CORE
Metadata, citation and similar papers at core.ac.uk
Provided by University of Kentucky

Kentucky Law Journal

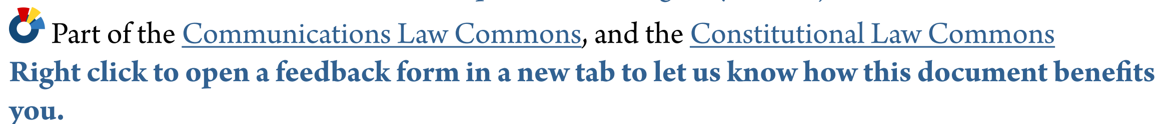
Volume 73 | Issue 4 Article 13

1985

# Cordless Telephones and the Fourth Amendment: A Trap for the Unwary Consumer

Mark S. Snell
*University of Kentucky*

Follow this and additional works at: https://uknowledge.uky.edu/klj



Part of the Communications Law Commons, and the Constitutional Law Commons
**Right click to open a feedback form in a new tab to let us know how this document benefits you.**

## Recommended Citation

Snell, Mark S. (1985) "Cordless Telephones and the Fourth Amendment: A Trap for the Unwary Consumer," *Kentucky Law Journal*: Vol. 73 : Iss. 4 , Article 13.
Available at: https://uknowledge.uky.edu/klj/vol73/iss4/13

This Comment is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

# Cordless Telephones and the Fourth Amendment: A Trap for the Unwary Consumer

## INTRODUCTION

The Supreme Court of Kansas recently became the first state high court to consider the issue of whether law enforcement officers must obtain a warrant prior to intercepting a cordless telephone conversation.[1] In *State v. Howard*[2] the court held that, because cordless telephone conversations fall outside the protection afforded by Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Title III),[3] no warrant is needed. Therefore, recordings of such conversations are not subject to the fourth amendment exclusionary rule[4] and are admissible as evidence at trial.[5]

---

[1] The Supreme Court of Rhode Island has since become the second court to decide this issue. State v. Delaurier, 488 A.2d 688 (R.I. 1985).

[2] 679 P.2d 197 (Kan. 1984).

[3] Pub. L. No. 90-351 Title III, § 802, 82 Stat. 212 (codified at 18 U.S.C. §§ 2510-20 (1982)) [hereinafter cited as Title III or by section number].

[4] Title III contains a statutory version of the judicially announced exclusionary rule. 18 U.S.C. § 2515 (1982) provides:

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

The "contents" of a communication include "any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication." 18 U.S.C. § 2510(8) (1982).

*See also* 18 U.S.C. § 2511(1) (1982) (willful interception of a communication or the disclosure or use of an intercepted communication in violation of Title III punishable by imprisonment for up to five years and/or a fine of up to $10,000); 18 U.S.C. § 2520 (1982) (recovery of civil damages authorized against one who unlawfully intercepts, discloses or uses contents of communication).

[5] The *Delaurier* court reached the same conclusion on similar facts. 488 A.2d 688. Delaurier's neighbor reported to police that "her son had been playing with the dial on her AM radio and had tuned in to what appeared to be a man discussing the sale of drugs." *Id.* at 690. Police recorded several subsequent conversations and introduced them as evidence at a bail-revocation hearing that resulted from Delaurier's illegal

The Kansas court faced one of the many thorny problems associated with the use—and abuse—of cordless phones. The problems arise because, while the phones masquerade under the term "telephone," they operate much like a radio transceiver.[6] The resulting communication is a hybrid whose definition fits neatly neither that of a radio broadcast, nor that of a telephone conversation.[7]

Although the transmission of telephone conversations by radio waves is not a new concept, the technique's widespread availability to the average consumer is a recent development. By one estimate, "[m]ore than 4 million cordless phones are in use in the United States, with more being sold each week."[8] Many users of these phones are not fully aware of the lack of privacy inherent in their use.[9]

Courts are divided on whether conversations transmitted partially by wire and partially by radio waves are protected under Title III.[10] Furthermore, many of the definitional sections of Title III are ambiguous.[11] Finally, commentators disagree as to the proper legal treatment of cordless phone conversations and the proper amount of protection to be afforded an unwary public.[12]

---

activities. *Id.* at 691.

The Supreme Court of Rhode Island held that the recorded conversations were not protected under Title III. Relying on its own interpretation of Congressional intent, the court stated, "Title III simply was not intended to prevent anyone from listening to an AM broadcast, put on the air voluntarily, and accessible by anyone possessing an ordinary AM radio." *Id.* at 694.

[6] *See* Temmer v. FCC, 743 F.2d 918 (D.C. Cir. 1984) (pointing out that the term "telephone" is a misnomer).

[7] For a good discussion of the history and technical aspects of cordless telephones, see generally Amendment of Part 15 to Add New Provisions for Cordless Telephones, 49 Fed. Reg. 1512 (1984) (to be codified at 47 C.F.R. pt. 15) [hereinafter cited as Amendments].

[8] Mauro, *Fight Brews On Cordless Phone 'Tap'* 6 NAT'L L.J., Feb. 6, 1984 at 8, col. 4.

[9] *See, e.g.,* Amendments, *supra* note 7, ¶ 34, at 1517.

[10] *Compare* United States v. Hall, 488 F.2d 193 (9th Cir. 1973) (mobile telephones protected as wire communications under Title III) *with* Dorsey v. State, 402 So. 2d 1178 (Fla. 1981) (transmission of message to pocket pagers not protected under Title III) *and* 488 A.2d 688 (radio waves emitted by cordless telephones not protected by Title III).

[11] *See* J. CARR, THE LAW OF ELECTRONIC SURVEILLANCE § 3.02, at 65 (1977).

[12] Notre Dame University law professor G. Robert Blakey, draftsman of Title III, believes that cordless phone users have no legitimate expectation of privacy in their conversations. " 'If you talk into a cordless phone, how the hell do you think it gets to the other end' except through a form of broadcasting. . . ." Mauro, *supra* note 8, at 8, col. 3.

This Comment will examine the pertinent provisions of Title III as they relate to cordless phones. It will then utilize the framework of *State v. Howard* to survey previous cases that have addressed the treatment afforded similar communications. Finally, it will recommend regulatory action to inform all owners and users about the significant threat to personal privacy that accompanies the use of cordless telephones.

## I. TITLE III: A STATUTORY PROTECTION OF THE RIGHT TO PRIVACY

### A. *History and Purpose of Title III*

The law of electronic surveillance[13] in the United States today is largely statutory, controlled in nearly every aspect by Title III.[14] Congress enacted Title III in 1968, shortly after the Supreme Court's landmark decisions in *Berger v. New York*[15] and *Katz v. United States*.[16] In *Berger*, the Court delineated the minimum standards necessary for an eavesdropping statute to survive fourth amendment scrutiny.[17] In *Katz*, the Court placed

---

[13] The terms "electronic surveillance" and "eavesdropping" will be used interchangeably in this Comment.

[14] For a discussion of pre-Title III law on electronic surveillance, see generally J. CARR, *supra* note 11, §§ 1-2; 1 W. LAFAVE, SEARCH AND SEIZURE § 2.2(e) (1978 & Supp. 1984); E. LAPIDUS, EAVESDROPPING ON TRIAL (1974); NATIONAL LAWYERS GUILD, RAISING AND LITIGATING ELECTRONIC SURVEILLANCE CLAIMS IN CRIMINAL CASES § 1.2-.3 (1977); M. PAULSEN, THE PROBLEMS OF ELECTRONIC EAVESDROPPING (1977).

[15] 388 U.S. 41 (1967) (declaring unconstitutional the New York statute governing the use of eavesdropping equipment).

[16] 389 U.S. 347 (1967) (holding inadmissible evidence obtained by a warrantless, non-trespassory "bug" on the outside of a public telephone booth).

[17] The *Berger* court listed the following procedural and substantive safeguards as constitutional prerequisites to the issuance of an electronic surveillance warrant:

> (1) there must be probable cause to believe that a particular offense has been or is being committed; (2) the conversations to be intercepted must be particularly described; (3) the eavesdrop must be for a specific and limited period of time to minimize the intrusion; (4) present probable cause must be shown for the continuance or renewal of the eavesdrop; (5) the eavesdropping must terminate once the evidence sought has been seized; (6) there must be notice unless a showing of exigency based on the existence of special facts is made; and (7) there must be a return on the warrant so that the court may supervise and restrict the use of the seized conversations.

Fishman, *The Interception of Communications Without a Court Order: Title III, Consent, and the Expectation of Privacy*, 51 ST. JOHN'S L. REV. 41, 42 n.4 (1976) (compiling from 388 U.S. at 54-60).

electronic surveillance squarely within the purview of the fourth amendment by ruling that such activities constitute a search.[18] The fourth amendment "protects people, not places,"[19] noted the Court; therefore, conversations undertaken with a reasonable expectation of privacy are protected no matter where they occur.[20]

In both *Katz* and *Berger*, the Court seemed to advocate a legislative solution to the regulation of electronic surveillance.[21] Congress responded a year later by enacting Title III,[22] which was "intended to reflect existing law."[23] The purpose of the statute has been expressed in a variety of ways.[24] The Senate Judiciary Committee maintained that the law was designed "to

---

[18] *See* 389 U.S. at 350-53. In *Katz*, the Supreme Court squarely rejected the "trespass doctrine" articulated in Olmstead v. United States, 277 U.S. 438 (1928) and Goldman v. United States, 316 U.S. 129 (1942). Those cases held that a trespassory intrusion was required to constitute a "search" within the meaning of the fourth amendment. *See* 316 U.S. at 133-34; 277 U.S. at 457.

[19] Katz v. United States, 389 U.S. at 351.

[20] Writing for the majority, Justice Stewart explained that eavesdropping by government agents "violated the privacy upon which [the defendant] justifiably relied while using the telephone booth." *Id.* at 353. Justice Harlan coined the phrase "reasonable expectation of privacy" in his concurring opinion, explaining that "[t]here is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' " *Id.* at 361 (Harlan, J., concurring).

[21] For a discussion of the effect of *Berger* and *Katz* on prior law, see Dash, Katz—*Variations on a Theme by* Berger, 17 CATH. U.L. REV. 296 (1968).

[22] *See* 18 U.S.C. §§ 2510-20 (1982). For a discussion of the political controversy leading up to Title III's enactment, see generally E. LAPIDUS, *supra* note 14, at 38-48. For a discussion of legislative forerunners of Title III, see generally J. CARR, *supra* note 11, at § 2.02.

[23] *See* S. REP. No. 1097, 90th Cong., 2d Sess. 237 (1968), *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 2112, 2178. The Senate Judiciary Committee Report comprises the only legislative history of Title III contained in U.S. CODE CONG. & AD. NEWS. Presumably the "existing law" referred to was Justice Stewart's opinion in *Katz*, quoted in part *supra* note 20.

[24] *See, e.g.,* United States v. Cianfrani, 573 F.2d 835, 855 (3rd Cir. 1978) (Title III has a twofold purpose: (1) to protect the privacy of oral and wire communications, and (2) to provide on a uniform basis the circumstances and conditions for the interception of such communications); *In re* Proceedings to Enforce Grand Jury Subpoenas, 430 F. Supp. 1071, 1072-73 (E.D. Pa. 1977) (statute deemed to be the legislative enactment of the fourth amendment exclusionary rule and its purpose is to deter the invasion of an individual's privacy through the misconduct of officials by denying "the fruits of their misconduct"); United States v. Carroll, 332 F. Supp. 1299, 1300 (D.D.C. 1971) ("intended to deal with increasing threats to privacy resulting from the growing use of sophisticated electronic devices and the inadequacy of limited prohibitions contained [in prior law]").

protect the privacy of wire and oral communications, to protect the integrity of court and administrative proceeding and to prevent the obstruction of interstate commerce."[25] Congress also intended that "all unauthorized interception of such [wire and oral] communications should be prohibited, as well as the use of the contents of unauthorized interceptions as evidence in courts and administrative hearings."[26]

### B. *The Scope of Title III*

Title III does not prohibit all electronic surveillance performed without a court order.[27] Only surveillance that constitutes an "interception"[28] of the "contents"[29] of "wire communications"[30] or "oral communications"[31] by the use of any "electronic, mechanical, or other device"[32] is prohibited.

---

[25] S. REP. No. 1097, *supra* note 23, at 2177.

[26] *Id.* For the statutory enactment of this exclusionary intent, see note 4 *supra* and accompanying text.

[27] Ambiguities in the language of Title III allow some surveillance to fall through "loopholes." *See* J. CARR, *supra* note 11, at § 3.-1-.09. Additionally, some activities are expressly excepted from statutory protection by specific provisions of Title III. *See* 18 U.S.C. § 2511(2)(a)(i)-(ii) (telephone company employees); 18 U.S.C. § 2511(2)(b) (employees of the FCC); 18 U.S.C. § 2511(2)(c) (consensual interceptions); 18 U.S.C. § 2518(7) (emergency situations).

[28] " '[I]ntercept' means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device." 18 U.S.C. § 2510(4) (1982).

[29] " '[C]ontents,' when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication." 18 U.S.C. § 2510(8).

[30] For the definition of "wire communication," see text accompanying note 55 *infra*.

[31] For the definition of "oral communication," see text accompanying note 55 *infra*.

[32] "[E]lectronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire or oral communication other than—

> (a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business; or (ii) being used by a communications common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;
>
> (b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal.

18 U.S.C. § 2510(5) (1982). The Supreme Court of Rhode Island has held that an AM radio is not a "device" within the meaning of Title III: "We do not believe that Congress intended to include within the meaning of 'device' an ordinary, unadulterated AM radio." State v. Delaurier, 488 A.2d 688, 694 (R.I. 1985).

The statutory definitions[33] of these terms are critical, because surveillance that does not conform to the statutory language is not regulated by Title III.[34] The proper interpretation of these definitions is the question most often raised in Title III litigation.[35]

The provisions of Title III apply to state as well as federal law enforcement officers.[36] Furthermore, state law enforcement officers may use electronic surveillance only if the state has enacted legislation expressly authorizing electronic surveillance.[37]

---

[33] Although a part of the definition of "intercept," the term "aural acquisition" is not defined in Title III. *See* note 28 *supra*. The legislative history provides no clue as to the term's intended meaning, except to specify that use of a pen register does not constitute an interception. *See* S. REP. No. 1097, *supra* note 23, at 2178. A pen register is a device that, when attached to a phone line, records the number called but not the conversation held. *See* J. CARR, *supra* note 11, at §§ 3.02[3][b][ii], 3.03[2].

[34] *See* J. CARR, *supra* note 11, at § 3.02.

[35] *See* W. LAFAVE, *supra* note 14, § 2.2, at 272.

[36] *See* Berger v. New York, 388 U.S. 41 (1967) (making clear the power of the federal government to prohibit bugging by state officers in violation of the fourth amendment). *Accord* Mapp v. Ohio, 367 U.S. 643 (1961) (making the fourth amendment right to freedom from unreasonable search and seizure applicable to the states).

[37] S. REP. No. 1097, *supra* note 23, at 2187. Kentucky has chosen not to enact such legislation. Therefore, eavesdropping without the consent of at least one party to the conversation is a criminal offense. *See* KY. REV. STAT. ANN. § 526.020 (Bobbs-Merrill 1985) [hereinafter cited as KRS]. The practice of wiring an informant for sound has become the chief means of eavesdropping in Kentucky because the informant has given the requisite consent required by KRS § 526.010 (1984). That section provides: " 'Eavesdrop' means to overhear, record, amplify or transmit any part of a wire or oral communication of others *without the consent of at least one party thereto* by means of any electronic, mechanical or other device." *Id.* (emphasis added). KRS § 526.070 (1984) provides for certain exceptions:

> A person is not guilty under this chapter when he:
>
> (1) Inadvertently overhears the communication through a regularly installed telephone party line or on a telephone extension but does not divulge it; or
>
> (2) Is an employe of a communications common carrier who, while acting in the course of his employment, intercepts, discloses or uses a communication transmitted through the facilities of his employer for a purpose which is a necessary incident to the rendition of the service or to the protection of the rights of the property of the carrier of such communication, provided however that communications common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

The proscription against non-consensual eavesdropping applies only to state officials and state courts. Federal agents may eavesdrop in Kentucky under the authority of Title III, but evidence is admissible only in federal, not state courts. Likewise, evidence gathered unlawfully by state officials still may be admissible in federal courts, although the state officials may be subject to civil sanctions. *See* United States v. Shaffer, 520 F.2d 1369,

Such legislation may be more, but not less, restrictive than Title III.[38] Even so, most state statutes either expressly incorporate the language of the federal statute or employ substantially similar language.[39] Only a few states provide greater procedural protection to the right of conversational privacy than does Title III.[40]

## II. A SAMPLE ANALYSIS UNDER TITLE III: *State v. Howard*

In *State v. Howard*,[41] the defendants' neighbor was at home tuning his AM/FM radio when he heard the defendants, who were using their cordless telephone.[42] Realizing that a narcotics deal was being discussed, he recorded both that and several subsequent conversations and turned the information over to the Kansas Bureau of Investigation (KBI).[43] The KBI supplied the neighbor with a tape recorder and blank tapes, requested that

---

1372 (3d Cir. 1975), *cert. denied*, 423 U.S. 1051 (1976). *But cf.* Elkins v. United States, 364 U.S. 206 (1960) (evidence unlawfully gathered by state officials is excluded in federal suit as violative of due process).

A total of 28 states and the District of Columbia have enacted legislation authorizing eavesdropping to date. For a complete compilation see C. FISHMAN, WIRETAPPING AND EAVESDROPPING § 5 n.14 (1978 & Supp. 1984).

[38] *See* Commonwealth v. Vitello, 327 N.E.2d 819, 833 (Mass. 1975); S. REP. No. 1097, *supra* note 23, at 2187. For a good discussion of the interaction between Title III and state eavesdropping statutes, see J. CARR, *supra* note 11, at § 2.04.

[39] *See* J. CARR, *supra* note 11, at § 2.04. The legislative history of Title III suggests that Congress intended its provisions to be closely echoed by state statutes. *See* S. REP. No. 1097, *supra* note 23, at 2187 ("The state statute must meet the minimum standards reflected as a whole in the proposed chapter."). *Accord* 114 CONG. REC. 11,208, 14,470 (1968) (statements of Sen. John McClellan); 114 CONG. REC. 14,731 (statement of Sen. Ralph Yarborough).

[40] *See, e.g.*, ALASKA STAT. § 42.20.310 (1984); N.Y. CRIM. PROC. LAW § 700.05 (McKinney 1984). These states apparently protect an oral communication regardless of whether an expectation of privacy exists. A cordless phone conversation would therefore seem to enjoy absolute protection against warrantless interception in these jurisdictions notwithstanding 18 U.S.C. § 2510(2).

[41] 679 P.2d 197 (Kan. 1984).

[42] "The radio receiver in question was a standard make and model and had not been modified in any manner to monitor or intercept defendants' conversation." *Id.* at 198. The *Howard* court noted that defendants' cordless phone was operating on a frequency identical to or similar to that of a commercial FM radio station. *Id.* at 199.

For a general discussion of recent operating frequency reassignments, see Amendments, *supra* note 7. *See also In re* Authorization of Spread Spectrum and Other Wideband Emissions Not Presently Provided for in the FCC Rules ad Regulations, 87 F.C.C.2d 876, 881-82 (1981) (discussing the overdemand for available frequencies and the problems resulting therefrom).

[43] 679 P.2d at 198.

he record any future conversations,[44] and then obtained court authorization for a pen register.[45]

When the police had ascertained that the recorded conversations coincided with the pen register numbers, they obtained a search warrant for the defendants' home and seized a cordless telephone and "certain narcotic drugs."[46] The defendants were charged with possession of cocaine and conspiracy to sell marijuana.[47]

The district court suppressed the recorded telephone conversations, holding that they were "wire communications" under Title III and that, absent court authorization, their interception violated the statute.[48] The Supreme Court of Kansas addressed the suppression on an interlocutory appeal.[49]

### A. *Wire Communication v. Oral Communication*

The *Howard* court ultimately faced two issues: 1) whether a cordless phone conversation is properly characterized as a "wire

---

[44] An agent of the KBI testified that "he would not have attempted to obtain a search warrant based solely upon the first tape recordings prepared by the confidential informant which were obtained without the police officers' knowledge or involvement." *Id.* at 199. The initial recordings apparently failed to meet the probable cause requirement of 18 U.S.C. § 2518. At this time the neighbor was still acting as a private citizen and the recordings might have been admissible at trial even if they were found to have been unlawfully intercepted. *See, e.g.,* Coolidge v. New Hampshire, 403 U.S. 443, 484-90 (1971) (fourth amendment exclusionary rule does not preclude the state from using evidence gathered from illegal search conducted by private citizen). The law is somewhat unclear about whether Title III's statutory exclusionary rule, 18 U.S.C. § 2515, would preclude a similar use. *Compare* United States v. Bobo, 477 F.2d 974, 990-91 (4th Cir. 1973) (allowing the use), *cert. denied,* 421 U.S. 909 (1975) *with* United States v. Phillips, 540 F.2d 319 (8th Cir.) (disallowing the use), *cert. denied,* 429 U.S. 1000 (1976).

When subsequent conversations were recorded on KBI-furnished equipment, the neighbor presumably became an agent of the police. *Coolidge* contains a discussion of the private citizen/agent of police distinction. *See* 403 U.S. at 484-90.

[45] A pen register monitors the outgoing electronic impulses created from the dialing of a telephone. It perforates a tape, indicating the date, time and number dialed. This allowed the KBI to correlate the dates and times indicated by the pen register attached to defendants' phone line with those recorded by the neighbor. 679 P.2d at 198.

[46] 679 P.2d at 198-99.

[47] *Id.* at 198. *See* KAN. STAT. ANN. §§ 65-4127(a), 21-3302, 65-4127(b) (1981 & Supp. 1983) [hereinafter cited as KSA] (Unlawful possession or possession with intent to sell opiates, opium, and narcotics and the resulting conspiracy are felonies; unlawful possession or possession with intent to sell depressants, stimulants, and hallucinogenics and the resulting conspiracy are misdemeanors.).

[48] 679 P.2d at 198.

[49] *Id. See also* KSA § 22-3603 (1981) (prosecution may file interlocutory appeal within 10 days of suppression order).

communication"[50] or as an "oral communication,"[51] and 2) if an oral communication, whether the requisite "reasonable expectation of privacy"[52] is present. The initial characterization as a wire/oral communication is crucial to reaching a proper result under Title III because a wire communication is absolutely protected from interception absent a court order,[53] while an oral communication is protected *only if* a reasonable expectation of privacy exists.[54]

Section 2510 of Title III contains the relevant definitions:

> As used in this chapter—
> (1) 'wire communication' means any communication 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 furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications;
> (2) '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*;[55]

While the proper classification of a cordless phone conversation was a question of first impression for the *Howard* court, other courts had already addressed a similar question involving mobile telephones.[56]

---

[50] *See* 18 U.S.C. § 2510(1) (1982).

[51] 18 U.S.C. § 2510(2) (1982).

[52] *See* notes 19-20 *supra* and accompanying text.

[53] J. CARR, *supra* note 11, § 3.02[1]. *See also* 18 U.S.C. § 2510(1). The legislative history of Title III indicates that the definition of wire communication "is intended to be comprehensive." *See* S. REP. No. 1097, *supra* note 23, at 2178.

[54] J. CARR, *supra* note 11, § 3.02[2]. *See also* 18 U.S.C. § 2510(2). One court has explained that "there is a reason for the more restrictive definition of oral communications. When a person talks by telephone, he can reasonably assume privacy. That assumption may often be invalid for non-wire communications. Therefore, it is incumbent upon the participants in an oral communication to make a reasonable estimate of the privacy afforded them by their particular circumstances." United States v. Hall, 488 F.2d 193, 196 (9th Cir. 1973).

[55] 18 U.S.C. § 2510(1)-(2) (emphasis added).

[56] For a general discussion of the two types of land mobile radio services, see generally RAM Broadcasting Co. v. FCC, 525 F.2d 630, 634 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976).

The seventh circuit considered the mobile phone question as early as 1970, in *United States v. Hoffa*.[57] Defendant Jimmy Hoffa placed phone calls over mobile telephone units located in union-supplied automobies. The FBI recorded several of these conversations by using an ordinary FM radio receiver located in its Detroit office and used the recordings to support charges of mail fraud, wire fraud and conspiracy. In ruling the evidence admissible, the court noted that "[s]urely, there was no expectation of privacy as to the Hoffa calls in Detroit which were exposed to everyone in that area who possessed an FM radio receiver or another automobile telephone tuned in to the same channel."[58]

Three years later, however, the ninth circuit reached the opposite result in *United States v. Hall*.[59] In a controversial decision,[60] the court held that conversations between a mobile telephone and a regular land-line telephone constitute "wire communications" under the provisions of Title III and were therefore absolutely protected from interception absent a court order.[61] The court arrived at what it conceded was an "absurd result"[62] by applying its interpretation of congressional intent.[63]

---

[57] 436 F.2d 1243 (7th Cir. 1970), *cert. denied*, 400 U.S. 1000 (1971). *Hoffa* did not deal with the statutory distinction between wire communications and oral communications because Title III was enacted after Hoffa's first trial in 1966. Nonetheless, the court's holding strongly indicates that it would not have defined the radio-telephone conversations as wire communications even if Title III had been in effect. *See id.* at 1247.

[58] *Id.* at 1247.

[59] 488 F.2d 193 (9th Cir. 1973). *Hall* involved facts remarkably similar to *State v. Howard* with the exception that the calls were placed from mobile radio-telephones rather than cordless phones. Defendant Hall's conversations were intercepted by a Tucson, Arizona woman who listened to her home radio while doing housework. She reported the suspicious conversations to the Arizona Department of Public Safety, which asked her to continue monitoring the transmissions and to report back at regular intervals. Subsequently, the Department conducted warrantless surveillance of defendant's conversations for five weeks, resulting in Hall's arrest on drug charges. *Id.* at 194-95. *Cf.* notes 41-47 *supra* and accompanying text.

[60] Courts have expressly refused to follow *Hall* in at least three subsequent cases. *See* Dorsey v. State, 402 So. 2d 1178, 1183 (Fla. 1981); State v. Howard, 679 P.2d at 204; State v. Delaurier, 488 A.2d 688, 693 (R.I. 1985).

[61] *See* 488 F.2d at 197. The court noted, in dictum, that a point-to-point radio transmission would not fit the definition of a wire communication. *See id.* Subsequent cases have held that such transmissions enjoy no protection under Title III. *See, e.g.*, United States v. Rose, 669 F.2d 23 (1st Cir.) (point-to-point radio transmission was not undertaken with reasonable expectation of privacy, and was not "wire" or "oral" communication within meaning of Title III), *cert. denied*, 459 U.S. 828 (1982).

[62] *See* 488 F.2d at 197.

[63] The court observed that there is nothing in the legislative history of Title III to indicate how Congress intended to treat a mobile telephone conversation. *Id.*

The court pointed out that the language of section 2510(2) defining oral communication is ambiguous at best and, if taken to extremes, could result in almost every communication being classified as a wire communication.[64] Nevertheless, it found the statutory language "made in whole or in part . . . by the aid of wire" particularly troublesome because it viewed such language as a strict expression of Congressional intent.[65] Therefore, despite its better judgment, it was forced to conclude that Congress intended that any conversation involving a regular land-line telephone be protected, even though a portion of the conversation was transmitted by radio.[66]

The Supreme Court of Florida expressly rejected the holding of *Hall* in *Dorsey v. State*.[67] In *Dorsey*, police acting on a tip used a "bearcat scanner"[68] to monitor messages received by the defendants on a "pocket pager."[69] Information obtained through this surveillance was then used to acquire a judicial wiretap order. Defendants moved to suppress the evidence, claiming that information received from the pager was the product of an illegal interception of a wire communication.[70]

In rejecting *Hall* the court noted that "[i]n Florida it is a well-settled principle that statutes must be construed so as to avoid absurd results. The instant statute can be so construed,

---

[64] The court noted that:

> For example, it could be argued that if any wire is used to aid the communication, it must be deemed a wire communication. If this were followed to its conclusion, the use of a radio would be included in the definition because some wires are contained in the radio transmitter and receiver—thus the communication would be aided 'in part' by the use of wire. However, such an interpretation would be inconsistent with the language of the immediately succeeding section which permits an agent of the FCC, in certain circumstances, "to intercept a wire communication, or oral communication transmitted by radio. . . ." 18 U.S.C. § 2511(2)(b).

*Id.* at 196.

[65] *See id.* at 197.

[66] *See id.*

[67] 402 So. 2d 1178.

[68] A "bearcat scanner" is a receiver capable of receiving any programmed frequency. *Id.* at 1182-83.

[69] *Id.* at 1182. A pocket pager, or "beeper," is a device capable of receiving, but not transmitting, messages. The message is converted to radio waves at a base station and transmitted to the beeper—and anyone else who is tuned to the beeper frequency. *Id.*

[70] Unlike in *Howard*, the trial court in *Dorsey* denied the motion to suppress the intercepted messages. *Id.*

and we do so to avoid reaching a result that would require a warrant or a court order to listen to the open and available airwaves."[71] The court held that the prohibition against warrantless interception applies "only to so much of the communication as is actually transmitted by wire and not broadcast in a manner available to the public."[72]

The *Howard* court also flatly rejected the holding of *Hall*, stating, "In our judgment, *United States v. Hall* not only arrived at an absurd result but misconstrued the Congressional intent."[73] The court pointed out that Congressional intent is to be determined by all the relevant facts and circumstances, not by statutory language alone.[74] Following the reasoning of the *Dorsey* court, and reaching the same result, the *Howard* court concluded that the definition of "wire communication" encompassed only that portion of the message that is actually transmitted by wire and not that portion broadcast in a manner available to the public.[75] Therefore, the *Howard* court reasoned, the defendants'

---

[71] *Id.* at 1183 (citations omitted). The U.S. Supreme Court has also held that a statute should not be interpreted as leading to an absurd result. *See* United States v. Bryan, 339 U.S. 323, 338 (1950). The *Dorsey* court observed that:

> Just as it would be absurd to include within the definition of 'wire communication' a message broadcast over a public address system for everyone to hear, even though the communication is aided by certain wires, it would be equally absurd and asinine to include within that definition television or radio signals broadcast with no reasonable expectation of privacy and openly available for anyone with the proper receiving equipment to hear.

402 So. 2d at 1183.

[72] 402 So. 2d at 1183.

[73] 679 P.2d at 204. The *Delaurier* court was even less charitable in its rejection of the *Hall* court's reasoning:

> The effect of defining defendant's broadcasts as "wire communications" would produce two results, both of which we find contrary to the intentions of Title III. The first would be that law-enforcement authorities would find it necessary to obtain a court order to listen to the AM radio. . . . Congress clearly did not intend such a result. Second, and perhaps more absurdly, the failure to obtain such an order could conceivably lead to liability for both civil and criminal sanctions. . . . Thus, the citizen who reported defendant's communications to the police could be subject to criminal prosecution as well as civil lawsuits. . . .

488 A.2d at 694 (citations omitted). *See also* note 4 *supra*.

[74] *See* 679 P.2d at 204.

[75] *See id.* at 205. The court underscored the irony of the contrary holding in *Hall* by observing that "any citizen who listens to a mobile-telephone band does so at his risk, and scores of mariners who listen to the ship-to-shore frequency, commonly used to call to a land-line telephone, commit criminal acts" under the *Hall* rationale. *Id. See also* note 4 *supra*.

cordless phone conversations must be protected, if at all, under those rules pertaining to "oral communications," rather than those pertaining to "wire communications."[76]

## B. *A Reasonable Expectation of Privacy*

Rather than defining an "oral communication" as any communication that is not a "wire communication," Congress chose to define "oral communication" in much narrower terms: " '[O]ral 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.*"[77] "Only if a conversation fits this definition is it protected from non-warrant interception. If the conversants do not have a justifiable expectation of privacy, their conversation is not an 'oral communication,' and law enforcement officials may overhear or record it without a warrant."[78]

One must look to case law for the definition of a "reasonable expectation of privacy."[79] The phrase itself comes from a concurrence in *Katz*[80] and has both a subjective and an objective element.[81] Not only must the conversants have an *actual* expec-

---

[76] *See* 679 P.2d at 204.

[77] 18 U.S.C. § 2510(2) (emphasis added).

[78] C. FISHMAN, *supra* note 37, § 22, at 37.

[79] While Title III does not explain what constitutes a justifiable expectation of privacy, its legislative history does give some indication of Congressional intent. Apparently Congress intended that the place at which a conversation occurs, while not controlling, be an important determining factor. *See* S. REP. No. 1097, *supra* note 23, at 2178. Ordinarily, conversations occurring in areas generally assumed to be private—such as one's home (Silverman v. United States, 365 U.S. 505 (1961)); office (Berger v. New York, 388 U.S. 41 (1967)); hotel room (United States v. Burroughs, 379 F. Supp. 736 (D.S.C. 1974), *aff'd*, 564 F.2d 1111 (4th Cir. 1977)); or telephone booth (Katz v. United States, 389 U.S. 347 (1967))—will support a justifiable expectation of privacy unless the conversants speak so loudly that they should be aware of the danger of being overheard. *See* S. REP. No. 1097, *supra* note 23, at 2178. On the other hand, "such an expectation would clearly be unjustified" in areas such as an open field or jail. *Id.* In the final analysis, all the facts and circumstances surrounding the case must be considered when deciding whether a justifiable expectation of privacy exists. *See id.*

[80] *See* Katz v. United States, 389 U.S. at 361 (Harlan, J., concurring). *See also* note 20 *supra*.

[81] *See, e.g.*, Holman v. Central Ark. Broadcasting Co., 610 F.2d 542, 544-45 & n.3 (8th Cir. 1979); United States v. McIntyre, 582 F.2d 1221, 1223 (9th Cir. 1978); United States v. Pui Kan Lam, 483 F.2d 1202, 1206 (2d Cir. 1973), *cert. denied*, 415 U.S. 984 (1974).

tancy, but it must be one *society* recognizes as reasonable.[82] The *Howard* court, therefore, faced the question of whether a person talking on a cordless phone actually expects conversational privacy and, if so, whether society recognizes that expectancy.

Every court considering the question has found that no reasonable expectation of privacy exists when conversations are broadcast in a manner allowing interception by anyone with a radio receiver.[83] In *United States v. Rose*[84] the First Circuit Court of Appeals held that defendants who discussed a drug drop via point-to-point radio had neither a subjective nor an objective expectation of privacy.[85] The court noted that defendants' frequent switching of channels indicated a suspicion that they were being monitored.[86] Furthermore, the fact that their conversation could be monitored by anyone with an ordinary "ham" radio receiver frustrated any claim that an expectation of privacy was objectively reasonable.[87]

The Florida court arrived at the same conclusion in *Dorsey v. State*.[88] Emphasizing the "*broadcast* nature"[89] of the messages, the court held that no expectation of privacy could exist

---

[82] For a discussion of the value judgments that society must make in determining whether an expectation of privacy is objectively reasonable, see W. LAFAVE, *supra* note 14, § 2.2, at 279-80.

[83] *See e.g.*, United States v. Hall, 488 F.2d 193, 196-97. The court recognized that no expectation of privacy reasonably exists, but felt constrained by Congressional intent to classify certain radio transmissions as protected wire communications under Title III. *See* notes 59-66 *supra* and accompanying text.

[84] 669 F.2d 23 (1st Cir.), *cert. denied*, 459 U.S. 828 (1982).

[85] *See id.* at 24-25.

[86] *Id.* at 25-26. It is interesting that the fourth circuit has held that while actual knowledge of eavesdropping may render an expectation of privacy unreasonable, a mere suspicion of eavesdropping will not. *See* United States v. Duncan, 598 F.2d 839, 850 (4th Cir.), *cert. denied*, 444 U.S. 871 (1979). Bank president Duncan was charged with eavesdropping on IRS and FBI agents who were auditing his bank. Duncan argued that a history of bad relations between the government and the bank should have put the agents on notice that their conversations were being monitored. The court held that public policy prevented its negating the agents' justifiable expectation of privacy because of a mere suspicion of eavesdropping. *See id.* at 852.

[87] 669 F.2d at 26. *See also* United States v. Sugden, 226 F.2d 281, 286 (9th Cir. 1955) (dictum), *aff'd*, 351 U.S. 916 (1956).

[88] 402 So. 2d 1178 (Fla. 1981).

[89] We emphasize the *broadcast* nature of such messages, since one who sends beeper messages should know, and in the instant case the Bailey organization did in fact know, that such communications are open to any members of the public who wish to take the simple step of listening to them.

*Id.* at 1183-84 (emphasis in original).

in messages being transmitted from a base station to a pocket pager.[90] Even the otherwise anamolous *United States v. Hall*[91] opinion acknowledged that no expectaion of privacy reasonably exists in radio transmissions.[92]

The *Howard* court, then, relied on ample precedent in deciding that defendants had no reasonable expectation of privacy in their cordless phone conversations.[93] Furthermore, the court correctly interpreted the statute in ruling that the absence of a reasonable expectation of privacy removed the conversations from the statutory definition of an "oral communication" and thereby removed the protections afforded by Title III.[94] Even though *Howard* appears correct on precedential, interpretative, and logical grounds, its ramifications are somehow troublesome—particularly its potential impact on the unwary consumer. Perhaps regulatory, rather than judicial, action would provide a better remedy.

## III. RECOMMENDED REGULATORY ACTION TO BETTER PROTECT THE UNWARY CONSUMER

In each case discussed previously, the defendants either knew or had reason to know[95] that their conversations were susceptible

---

[90] The court noted: "We do not reach any hypothetical questions involving more sophisticated methods of intercepting communications which in fact engender a reasonable expectation of privacy, such as land-line telephone messages transmitted in part by wireless signals." *Id.* at 1184 n.4.

[91] 488 F.2d 193.

[92] *See* note 83 *supra*.

[93] *See* State v. Howard, 679 P.2d 197, 201-04 (Kan. 1984). The court emphasized, "this case does not involve the rights of a person on the other end of the telephone land line who was speaking over a standard telephone and who was without knowledge that the defendants were the owners and users of a cordless telephone." *Id.* at 206. The *Delaurier* court also expressly excluded this issue, but noted that such persons "may well have been justified in expecting privacy." State v. Delaurier, 488 A.2d at 694 n.4. Unfortunately, this intriguing issue is outside the scope of this Comment.

[94] Aside from Title III, the interception in *Howard* might qualify as an interception of a radio communication, which is barred by 47 U.S.C. § 605 (1982). Law enforcement officials are exempt from the provisions of § 605. S. REP. No. 1097, *supra* note 23, at 2197. Therefore, the KBI would have needed no warrant to intercept defendants' conversations. This issue was not before the *Howard* court because the parties stipulated that Title III was controlling. *See* 679 P.2d at 200.

[95] But see United States v. Duncan, 598 F.2d 839 (4th Cir. 1979), which is discussed *supra* note 86. (A mere suspicion of eavesdropping may not be enough to mitigate a justifiable expectation of privacy.).

to interception. In *Hoffa*, *Dorsey* and *Hall*, defendants were obviously using radio transmitters to communicate with someone at a distant site. While the *Howard* defendants used a somewhat different device, the court stressed that the defendants were "fully advised by the owner's manual as to the nature of the equipment."[96] In concluding that the defendants were "fully advised," the court made a crucial, and suspect, assumption: that upon reading the words "antenna," "mobile unit" and "base unit," and upon being advised that the cordless phone has a range of fifty feet,[97] a consumer will naturally realize that conversations are being broadcast to the general public.[98] Such an assumption is contrary to reality.

Average consumers are not authorities on radio signals, bands, and frequencies. They likely do not realize that their cordless phones operate on a band just above that of their AM radios, thereby making their conversations accessible to anyone with an AM/FM receiver.[99] More likely they think of the radio signal transmitted by a handset as traveling across the room to a base unit, not passing through the walls of their homes and into neighbors' homes, or into passing vehicles.[100] In short, absent a clear warning, the average consumer probably is not "fully advised . . . as to the nature of the equipment."[101]

The most feasible solution to this problem is a mandatory consumer education program, administered by the Federal Communications Commission (FCC).[102] Such a program could be implemented by amending 47 C.F.R. part 15[103] to require uniform warning labels on *both* the base unit *and* the handset.[104]

---

[96] State v. Howard, 679 P.2d 197, 206 (Kan. 1984).

[97] Many contemporary cordless phones advertise a range of 1,000 feet.

[98] *See* 679 P.2d at 199.

[99] *See id.* (discussing the technical aspects of defendants' cordless phone). *See generally* Amendments, *supra* note 7 (discussing the general specifications of cordless telephones).

[100] *See* authorities cited *supra* note 99.

[101] 679 P.2d at 206.

[102] Some consumers have suggested that the FCC require features such as voice scrambling or warning beepers to protect against invasion of privacy. The FCC has rejected these suggested features as being too costly a requirement, although it acknowledges that they soon may be available as optional features on higher priced models. *See* Amendments, *supra* note 7, at 1517.

[103] *See* 47 C.F.R. pt. 15 (1980).

[104] Current FCC regulations require a warning label only on the base unit. 47 C.F.R. § 15.236 (1984). For a discussion of why this is so, see notes 109-10 *infra* and accompanying text.

Similar warnings should appear on the outside package[105] and in the owner's manual.[106] The warning should plainly state that a danger of unauthorized interception exists.[107]

Despite numerous complaints from consumers concerning the insufficiency of current labeling requirements,[108] the FCC has acquiesced to industry requests that labeling requirements be kept to a minimum.[109] Industry representatives complain that warning labels consume too much space and are "aesthetically unpleasing."[110] In light of the *Howard* decision, such concerns, on balance, seem to have little merit.

## CONCLUSION

The explosive domestic market for cordless telephones has caused a myriad of concerns—intertwining technological and legal issues. One such issue is the fourth amendment's proscription against unreasonable searches. While courts agree that no expectation of privacy reasonably exists in radio broadcasts, the underlying premise of the rule—actual or constructive knowledge of possible interception—becomes questionable when applied to a relatively new technology such as cordless phones. Arguably most consumers do not understand the danger these devices pose to conversational privacy.

The most feasible solution seems to be the amendment of FCC regulations to require a mandatory program of consumer education through the increased use of warning labels. Such a program would increase consumer awareness dramatically, at

---

[105] A warning on the outside of the package would ensure that a consumer is fully informed of the danger to privacy before investing in a cordless phone.

[106] Several manufacturers have urged the FCC to require warnings only in the owner's manual. *See* Amendments, *supra* note 7, at 1517-18.

[107] The current warning label required by 47 C.F.R. § 15.236 (1984) contains one sentence concerning the danger to privacy, and that sentence is not particularly forceful: "Privacy of Communications may not be ensured when using this phone."

[108] *See* Amendments, *supra* note 7, at 1517 & n.19 (citing a complaint received from Mr. Samuel H. Beverage that consumers may not be aware that a cordless telephone is a radio device and that conversations may not be private, and acknowledging that the FCC has received numerous complaints of a similar nature).

[109] *See id.* at 1517-18. The FCC had originally proposed to require a warning label on both the handset and the base unit. *See* Notice of Proposed Rulemaking, 48 Fed. Reg. 16,298 (1983). But after manufacturers complained, the FCC decided to require a warning label on the base unit only. *See* Amendments, *supra* note 7, at 1517-18.

[110] *See* Amendments, *supra* note 7, at 1517.

little or no cost to the manufacturer, and increased costs could be passed through to the consumer—the ultimate beneficiary. Best of all, the program would, without offending a basic sense of fairness, allow the courts to impute knowledge to the user of a cordless telephone.

*Mark S. Snell*