The Supreme Court stated:

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.¹⁶¹

The Court further stated: "[T]here is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility."¹⁶²

In *Caron*, the Fifth Circuit analyzed the holding of *Walder* in conjunction with the legislative history of section 2515 and held that evidence obtained in violation of Title III could be used for impeachment purposes since the defendant testified on direct examination.¹⁶³

The importance of this reasoning is underscored by the decision reached by the Sixth Circuit in *Underhill*. While *Underhill* does not involve the issue of impeachment, an examination of the analysis used in *Walder* and *Caron* to find that the use of illegally intercepted evidence is admissible for impeachment purposes is helpful in justifying the decision in *Underhill*. The defendant in *Underhill*, like the defendants in *Walder* and *Caron*, indirectly attempted to take advantage of the illegality of his own act to shield himself from the government's use of that illegally intercepted evidence against him. Because the seizure of the tapes in *Underhill* was lawful, the defendant's only argument against introduction of those tapes was the defendant's own violation of Title III.¹⁶⁴

In *United States v. Traficant*¹⁶⁵ the United States District Court for the Northern District of Ohio found, in dicta, an exception to section 2515 based on the legislative history of section 2511(2)(d).¹⁶⁶ The *Traficant*

160. *Walder*, 347 U.S. at 64-65.

161. *Id.* at 65.

162. *Id.*

163. *United States v. Caron*, 474 F.2d 506, 509 (5th Cir. 1973). The court read the legislative history of § 2515 as making it clear "that [§ 2515] should not be construed as requiring exclusion of the evidence in circumstances such as those before us." *Id.* at 509.

164. *Underhill*, 813 F.2d 105. The *Underhill* decision makes no mention that the seizure of the tapes by federal agents was unlawfully effectuated. Defendants argued that since their own actions were unlawful and did not fall within any of the statutory exceptions to § 2515, the evidence obtained by the illegal interceptions must be suppressed. *Id.* at 108.

165. 558 F. Supp. 996 (N.D. Ohio 1983).

166. In *Traficant*, an elected Sheriff was indicted for accepting bribes from

court found that the language of section 2511(2)(d) cannot be construed alone, but must be construed in the context of the entire act and its purposes.¹⁶⁷ The court reasoned that barring admission of tapes recorded for an illegal purpose would afford privacy protection for illegal activities.¹⁶⁸ The court stated that Congress could not have intended to protect discussions of illegal activities,¹⁶⁹ and that “[s]uch an interpretation of the statute would shield from prosecutorial inquiry the alleged activities of organized crime, the very evil which the Act was designed to control.”¹⁷⁰ This conclusion goes beyond the *Vest* holding in that it refuses to give section 2515 suppression protection to even the victim of an interception if the court finds the subject matter of the intercepted conversation was “illegal activities.”

The First Circuit in *Vest* held that under section 2515, the illegally intercepted communications should have been suppressed.¹⁷¹ Like the defendant in *Traficant*, the defendant in *Vest* was the *victim* of an illegal interception, not the perpetrator.¹⁷² The dual intent of Congress in enacting section 2515 was to compel compliance with Title III and thereby protect the privacy of innocent victims.¹⁷³ The court reasoned that the latter of these goals would be effectuated by suppression in *Vest* and thus the recording was properly suppressed.¹⁷⁴ The First Circuit thus disagreed with the *Traficant* dicta¹⁷⁵ that “illegal conversations” do not

certain organized crime figures, the Carrabias. *Id.* at 998. The FBI learned of the bribes through tape conversations between Traficant and the Carrabias. *Id.* The recordings were made by Charles Carrabias without the knowledge or consent of Traficant. *Id.* Thus, Traficant was, like the defendant in *Vest*, a victim of an interception.

The defendant moved to suppress the tape recordings pursuant to § 2515 claiming that they were made for an impermissible purpose and thus were not within the exception of § 2511(2)(d). *Id.* at 1000. The district court held that the defendant did not meet his burden of proof of showing that the tapes were recorded for a criminal purpose, and therefore dismissed the motion. *Id.* at 1000-01. After reaching this conclusion, the court examined the legislative history of § 2511(2)(d) and found an exception to § 2515 when the topic of the intercepted communications involves illegal activities. *Id.* at 1002 (dicta).

167. *Id.* at 1002.

168. *Id.*

169. *Id.*

170. *Id.* (dicta).

171. *United States v. Vest*, 813 F.2d 477, 479 (1st Cir. 1987).

172. *Id.* at 479.

173. *See id.* at 481 (citing *Gelbard v. United States*, 408 U.S. 41, 48, 50 (1972) (§ 2515 is important as protection for victim of unlawful invasion)); *see also United States v. Caron*, 474 F.2d 506, 509 (5th Cir. 1973) (§ 2515 imposes evidentiary sanction to compel compliance with Title III).

174. *Vest*, 813 F.2d at 481, 484.

175. *Id.* at 483 n.4. The court stated: “We . . . reject . . . the conclusion reached in *United States v. Traficant* that section 2511(2)(d) does not operate to ban the disclosure of illegally-intercepted communications where the communications themselves were for the purpose of furthering ‘illegal activities.’” *Id.* (citation omitted). The First Circuit rejected *Traficant* because the decision ig-

provide an enforceable expectation of privacy with respect to Title III, holding instead that Congress did not intend to confer discretion on courts to develop exceptions to the exclusionary rule.¹⁷⁶

The First Circuit's approach in *Vest*, therefore, is that the victim of an interception which does not fall within the exception under section 2511(2)(d) because it was made for an improper purpose is entitled to have evidence obtained by that interception suppressed pursuant to section 2515. This approach is consistent with both the plain meaning and the legislative history of Title III.¹⁷⁷ The recording of the conversation with *Vest* was committed for a criminal purpose and *Vest* should therefore have been protected from the subsequent use or disclosure of that recording, except for the possible use of that evidence in impeachment proceedings.¹⁷⁸

The First Circuit found that Congress did not intend to permit the courts to create exceptions to section 2515.¹⁷⁹ The court thus declined to do so even after noting favorably the government's argument that literal readings of a statute are inappropriate if plainly at variance with the policy of the legislation as a whole.¹⁸⁰ The suppression in *Vest* upheld the protection of privacy at the expense of excluding evidence useful for combatting crime. This is nevertheless an expected consequence of the balance sought by Congress in the enactment of the statute.¹⁸¹

The situation in *Vest* differs from the situation in *Underhill*, and therefore, the cases may be distinguished on their facts. In *Underhill*, the defendant was not a *victim* of an illegal interception, instead he was the *perpetrator* of that interception.¹⁸² Requiring suppression in this situation clearly would have produced an absurd result¹⁸³ and thus, even though suppression in this circumstance does not comport with a literal interpretation of the statute, it furthers the policies of Title III as found in the legislative history.¹⁸⁴ In *Underhill*, suppression would have encouraged non-compliance with the Act¹⁸⁵ while section 2515 was

nored the purpose of protection of privacy which is essential to Title III. *Id.* at 483.

176. *Id.* at 482-84.

177. For discussion of the legislative history and judicial interpretation of §§ 2511(2)(d) and 2515, see *supra* notes 57-104 and accompanying text.

178. For further discussion of the use of interceptions which violate Title III for impeachment purposes, see *supra* notes 88-94 and accompanying text.

179. *Vest*, 813 F.2d at 482-84.

180. *Id.* at 480. For further discussion of the role of statutory interpretation, see *supra* note 131 and accompanying text.

181. See *Vest*, 813 F.2d at 481.

182. *Underhill*, 813 F.2d 105, 107-08. For further discussion of the facts of *Underhill*, see *supra* notes 135-46 and accompanying text.

183. *Id.* at 111 (suppressing tapes will serve neither purpose of protecting privacy nor prevention of misuse of contents of illegally intercepted communication against party to such communications).

184. *Id.* at 112.

185. *Id.* at 109. Suppression would encourage non-compliance because

designed to compel compliance.¹⁸⁶ This result would be directly contrary to the goals sought by Congress in enacting Title III.¹⁸⁷ Section 2515's goal of protection of privacy is designed to protect the victim of an intercepted communication, not the interceptor, and thus neither goal of Title III would have been furthered by suppressing the evidence in *Underhill*.

The judicial and legislative history of Title III shows that section 2515 is not an absolute bar to the introduction of all evidence obtained in any violation of the various provisions of Title III, including section 2511(2)(d).¹⁸⁸ For example, section 2515 is not self-executing but can only be asserted on a motion to suppress,¹⁸⁹ and can only be asserted when a party moving for suppression has standing to invoke it.¹⁹⁰

Other exceptions to the suppression requirement of section 2515 have been allowed, including the use of evidence obtained in violation of section 2511(2)(d) for impeachment purposes¹⁹¹ and the marital exception allowed by one court.¹⁹² Furthermore, in a motion to suppress based on an alleged violation of section 2511(2)(d), the party seeking to suppress has the burden of showing that an interception was made with a criminal or tortious purpose. This burden of proof requirement indirectly limits the scope of section 2515.¹⁹³ The recent amendment of

criminals could deliberately violate the law against interceptions and benefit from suppression of the evidence of their wrongdoing. *See id.*

186. *See Vest*, 813 F.2d at 481.

187. *See Underhill*, 813 F.2d at 109-112. Suppression would facilitate organized crime by allowing criminals to suppress evidence of their wrongdoing. Furthermore, it would not facilitate protection of privacy in this situation because the government here seeks to introduce the evidence against the perpetrators of the violation, not against a victim, and there is no evidence that any victim of the violation would be injured by disclosure under the circumstances. *Id.* at 112.

For discussion of the congressional purpose behind the enactment of Title III, see *supra* notes 11 & 12 and accompanying text.

188. *See United States v. Donovan*, 429 U.S. 413 (1977) (violation of identification and notice requirements of wiretap applications does not require suppression); *United States v. Chun*, 503 F.2d 533 (9th Cir. 1974) (suppression only required for violation of central or at least functional provisions of Title III).

For discussion of the violations of Title III which do not require suppression, see Note, *supra* note 40.

189. 18 U.S.C. § 2518(10)(a) (1982). *See also United States v. Phillips*, 540 F.2d 319, 325 (8th Cir.) (§ 2518(10)(a) provides remedy for right created by § 2515), *cert. denied*, 429 U.S. 1000 (1976).

190. *See* 18 U.S.C. § 2518(10)(a) (1982). Standing under § 2518 is granted to an "aggrieved person" as defined in § 2510(11). For a discussion of these statutory provisions, see *supra* note 20.

191. *United States v. Caron*, 474 F.2d 506, 508-10 (5th Cir. 1973). For further discussion of the use of unlawfully intercepted communications for impeachment purposes, see *supra* notes 155-63 and accompanying text.

192. *See In re Marriage of Lopp*, 268 Ind. 690, 703-05, 378 N.E.2d 414, 421 (1978).

193. *See, e.g., United States v. Phillips*, 540 F.2d 319, 326 (8th Cir. 1976). For a further discussion of the burden of proof required to prove a violation of § 2511(2)(d), see *supra* notes 70-76 and accompanying text.

section 2511(2)(d) also shows a congressional concern with the breadth of that section.¹⁹⁴

The interplay between section 2515 and other provisions of Title III indicates that the purposes behind the statute are to achieve a *balance* between privacy and crime control. Neither interest outweighs the other and both have been fulfilled in the decisions in *Vest* and *Underhill*.

This interpretation is supported by the decision in *United States v. Cantley*,¹⁹⁵ an unreported memorandum opinion, where *Underhill* and *Vest* were both cited as authority and were used coextensively and consistently. In *Cantley*, the defendants were convicted on various gambling charges¹⁹⁶ and contested their conviction on the grounds, inter alia, that the government was erroneously permitted to use tape recorded telephone conversations of bets being placed.¹⁹⁷ The situation in *Cantley* was similar to the situation in *Underhill* in that the criminal defendants had tape recorded conversations about illegal gambling with a confederate.¹⁹⁸ The district court held that the government could rely on the tapes because the defendants recorded their own conversations as part of their illegal activity.¹⁹⁹ The court held that the situation fell squarely within the rationale of *Underhill* because the defendants had made an illegal recording and were attempting to use section 2515 to protect themselves from the evidence of their criminal activity.²⁰⁰ Furthermore, the court held that a confederate of the defendants could not use section 2515 because, like the co-conspirators in *Underhill*, he had waived his right to privacy by participating in the illegal activity.²⁰¹ The confederate in the scheme argued that the tapes were inadmissible against him under the rationale of *Vest* because he did not participate in or consent to the recordings.²⁰² He further contended that the tapes would only be admissible against him under the rationale of *Underhill* if he were charged with conspiracy.²⁰³

The court rejected both of these arguments because of the degree

194. For a discussion of the recent amendments to Title III, see *supra* notes 64-68 and accompanying text.

195. *United States v. Cantley*, Crim. Nos. 86-00293-02-06 (E.D. Pa. July 8, 1987) (1987 WL 13668).

196. *Id.* at 26.

197. *Id.*

198. *Id.* at 29.

199. *Id.* at 29-36. See also *United States v. Shearson Lehman Bros.*, 650 F. Supp. 490, 503 (E.D. Pa. 1986) (government allowed to introduce lawfully acquired tapes when government did not tape or participate in recording).

200. *Cantley*, 1987 WL 13668 at 28.

201. *Id.* See also *Pinkerton v. United States*, 328 U.S. 640, 646-48 (1946) (party may be responsible for co-conspirator's offenses even if he does not participate in or have any knowledge of the offenses).

202. *Cantley*, 1987 WL 13668 at 28.

203. *Id.*

of the confederate's involvement with the illegal gambling operation.²⁰⁴ The court reasoned that the government need not charge the operator of an illegal gambling business with conspiracy in order to use the *Underhill* theory.²⁰⁵ Furthermore, according to the court, this confederate could not be said to have been "an unwitting participant" in the taped recordings, and thus a victim thereof, given his familiarity with the set-up of the establishment.²⁰⁶ Therefore, this defendant's reliance on *Vest* was misplaced.²⁰⁷

Based on the reasoning in the *Underhill* decision, the *Cantley* court found that the seized tapes were admissible against defendants who actually made the recordings and also against the defendant who acted as a confederate in the illegal gambling activity.²⁰⁸

While not of great precedential value, the district court decision in *Cantley* effectively highlights the crucial factual differences between *Vest* and *Underhill*. The defendant in *Vest* was purely a victim of the interception and had no interest in the purpose behind the interception. The overriding concern in Title III with the privacy of communications required suppression in these circumstances. In *Underhill*, however, the defendants were aware of, or actually participated in the recordings and derived some benefit from the making of those recordings.²⁰⁹ They were aware of the criminal purpose behind the recordings and thus could not rely on section 2515 to prevent the government from introducing the best evidence available of their wrongdoing.²¹⁰ Therefore, the decision in *Cantley* correctly treats *Vest* and *Underhill* as consistent decisions, with the crucial factual distinctions being the identity of the party seeking suppression and his or her degree of participation in the illegal interception.

VII. CONCLUSION

A practical approach to the interaction of sections 2511(2)(d) and 2515 is to view the motion to suppress from the standpoint of the per-

204. *Id.* at 29-30.

205. *Id.*

206. *Id.* The court stated: "In this case, [the confederate] operated a gambling business that routinely memorialized its wagers on tape. Therefore, even if [the confederate] did not install the tape machine himself, he would be hard pressed to argue that he was an unwitting participant in the recording." *Id.* at 30.

207. *Id.*

208. *Id.* at 30. See also *Underhill*, 813 F.2d at 112 (co-conspirator bound by acts of other co-conspirators and waived his right of privacy in communications in furtherance of that conspiracy).

209. *Underhill*, 813 F.2d at 108, 112. The defendants in *Underhill* used the tape recordings to settle disputes with gamblers about the amount of wagers made. *Id.* at 108. For further discussion of the facts of *Underhill*, see *supra* notes 135-42 and accompanying text.

210. *Underhill*, 813 F.2d at 112.

son seeking suppression. An innocent victim of an interception would suffer a loss of privacy from the introduction of illegally intercepted evidence whereas suppression would enable the perpetrator of the illegal interception to benefit from his illegal acts. The result in the latter case would also be to deprive prosecutors of very probative evidence of wrongdoing.

Once a criminal or tortious purpose is shown under section 2511(2)(d) the focus should shift to the identity of the person seeking to suppress the evidence. The perpetrator of the interception should not be allowed to benefit from his wrongful acts and an innocent victim should not have his protected privacy interest violated. The decisions of the First and Sixth Circuits in *Vest* and *Underhill* accurately reflect the intent of Congress in enacting the suppression section of Title III and are therefore consistent in their interpretation of that act.

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