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Does The "One-Party Consent" Exception Effectuate the Underlying Goals of Title III?

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DOES THE "ONE-PARTY CONSENT" EXCEPTION EFFECTUATE THE UNDERLYING GOALS OF TITLE III?

INTRODUCTION

Title III of The Omnibus Crime Control and Safe Streets Act of 1968[1] (hereinafter Title III) was enacted to give law enforcement agencies statutory authority under specifically described standards[2] to conduct wiretapping or electronic surveillance.[3] Because law enforcement agencies[4] have frequently utilized Title III, the majority of cases have dealt with the suppression of evidence obtained through electronic surveillance.[5] In addition, Congress saw the need to place safeguards on the use of electronic surveillance for the protection of the private individual. These safeguards were necessary due to the tremendous advances in technology, making the possibility of widespread use and abuse of electronic surveillance[6] a threat to every household and office.[7]

Because of the need to protect individual privacy, the legalization of electronic surveillance, through enactment of Title III, was strongly opposed. By legally sanctioning the use of eavesdropping[8] on the pretext of combating organized crime,[9] those opposing the enactment saw Title III as the arrival of "Big Brother."[10] In an effort to gain support of Title III, the legislation became

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[1]Pub. L. No. 90-351, 82 Stat. 211-23 (1968) (codified as amended at 18 U.S.C. §§ 2510-20 (1979 & Supp. 1984)).

[2]*See generally*, 18 U.S.C. § 2518. A wiretap may be obtained from a judge or magistrate upon written request by a law enforcement officer. The request must include a complete statement of the facts essential to determine the need for the authorization, the identity of the requesting officer, the time period of the request, and existence of previous application or request for extensions. The request must show probable cause concerning commission of a crime, that normal investigative procedures will not succeed in the apprehension of the criminals and there is probable cause the crime is being committed at the location. The request must identify the person whose communications are to be intercepted, the type of surveillance employed, the identity of the agency authorized to use surveillance and the period of time the surveillance is to be authorized.

[3]The term *electronic surveillance* will be used to include wiretapping, acquisition of oral communication and the recording of any conversation by any means.

[4]S. REP. NO. 1097, 90th Cong. 2d Sess, *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 2112, 2154 (hereinafter cited as S. REP. NO. 1097).

[5]114 CONG. REC. 14,160 (1968).

[6]A conservative estimate would be that more than 12,000 wiretaps and bugs are installed annually by local law enforcement agencies. A. WESTIN. PRIVACY AND FREEDOM 127 (1967).

[7]Comment, *Wiretapping: The Federal Law*, 51 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 441, 448 (1960) [hereinafter cited as Comment, *Wiretapping: The Federal Law*].

[8]"Eavesdropping was an ancient practice which at common law was condemned as a nuisance." Katz v. United States, 389 U.S. 347, 366 (1967) (Black, J., dissenting); "Perhaps as good a definition of eavesdropping as another is that it is listening secretly and sometimes snoopily to conversations and discussions believed to be private by those engaged in them." Berger v. New York, 388 U.S. 41, 71 (1967) (Black, J., dissenting).

[9]S. REP. NO. 1097, *supra* note 4, at 2223.

[10]G. ORWELL, 1984 (1949).

a compromise between Title III's use as a tool for combating crime[11] and its potential intrusion upon the private individual. Therefore, the drafters of Title III were faced with the task of formulating legislation to protect private citizens from the existing technology available for electronic surveillance "while arming the prosecution with a powerful weapon"[12] to combat crime. These developments resulted from the Supreme Court's holding in *Berger v. New York*,[13] that protection of the individual and his privacy should not be relegated to a "second class" position.[14]

In an attempt to control the "dirty business" of electronic surveillance[15] and desire not to totally legalize "peeping toms,"[16] Title III restricted private electronic surveillance to those situations where a participant consented to or authorized the interception[17] of the communications.[18]

Title III is an attempt to balance two purposes — protection of private citizens and control of organized crime.[19] Because of these diametric purposes, discussion of all aspects of Title III is beyond the scope of this comment. The first section of this comment will discuss the Supreme Court's past and present position on the use of electronic surveillance. The remainder of the comment will trace the development of the "one-party consent" exception as codified in Title III, analyzing its continued validity and applicability to private unauthorized electronic surveillance.

JUDICIAL AND CONGRESSIONAL CONTROL OF ELECTRONIC SURVEILLANCE

The problem of controlling wiretapping was not new to Congress. The first wiretapping regulation was passed in 1917.[20] This legislation allowed electronic surveillance by governmental agencies, placing no restrictions on the use of electronic surveillance during private conversations. In *Olmstead v. United States*[21], the Supreme Court considered the propriety of law enforcement officials wiretapping the defendant's telephone. The evidence obtained

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[11]Goldsmith, *The Supreme Court and Title III: Rewriting the Laws of Electronic Surveillance*, 74 J. CRIM. L. & CRIMINOLOGY 1, 3 (1983) [hereinafter cited as Goldsmith].

[12]Goldstone, *The Federal Wiretapping Law*, 44 TEX. B. J. 382, 387 (1981) [hereinafter cited as Goldstone].

[13]388 U.S. 41 (1967).

[14]*Berger*, 388 U.S. at 49 (quoting Lord Camden in Entick v. Carrington, 19 How. St. Tr. 1029, 1066, 95 Eng. Rep. 807 (1765) (95 Eng. Rep. 807 is not an accurate reproduction)).

[15]Olmstead v. United States, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting).

[16]S. REP. NO. 1097, *supra* note 4, at 2224.

[17]Interception is defined as "the aural acquisition of the contents of any wire or oral communications through the use of any electronic, mechanical or other device." 18 U.S.C. § 2510(4).

[18]By limiting private surveillance to those instances where the consenting party does not use the conversation to injure the non-consenting party, Congress felt "[they had] gone about as far in that respect as [they could] under the Constitution." 114 CONG. REC. 14,728 (1968).

[19]J. CARR, THE LAW OF ELECTRONIC SURVEILLANCE § 201 (1977) [hereinafter cited as Carr].

[20]Act of Oct. 29, 1918, ch. 197, 40 Stat. 1017.

[21]277 U.S. 438 (1928).

by this wiretap was admitted at trial, resulting in a conviction for conspiracy to sell liquor. Because there was no physical trespass upon the home of the defendant, the Supreme Court refused to hold that this was an illegal search[22] in violation of the fourth amendment.[23] Chief Justice Taft, writing for the majority, explicitly stated that the proper method to stop this practice was through Congressional legislation.[24] The *Olmstead* decision was not without criticism. Justice Holmes stated this decision was a legalization of the "dirty business" of eavesdropping.[25] By condemning electronic surveillance in his dissent, Justice Brandeis foresaw the adverse impact this decision would have on society.[26]

The Communications Act of 1934[27] [hereinafter §605] was the first major piece of legislation used in an attempt to alleviate the fears of Justice Brandeis. Although the original purpose of the statute was to define the jurisdiction of the Federal Communications Commission[28], the courts began to use this statute to control electronic surveillance.[29] However, the statute was not sufficient to meet the growing technological developments.[30]

In 1957[31], another inadequacy of §605 became apparent when the Supreme Court, in *Rathburn v. United States,*[32] allowed the admission of evidence recorded with the consent of a party to the conversation. In *Rathburn,* police listened on an extension phone while the defendant threatened to commit a murder. Although the elements necessary for suppression[33] of this evidence existed, the Court held "that the clear inference [of §605] is that one entitled to receive the communication may use it for his own benefit or have another use it for him."[34] *Rathburn* became the basis of the "one party consent" exception codified in Title III.[35]

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[22]Carr, *supra* note 19, at § 1.03.

[23]*Olmstead,* 277 U.S. at 466.

[24]*Id.* at 465.

[25]*Id.* at 470 (Holmes, J., dissenting).

[26]*Id.* at 471 (Brandeis, J., dissenting).

[27]The Communications Act of 1934, ch. 625, § 605, 48 Stat. 1064, 1103 (codified at 47 U.S.C. § 605 (1962). "No person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person."

[28]Goldsmith, *supra* note 11, at 11.

[29]*See,* Carr, *supra* note 19, at § 1.02[2].

[30]Although 42 U.S.C.§ 605 did not provide for civil liability if the communication was intercepted and divulged, the availability of civil damages was recognized. *See,* Carr, *supra* note 19, at § 1.02[2](d); *contra,* Daly v. CBS, 309 F.2d 83, 85 (7th Cir. 1962).

[31]In 1940, President Roosevelt authorized wiretapping on the pretext of national security. The majority of courts held that this evidence was not suppressible under 47 U.S.C. § 605.

[32]355 U.S. 107 (1957).

[33]42 U.S.C. § 605 required that the communication be intercepted and divulged to constitute a violation. Comment, *Wiretapping: The Federal Law, supra* note 7, at 442.

[34]*Rathburn,* 355 U.S. at 110.

[35]*See generally,* 18 U.S.C. § 2511(2)(c) & (d).

Although the "one-party consent" exception was codified in Title III, the rationale of *Olmstead*[36] did not begin to erode[37] until *Irvine v. United States.*[38] In *Irvine,* the Court did not overrule *Olmstead,* but they did begin to imply that electronic surveillance may constitute a violation of the fourth amendment.[39] However, six years later, in *Silverman v. United States,*[40] the Court applied the rationale of *Olmstead* by finding that inserting a spike mike into defendant's wall, placing it in contact with the heating system, was an illegal search and seizure under the fourth amendment. Although the Court refused to base their decision of whether there had been a technical trespass upon a home under local property law, the holding rested on "the right of every man to retreat to his home."[41]

Not until 1967, in *Katz v. United States,*[42] did the Supreme Court overrule *Olmstead* and its progeny by stating "[t]he Fourth Amendment protects people, not places."[43] This decision paved the way for Title III and the protection of privacy.[44]

Six months[45] before *Katz,* the Supreme Court decided *Berger v. New York.*[46] In *Berger,* the Supreme Court held that a New York wiretap statute[47] was unconstitutional. The *Berger* decision provided Congress with the necessary framework to draft federal legislation by setting out the major criteria for a constitutionally permissible statute regulating electronic surveillance.[48] The Court established eight criteria to obtain authorization for electronic surveillance. The law enforcement officials requesting authority for electronic surveillance must show:

1. Particularity in describing the place to be searched and the person or thing to be seized.

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[36]277 U.S. 438 (1928).

[37]Goldsmith, *supra* note 11, at 13.

[38]347 U.S. 128 (1954).

[39]U.S. CONST. amend. IV.

[40]365 U.S. 505 (1961).

[41]Goldsmith, *supra* note 11, at 14.

[42]389 U.S. 347 (1967).

[43]*Id.* at 351.

[44]Carr, *supra* note 19, at § 1.02[1]; Note, *Interspousal Wiretaps,* 34 S.C.L. REV. 158, 163 (1982) (the right to privacy is to protect people not places).

[45]The Supreme Court decided Berger v. New York, 388 U.S. 41 (1967) on June 12, 1967. *Katz,* 389 U.S. 347 (1967), was decided on Dec. 18, 1967.

[46]388 U.S. 41 (1967).

[47]N.Y. CODE CRIM. PROC. 813-a, *repealed by,* N.Y. CODE CRIM. PROC. § 700.05-.70 (McKinney 1971).

[48]In the S. REP. NO. 1097, Senator Scott explained the unsuccessful attempts Congress had made to pass appropriate legislation concerning electronic surveillance. After World War II, an attempt was made to pass a bill. But it was not until the Kennedy administration that a bill was introduced to help law enforcement officials to combat organized crime. In 1961, Kennedy sent proposals to Congress. These proposals were followed by 1962 and 1963 proposals in an attempt to authorize electronic surveillance for national security, against organized crime and other serious crimes. Congress took no action on any of these proposals. S. REP. NO. 1097, *supra* note 4, at 2267 (Individual Views of Mr. Scott).

2. Particularity in describing the crime that has been, is being, or is about to be committed.
3. Particularity in describing the type of conversation sought.
4. Limitations on the officer executing the eavesdrop over which would
   a) prevent his searching unauthorized areas.
   b) prevent further searching once the property sought is found.
5. Probable cause in seeking to renew the eavesdrop order.
6. Dispatch in executing the eavesdrop order.
7. Requirement that executing officer makes return of eavesdrop order showing what was seized.
8. A showing of exigent circumstances in order to overcome the defect of not giving prior notice.[49]

In *Berger*, the Court considered open-ended eavesdropping orders unconstitutional.[50] Because of the extremely controversial nature of electronic surveillance,[51] and the need to comply with the requirements of *Berger*, Congress seemed to be faced with an insurmountable task. One of the greatest problems with the *Berger* criteria was giving notice to the party who was the subject of the electronic surveillance.[52] Because of these requirements, the enactment of legislation complying with the constitutional standard required by the fourth amendment[53] and the *Berger* criteria seemed very difficult.[54] While Congress was attempting to overcome this notice requirement, the Supreme Court decided *Katz*. In *Katz*, Justice Stewart, writing for the majority, stated "[t]he very nature of electronic surveillance precludes its use pursuant to the suspect's consent."[55] This decision not only clarified the criteria of *Berger* but simplified the requirement of notice to the suspect. This enabled Congress to devise a notice requirement, giving the suspect notice of the wiretap after the information had been obtained,[56] as well as giving the authorizing magistrate a copy of the

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[49]S. REP. NO. 1097, *supra* note 4, at 2161-62.

[50]Carr, *supra* note 19, at § 1.01[2].

[51]"Congress drafted this statute with exacting precision as its principal sponsor Senator John L. McClellan stated 'a bill as controversial as this requires close attention to the dotting of every 'i' and the crossing of every 't''." Silver, *IRS Use of Wiretap Evidence in Civil Tax Proceedings in Doubt Despite Recent Case*, 56 J. TAX'N 300, 300 (1982).

[52]*Berger*, 388 U.S. at 60.

[53]Kinoy v. Mitchell, 331 F. Supp. 379, 382 (S.D.N.Y. 1971). ("Congress intended [Title III] to be as persuasive as the Fourth Amendment's constitutional standards as set forth in *Berger*.")

[54]In his dissent in *Berger*, Justice Black explained "Since secrecy is an essential, indeed a definitional element of eavesdropping, when the Court says there shall be no eavesdropping without notice [of eavesdropping to the party], the Court means to inform the Nation there shall be no eavesdropping — period." *Berger*, 388 U.S. at 86 (Black, J., dissenting).

[55]*Katz*, 389 U.S. at 358.

[56]Congress prescribes a ninety day time limit on notification to the person who was subject to the electronic surveillance. This time limit may be postponed upon a showing of good cause. 18 U.S.C. § 2518(8)(d).

material obtained by electronic surveillance.[57]

Because of these stringent requirements and the apprehension surrounding legalization of electronic surveillance, the passage of Title III was difficult. Many supported President Johnson's proposals allowing electronic surveillance only in cases of national security.[58] Because some favored electronic surveillance in the interest of the nation,[59] Title III was passed with the dual purpose of "protecting the privacy of wire and oral communications [and] delineating on a uniform basis the circumstances and conditions under which the interceptions of wire and oral communications may be authorized."[60]

As well as meeting the constitutional standard of *Berger*, the statute eliminated some of the problems of §605. By enacting Title III, Congress made it clear that §605 was no longer an effective tool to negate the abuse of electronic surveillance.[61] To constitute a violation of Title III, both interception *and* divulgence were no longer necessary.[62]

Title III can be analyzed in three tiers.[63] The first tier deals with criminal offenses.[64] This section describes the various exceptions[65] to the requirements of Title III.[66] The second tier deals with both criminal and civil offenses providing strong deterrence for violations of the statute by excluding evidence improperly obtained.[67] Because of *Berger* and the Court's desire to protect unauthorized invasion of privacy, the third tier provides a civil cause of action for violation of Title III.[68] Although Title III is restrictive in nature, it still permits some types of invasion on conversational privacy[69] as long as the elec-

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[57]S. REP. NO. 1097 *supra* note 4, at 2162.

[58]*Id.* at 2223 (Individual Views of Mr. Long of Missouri and Mr. Hart in Opposition to Title III).

[59]Westin, *The Wiretapping Problem: An Analysis and a Legislative Proposal*, 52 COLUM. L. REV. 165, 186 (1952) [hereinafter cited as Westin].

[60]S. REP. NO. 1097, *supra* note 4, at 2153.

[61]Carr, *supra* note 19, at § 8.01[4] (47 U.S.C. § 605 was amended upon passage of Title III to only cover radio communications).

[62]*See*, 18 U.S.C. § 2511 (an interception *or* divulgence is a violation (*emphasis added*)).

[63]Note, *Interspousal Wiretaps*, 34 S.C.L. REV. 158, 160 (1982).

[64]*See*, 18 U.S.C. § 2511.

[65]For an explanation of exception to warrant requirements *see*, C. FISHMAN, WIRETAPPING & EAVESDROPPING § 8 (1978).

[66]An example of one exception is 18 U.S.C. § 2511(3). Some early cases interpreted this section not to require a warrant for electronic surveillance in cases of national security, *see, e.g.*, Philadelphia Resistance v. Mitchell, 58 F.R.D. 139 (E.D. Pa. 1972). In United States v. United States Dist. Ct., 407 U.S. 297, 301 (1972), the Supreme Court held that § 2511(3) is merely a disclaimer of congressional intent to define presidential powers in matters affecting national security and is not a grant of authority to conduct warrantless national security surveillances. In 1978, The Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified at 50 U.S.C. §§1801-1811 (Supp. IV 1984) was enacted. The Carter administration only obtained 322 orders from the Foreign Intelligence Surveillance Court, as compared to the Reagan Administration's obtaining 433, a substantial increase possibly echoing a "serious threat to civil liberties." Richard, *Unleashing the Intelligence Community*, 69 A.B.A.J. 906, 906 (1983).

[67]*See generally*, 18 U.S.C. § 2515.

[68]*See generally*, 18 U.S.C. § 2520.

[69]Carr, *supra* note 19, at § 1.01[2](b).

tronic surveillance is not used to commit "a criminal, tortious or . . . other injurious act" to a party to the conversation.[70] However, for civil liability under the third tier of Title III, the person whose conversation is intercepted must have an "actual (subjective) expectation of privacy and . . . that the expectation is reasonable."[71]

Congress was cognizant of the need to protect the private citizen from electronic surveillance, while permitting law enforcement agents to combat organized crime. Therefore, the purpose of the legislation "was to effectively prohibit all interceptions of oral communications, except those specifically provided for in [Title III]."[72]

Although Title III was enacted to regulate electronic surveillance, its major purpose was to combat organized crime.[73] To carry out this purpose, the drafters armed law enforcement officials with adequate opportunity to use electronic surveillance against the criminal underworld. Because of the internal checks that organized crime has upon its membership and the difficult task of infiltration in the ordinary investigative manner, the drafters recognized the utility[74] of electronic surveillance to offset these obstacles. Congress provided law enforcement agencies with the statutory authority to obtain warrants (with some exceptions)[75] for using electronic surveillance as an investigative tool.[76]

The need for electronic surveillance to combat crime was met with strong opposition.[77] Senator Long, an avid critic of Title III,[78] stated, "to help eliminate crime, Congress is asked to sell its soul for a mess of porridge."[79] It was felt that electronic surveillance would at some point become a governmental intru-

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[70]18 U.S.C. § 2511(2)(d); *see also,* Goldstone *supra* note 12, at 384.

[71]18 U.S.C. § 2510(2). The expectation of privacy requirement is derived from Justice Harlan's concurring opinion in Katz v. United States 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

[72]United States v. Giordano, 416 U.S. 505, 514 (1974).

[73]S. REP.NO. 1097, *supra* note 4, at 2157; *see also,* Comment, *Interspousal Electronic Surveillance Immunity,* 7 U. TOL. L. REV. 185, 198 (1975).

[74]*Berger,* 388 U.S. at 62.

[75]The Senate Report defined three exceptions to the warrant requirements of the act stating no warrant is necessary for presidential orders of electronic surveillance in the protection of national security, for employees of the Federal Communications Commission in normal course of their employment, and employees of a communications common carrier in normal course of their employment. S. REP. NO. 1097, *supra* note 4, at 2153-54.

[76]Because of Congress' desire to eliminate unauthorized electronic surveillance, they made the manufacturing or possession of devices used for electronic surveillance a violation of the act. *See,* 18 U.S.C.§ 2512; United States v. Reed, 489 F.2d 917 (6th Cir. 1974) (conviction for possession of electronic surveillance instruments or equipment); *see generally,* Carr, *supra* note 19, at § 8.01.

[77]S. REP. NO. 1097, *supra* note 4, at 2222 (Individual Views of Mr. Long of Missouri and Mr. Hart in Opposition to Title III).

[78]Mr. Long expressed his concern as to the effectiveness by stating, "Big Brother is well on his way technologically. Do we want to spread his arrival legally by sanctioning the use of his tools especially when their application will have little or no effect in lessening crime." *Id.* at 2223.

[79]*Id.*

sion[80] greater than the crimes Title III was authorized to control.[81] However, Title III was enacted imposing minimal standards on state[82] and federal electronic surveillance. States[83] may enact their own electronic surveillance statutes, but they must conform to the minimal constitutional standards.[84]

Although Title III was enacted as a vehicle to control crime, the drafters attempted to broadly prohibit unauthorized electronic surveillance. This prohibition was designed to balance the need for electronic surveillance and the deterrence of private electronic surveillance. To effectuate this prohibition, criminal[85] and civil[86] causes of action were provided. Although the legislation of Title III dealt for the most part with the controls and regulations necessary for compliance with the constitutional standards,[87] an equally important aspect of Title III was "the protection of the law-abiding citizen."[88] Some legislators opposed Title III because of their fears that no adequate safeguards could be provided to protect private citizens.[89]

But Title III was proposed and enacted with the protection of private citi-

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[80]Coliver, *Electronic Surveillance: How Much Is Too Much?*, 18 Trial 61, 64 (Sept. 1982).

[81]"The Attorney General-elect has now made it plain that he intends to protect us from crime, even if he has to creep electronically into our homes." *Tap, Tap, Tap*, Washington D.C. Post, Jan. 17, 1969 at 18, col. 2.

[82]As a general rule, federal courts can admit evidence that violates a state statute more restrictive than the federal statute. United States v. Hall, 543 F.2d 1229, 1232 (9th Cir. 1976) (en banc) (in absence of direct conflict, Title III is not controlled by stricter state statute), *cert denied*, 429 U.S. 1075 (1977); United States v. Kaiser, 660 F.2d 724, 734 (9th Cir. 1981) (Although consent of all parties to conversation was necessary under state statute, admissibility of evidence in federal court was admissible without the consent of one party).

[83]State statutes concerning electronic surveillance are: ALA. CODE §§ 13A-11-30. to 37. (1975); ALASKA STAT. §§ 42.20.3.00-.340 (1962); ARIZ. REV. STAT. ANN. §§ 13-3004 to 3014 (1978); ARK. STAT. § 73-1810 (1979); CAL. PENAL CODE §§ 630-637.2 (West 1970 & Supp. 1985); COLO. REV. STAT. §§ 16-15-101 to -104 (1973); CONN. GEN. STAT. ANN. §§ 53a-187 to 189 (West 1982); DEL. CODE ANN. tit. 11, § 1336 (1979); D.C. CODE ANN. §§ 23-541 to -556 (1981); FLA. STAT. ANN. §§ 934.01 - .10 (West 1973 & Supp. 1983); GA CODE ANN. §§ 16-11-60 to 69 (1982); HAWAII REV. STAT. § 803-41 to -50 (Supp. 1984); IDAHO CODE §§ 18-6701 to -6709 (Supp. 1984); ILL. ANN. STAT. ch. 38, § 14-1 (Smith-Hurd 1975); IOWA CODE ANN. § 727.8 (1979); KAN. STAT. ANN. §§ 22-2514 to -2519 (1981); KY. REV. STAT. §§ 526.010-.080 (1979); LA. REV. STAT. ANN. §§ 15:1301 to :1312 (West 1981); ME. REV. STAT. ANN. tit. 15, § 709-712 (West 1980); MD. CTS. JUD. PROC. CODE ANN. §§ 10-401 to -412 (1984); MASS. GEN. LAWS ANN. ch. 272, § 99 (West 1970); MICH. COMP. LAWS § 750.539 - .540d (1968); MINN. STAT. ANN. §§ 626.A.01-.23 (West 1983); MISS. CODE ANN. § 97-25-53 (1972); MONT. CODE ANN. § 45-8-213 (1983); NEB. REV. STAT. §§ 86-701 to -712 (1981); NEV. REV. STAT. §§ 179.410 - .515 (1981); N.H. REV. STAT. ANN. § 570-A.1 to -A:11 (1974); N.J. STAT. ANN. §§ 2A:156A-1 to -26 (West 1971); N.M. STAT. ANN. §§ 30-12-1 to -11 (Supp. 1983); N.Y. CRIM. PROC. LAW §§ 700.05 - .70 (McKinney 1971); N.C. GEN. STAT. § 14-158 (1969); N.D. CENT. CODE § 8-10-07.2 (1975); OHIO REV. CODE § 4931.28 (Page 1954); OKLA. STAT. tit. 13, §§ 176.1-.14 (West 1983); OR. REV. STAT. §§ 133.721 to .739 (1981); PA. STAT. tit. 18 §§ 5701-5726 (Purdon 1982); R.I. GEN. LAWS §§ 12-5.1-1 to 16 (1981); S.D. CODIFIED LAWS ANN. §§ 23A-35A-1 to -21 (Supp. 1984); TENN. CODE ANN. § 39-3-1324 (1982); TEX. CRIM. PROC. CODE ANN. § 18.20 (Vernon Supp. 1985); VA. CODE §§ 19.2-61 to -70 (1983); WASH. REV. CODE §§ 9.73.030 to 100 (1973); WISC. STAT. ANN. §§ 968.27-.33 (West 1985); WYO. STAT. § 37-259.1 (1977).

[84]114 CONG. REC. 14,728 (1968).

[85]18 U.S.C. § 2511.

[86]18 U.S.C. § 2520.

[87]*See supra* text accompanying notes 46-57.

[88]115 CONG. REC. 23,238 (1969).

[89]Westin, *supra* note 59, at 188.

zens as one of its major concerns.[90] This topic was debated at length on the Senate floor. Senator Long of Missouri, who opposed Title III, expressed his fear that Title III "would take away all rights of our own citizens to privacy."[91] Senator McClellan, the strongest supporter of Title III, responded, "[m]y bill prohibits any invasion of privacy except in certain cases where the court orders it."[92] Senator McClellan's interpretation of the purpose of Title III was supported by Senator Fong. Senator Fong strongly endorsed Title III's provision protecting "the individual from electronic invasion of his privacy by private persons."[93] This debate clearly indicates that Title III was enacted as a broad prohibition of private electronic surveillance, allowing only authorized surveillance.[94] This interpretation was supported by the Supreme Court, who recognized Title III's importance for the protection of private citizens[95] "against the abuse of electronic surveillance made possible by the secrecy without detection"[96] and the technological advances in the field of electronic surveillance.[97]

Although Title III's main purpose was to control organized crime, it also protected private individuals from an unauthorized invasion of their privacy[98] by other private citizens as well as law enforcement agents.[99] Title III has restricted many possible forms of electronic surveillance but the possibility of intrusion into the innermost feelings of many individuals[100] is not totally prohibited.[101] Title III allows electronic surveillance without court authorization[102] when one of the parties to the conversation consents to the electronic surveillance, unless the purpose of the interception is to commit a criminal, tortious or other injurious act.[103]

THE ONE-PARTY CONSENT EXCEPTION

A major exception to Title III's requirement for a warrant is the "one-party consent" exception. This exception developed from undercover agents'

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[90]*Berger*, 388 U.S. at 65 (Douglas, J., concurring).

[91]114 CONG REC. 12,284 (1968).

[92]*Id.*

[93]*Id.* at 12,296.

[94]S. REP. NO. 1097, *supra* note 4, at 2274 (Individual Views Messers. Dirkens, Hruska, Scott, Thurmond on Titles I, II, & III).

[95]Gelbard v. United States, 408 U.S. 41, 48 (1972).

[96]Galloway, *The Uninvited Ear: The Fourth Amendment Ban on Electronic General Searches*, 22 SANTA CLARA L. REV. 993, 1010 (1982) [hereinafter cited as Galloway].

[97]Jandak v. Village of Brookfield, 520 F. Supp. 815, 819 (N.D. Ill. 1981).

[98]*See generally*, Warren & Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193 (1890) [hereinafter cited as Warren].

[99]Smith v. Wunter, 356 F. Supp. 44, 46 (S.D. Ohio 1972).

[100]*Berger*, 388 U.S. at 65 (Douglas, J., concurring).

[101]*See generally*, 18 U.S.C. §§ 2511(2)(c) & (d).

[102]*Id.*

[103]Goldstone, *supra* note 12, at 384.

need to use informants in the gathering of evidence for criminal prosecution. The "one-party consent" exception can be discerned from the ambiguous language of 47 U.S.C.§605.[104] Although 18 U.S.C.§2511(2)(c) & (d)[105] retain the "one-party consent" exception,[106] these exceptions must be given a strict interpretation to achieve the protection of private citizens the drafters intended.[107]

This application of the "one-party consent" exception can be traced to *On Lee v. United States.*[108] Chin Poy, an informant, was equipped with an electronic transmitter. A federal agent overheard the incriminating conversation between On Lee and Chin Poy, resulting in On Lee's conviction for selling opium. Because On Lee consented to Chin Poy's presence, the Supreme Court held the contents of the conversation admissible regardless of On Lee's mistake as to his visitor's true purpose.[109] The rationale of *On Lee* rests upon the expectation of the person revealing the incriminating information. If the conversation is a voluntary act, the speaker has no expectation that the information will be kept secret.[110]

Twelve years later,[111] the Supreme Court reaffirmed the one-party consent exception in *Lopez v. United States.*[112] The Internal Revenue Service equipped an agent with a Miniform.[113] Lopez offered the agent a bribe. The conversation was recorded, resulting in Lopez' conviction. Although the relationship of the parties to each conversation was different, the Court refused to distinguish *Lopez* from the prior decision of *On Lee.* Furthermore, the recording party in *Lopez* induced the incriminating conversation.[114] However, the rationale of *On Lee* was applied, upholding Lopez' conviction. Justice Harlan writing for the majority, explained that the Government was only recording the conversation

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[104]*See supra* text accompanying note 27.

[105]18 U.S.C. §§ 2511(2)(c) & (d).

[106]"The requirement of consent is met if the consenting party knows the electronic surveillance is taking place. United States v. Horton 601 F.2d 319 (7th Cir. 1979). For an excellent explanation of the requirement of consent, *see* Fishmann, *The Interception of Communications Without a Court Order: Title III, Consent and The Expectation of Privacy*, 51 ST. JOHN'S L. REV. 41, 77-87 (1976); *see e.g.*, United States v. Cortese, 568 F. Supp. 114, 116 (M.D.Pa. 1983) ("[A]lthough cases exist in which direct evidence from an informant has not been produced, the *better* course is to have the informant available" *(emphasis added)*); United States v. Congote, 656 F.2d 971 (5th Cir. 1981); United States v. Hodge, 539 F.2d 898 (6th Cir. 1976); United States v. Laughlin, 226 F. Supp. 112 (D.D.C. 1964); United States v. Pierce, 124 F. Supp. 264 (N.D. Ohio 1954), *aff'd*, 224 F.2d 281 (1955); United States v. Yee Ping Jong, 26 F. Supp. 69 (W.D. Pa. 1939).

[107]115 CONG. REC. 23,242 (1969).

[108]343 U.S. 747 (1952).

[109]*Id.* at 751.

[110]*Hodge*, 539 F.2d at 903 (explaining *On Lee* and its continued validity for criminal prosecution).

[111]Rathburn v. United States, 355 U.S. 107 (1957) (the one-party consent exception was applied for use of an extension telephone, making *Rathburn* the basis for the continued application of the one-party consent exception).

[112]373 U.S. 427 (1963).

[113]A Miniform is a small tape recorder, concealed on the body of the IRS agent.

[114]Greenwalt, *The Consent Problem in Wiretapping and Eavesdropping: Surreptitious Monitoring With The Consent of A Participant in A Conversation*, 68 COLUM. L. REV. 189, 224 (1968) [hereinafter cited as Greenwald].

as a means for preserving a reliable record of the transaction.[115]

Justice Brennan strongly criticized the majority decision. He stated that permitting electronic surveillance in these situations created:

> the risk that third parties, whether mechanical auditors like the Miniform or human transcribers of mechanical transmissions as in *On Lee* [they represent] — third parties who cannot be shut out of a conversation as conventional eavesdropper can be, merely by a lowering of voices or withdrawing to a private place.[116]

Because of the effect this decision would have on a person's ability to speak freely,[117] Justice Brennan dissented, stating *On Lee* should be overruled.[118]

Again, eight years later, in *United States v. White,*[119] the conviction of the defendant was upheld. The Court allowed admission of evidence obtained during a recorded conversation between an informant and the defendant in the defendant's home. Justice White, for the majority, restated his position from *Katz v. United States,* where he said "when a man speaks to another, he takes all risks ordinarily inherent in so doing, including the risk that the man to whom he speaks will make public what he has heard."[120] The Supreme Court, by deciding *White* upon the rationale of *On Lee,*[121] established the validity[122] of the "one-party consent" exception[123] in criminal proceedings.

It is important to note that application of this exception has been confined to criminal proceedings. Some courts found fault with the reasoning in *White,* especially in private conversations when there was a distinction between the risk of the conversation being repeated and the risk of the conversation being "recorded surreptitiously."[124] A few authors have suggested that the "one-party consent" exception is not authorized in all situations, but is restricted to those cases that will help obtain reliable and trustworthy evidence.[125] When the recorded conversation is not used to effectuate criminal prosecution of the

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[115]*Lopez,* 373 U.S. at 438.

[116]*Id.* at 450 (Brennan, J., dissenting).

[117]*Id.* at 449.

[118]*Id.* at 447.

[119]401 U.S. 745 (1971).

[120]Katz v. United States, 389 U.S. 347, 363 n.* (1967) (White, J., concurring).

[121]United States v. White, 401 U.S. 745, 750 (1971) (The rationale of *On Lee* is confirmed).

[122]*White* settles the question that evidence obtained by warrantless recording between a consenting party and a non-consenting defendant will not be inadmissible. Special Project, *Criminal Law,* 16 AKRON L. REV. 628, 629 (1983); *see also,* United States v. Horton, 601 F.2d 319, 320 (7th Cir. 1979); State v. Geraldo, 68 Ohio St.2d 120, 429 N.E.2d 141 (1981) (Ohio follows the decision of *White).*

[123]*See,* 18 U.S.C. §§ 2511(2)(c) & (d).

[124]Krely, *Warrantless Electronic Surveillance in Massachusetts,* 67 MASS. L. REV. 183, 191 (1982).

[125]Walinski & Tucker, *Expectations of Fourth Amendment Legitimacy Through State Law,* 16 HARV. C.R.-C.L. L. REV. 1, 16 (1981) [hereinafter cited as Walinski].

defendant,[126] the application of the "one-party consent"[127] exception has not been consistently applied.

The drafters of Title III realized that "private unauthorized [electronic surveillance had] little justification when communications [were] *intercepted* without the consent of one of the participants."[128] *(emphasis added)* The "one-party consent" exception has the potential for thwarting the true disclosure of a person's thoughts and ideas[129] for fear that a party to the conversation may be recording the conversation.[130] In this situation, the use of that recording is the controlling factor. The consenting party's invasion upon the non-consenting party[131] must be outweighed by some social utility for recording the conversation.[132].

But the original draft of Title III[133] exempted all consensual electronic surveillance from the requirements of the legislation, even though the electronic surveillance could be used "for insidious purposes such as blackmail, stealing business secrets or other criminal or tortious acts."[134] By applying *On Lee* and its progeny in criminal proceedings, the courts would allow consensual electronic surveillance upon private individuals. But in non-criminal situations, this rationale cannot imply that a person takes the risk that what he has said can be recorded and used to his detriment. Should the non-consenting party take the risk that what is recorded will be broadcast in "full living color . . . to the public at large" for the monetary gain of the consenting party?[135] When dealing with private unauthorized consensual electronic surveillance,[136] the non-consenting party cannot be expected to accept the risk that his conversations may be used against him. Therefore, the thrust of 18U.S.C.§2511(2)(d)[137] is on disclosure of the conversation.[138]

To support this interpretation that a violation of 18 U.S.C. §2511(2)(d) [hereinafter §2511(2)(d)] occurs on disclosure of the conversation, an analysis of the language of the statute is necessary. Section 2511 (2)(d) states:

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[126]18 U.S.C. § 2511(2)(c) (codification of one-party consent exception for criminal prosecution).

[127]18 U.S.C. § 2511(2)(d) (allows electronic surveillance with the consent of one party).

[128]S. REP. NO. 1097, *supra* note 4, at 2156.

[129]*White*, 401 U.S. at 763 (Douglas, J., dissenting).

[130]Galloway, *supra* note 96, at 1008, ("electronic surveillance invades an intimate sphere of privacy, namely the spontaneous oral utterances which occur in the course of one's personal life.").

[131]A person has a right to keep certain aspects of his life private, but this protection does not exist when *he* consents to disclosure. *(emphasis added)* Warren, *supra* note 98, at 199.

[132]Greenwalt, *supra* note 114, at 223.

[133]S. REP. NO. 1097, *supra* note 4, at 2236.

[134]Meredith v. Gavin, 446 F.2d 794, 798 (8th Cir. 1971).

[135]Dietemann v. Time, Inc., 449 F.2d 245, 249 (9th Cir. 1971).

[136]18 U.S.C. § 2511(2)(d).

[137]*Id.*

[138]United States v. Cianfrani, 448 F. Supp. 1102, 1121 (E.D. Pa. 1978), *rev'd.* 573 F.2d 835 (1978).

> It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties 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 Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act.[139]

Title III defines person, [140] intercept,[141] wire[142] and oral communication.[143] But Title III does not define "not acting under color of law" nor the necessity of an expectation of privacy required under the definition of oral communications.

Section 2511(2)(d) does not apply to any party to a conversation who is there under the authority of any law enforcement agency or employed by any office of the United States.[144] The definition of oral communication requires that a person must have an expectation of privacy to be protected under Title III. This expectation of privacy is a "subjective test."[145] The requirement is to protect the person's right to privacy.[146] However, the expectation must be legitimate[147] or reasonable[148] under the circumstances. The concept of reasonableness is a relative concept,[149] allowing the party to the conversation the right to circumscribe the nature[150] and extent of disclosure of the conversation.[151] This standard of reasonableness for a private individual's expectation of privacy is not determined in the same manner as a criminal defendant's. The

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[139]18 U.S.C. § 2511(2)(d).

[140]18 U.S.C. § 2510(6). "As used in this chapter 'person' means any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation."

[141]18 U.S.C. § 2510(4). "As used in this chapter 'intercept' means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device."

[142]18 U.S.C. § 2510(1).

> As used in this chapter "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 of foreign communications.

[143]18 U.S.C. § 2510(2). "As used in this chapter 'oral communications' means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectations.

[144]United States v. Robertson, 562 F. Supp. 463, 465 (W.D. La. 1983).

[145]Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); *see also,* Walinski, *supra* note 125, at 1; Carr, *supra* note 19, at § 1.03 [5].

[146]114 CONG. REC. 14,160 (1968).

[147]Special Project, *Electronic Surveillance,* 71 GEO. L.J. 397, 398-99 (1982).

[148]*See,* Ashdown, *The Fourth Amendment and the Legislative Expectation of Privacy,* 34 VAND. L. REV. 1289 (1981) [hereinafter cited as Ashdown].

[149]*Id.* at 1315.

[150]*Id.* at 1316.

[151]Warren, *supra* note 98, at 198, (the power to fix the extent of disclosure should be retained by the person whose privacy is at stake).

standard seems to be higher when the parties to the conversation are not engaged in illegal conduct, allowing the parties more assurance that their conversation is not going to be disclosed to their detriment.[152] The determination as to what is reasonable is on a case-by-case analysis.[153] For example, a person is protected by §2511(2)(d) when he does not have an expectation of total privacy, "because he was not aware of the specific nature of another's invasion on his privacy."[154]

The remaining language of §2511(2)(d), "for the purpose of committing any criminal or tortious act . . . [or] any other injurious act,"[155] requires that the interception by the consenting party may not be used to the disadvantage of the non-consenting party. This important language restricting the use of the intercepted conversation was not in the original legislation.[156] The unrestricted use of a conversation recorded with the consent of one of the parties was, for many, an unacceptable risk that a person would have to assume.[157] Senators Hart and McClellan cooperated in amending §2511(2)(d) to include the restriction on the use of the intercepted conversation.[158] The Senate debates concerning this amendment make it clear that "one-party consent" exceptions were inapplicable "except for private persons acting in a defensive manner."[159] This amended language was intended to eliminate the disclosure of the conversation, if it would injure the other party by publicly embarrassing him,[160] "or any other way."[161]

Under the analysis of §2511(2)(d), it is the purpose[162] for which the conversation is intercepted that determines if §2511(2)(d) exempts that person from liability.[163] If the consenting party intends to use that information to the other party's detriment, he is clearly unable to use §2511(2)(d) as a shield to protect himself from criminal prosecution[164] for violating Title III or civil liability[165] for damages. The legislative history has not adequately explained what is included

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[152]Benford v. ABC, Inc., 502 F. Supp. 1159, 1162 (D. Md. 1980), *aff'd*, 661 F.2d 917 (4th Cir. 1980), *cert. denied*, 454 U.S. 1060 (1980).

[153]*Id.*

[154]Bianco v. ABC, Inc., 470 F. Supp. 182, 185 (N.D. Ill. 1979).

[155]18 U.S.C. § 2511(2)(d) (unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any state or for the purpose of committing any other injurious act.).

[156]United States v. Phillips, 540 F.2d 319, 324 (8th Cir. 1976), *cert. denied* 429 U.S. 1000 (1976).

[157]114 CONG. REC. 14,476 (1968).

[158]*Id.* at 14,694.

[159]*Id.*

[160]*Id.*

[161]The debaters implied this amendment would help eliminate industrial espionage. *Id.*

[162]Consumer Elec. Prods., Inc. v. Sanyo Elec., Inc., 568 F. Supp. 1194, 1195 (D. Colo. 1983).

[163]*Benford*, 502 F. Supp. at 1162, *see also*, Carr, *supra* note 19, at § 8.05[3].

[164]18 U.S.C. § 2511(1).

[165]18 U.S.C. § 2520.

in the language, "criminal, tortious or . . . any other injurious act."[166] But Congress attempted to eliminate the interception of private conversations and the disclosure of that conversation against the speaker to the advantage of the intercepting party.[167]

The disclosure of the intercepted conversation for the purpose of blackmail[168] or the stealing of business secrets[169] has been considered a criminal purpose and is prohibited. However, in *United States v. Traficant,*[170] the Northern District Court of Ohio seems to reject the use of conversations for the purpose of blackmail as the basis for the suppression of the recorded conversation. In *Traficant,* the defendant alleged his conversation with underworld figures was recorded by the underworld for blackmail. The legal authorities obtained the recording of these conversations and presented them at the defendant's trial on charges of bribery. The defendant sought to suppress these conversations as a violation of Title III. The court perceived that the major purpose of Title III was to control organized crime and although the purpose included "across the board prohibition on all unauthorized electronic surveillance,"[171] the unauthorized surveillance which was specifically anticipated under §2511(2)(d) were the areas of industry, divorce and politics.[172] Judge Aldrich stated that to allow suppression of the evidence because it was obtained for blackmail "would add a new category to the list of protected privacy interest — illegal activities."[173] This decision is consistent with the interpretation of §2511(2)(d). The disclosure of the conversation was not for the purpose of blackmail as the defendant claimed. Therefore, his motion for the suppression of the evidence was properly overruled. The reason the recorded conversation was properly admitted was because it was used by law enforcement officials for the defensive purpose of preservation of evidence.[174]

Invasion of privacy is a tortious act under §2511(2)(d).[175] The application and recognition of invasion of privacy as a tort is to be determined by the law of the individual states.[176] Invasion of privacy has been divided into four

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[166]18 U.S.C. § 2511(2)(d).

[167]Smith v. Wunker, 356 F. Supp. 44, 46 (S.D. Ohio 1972).

[168]*Consumer,* 568 F. Supp. at 1197.

[169]Greenwalt, *supra* note 114, at 234.

[170]558 F. Supp. 996 (N.D. Ohio 1983).

[171]*Id.* at 1002.

[172]*Id.*

[173]*Id.*

[174]Under this analysis, the court did not analyze the applicability of § 2511(2)(d) when the consenting party to the conversation has not authorized its use in the proceedings.

[175]Brown v. ABC, Inc., 704 F.2d 1296, 1301 (4th Cir. 1983).

[176]Katz v. United States, 389 U.S. 347, 350-51 (1967).

distinct torts: appropriation,[177] intrusion,[178] public disclosure of private facts,[179] and false light.[180] A tortious act constituting a violation under §2511(2)(d) most likely will include intrusion upon a person and the public disclosure of private facts.[181] If the disclosure is defaming or libelous,[182] this would be tortious within the meaning of §2511(2)(d). In some circumstances, the infliction of emotional distress has been used as a prohibited purpose under §2511(2)(d).[183]

Although Congress did not define "injurious act,"[184] this language taken in conjunction with criminal and tortious is interpreted as an illegitimate act,[185] not amounting to a crime or a tort that harms the non-consenting party.[186] The purpose must be illegitimate to fall within the language of "injurious act." The preservation of an accurate record for important purposes[187] or for the protection of the consenting party against blackmail[188] or having a secretary transcribe a conversation[189] are not injurious acts. The use of a recorded conversation in a criminal proceeding is a legitimate act and therefore not injurious.[190] There is a scarcity of case law interpreting exactly what was intended by "injurious act." It has been implied that recording a conversation to gain political advantage,[191] for improperly terminating an employee's employment with the company,[192] and for the purpose of filing a lawsuit[193] are injurious acts. The burden to show that the purpose for recording the conversation was not for criminal, tortious or other injurious acts is on the party claiming protection from liability under §2511(2)(d).[194]

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[177]*See generally*, W. PROSSER, THE LAW OF TORTS § 117 at 804-7 (4th ed. 1971); RESTATEMENT (SECOND) of TORTS § 652C (1976).

[178]*See generally*, W. PROSSER, THE LAW OF TORTS § 117 at 807-9 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS § 652B (1976).

[179]*See generally*, W. PROSSER, THE LAW OF TORTS § 117 at 809-12 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS § 652D (1976).

[180]*See generally*, W. PROSSER, THE LAW OF TORTS § 117 at 812-15 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS § 652E (1976).

[181]Greenwalt, *supra* note 114, at 236.

[182]Time, Inc. v. Hill, 385 U.S. 374, 390 (1966) (setting out the elements of libel).

[183]Dietemann v. Time, Inc., 449 F.2d 245, 247 (9th Cir. 1971); Gerrard v. Blackmann, 401 F. Supp. 1189, 1193 (N.D. Ill. 1975).

[184]Moore v. Telfon Communications Corp., 589 F.2d 959, 965 (9th Cir. 1978).

[185]Meredith v. Gavin, 446 F.2d 794, 799 (8th Cir. 1971).

[186]*Id.*

[187]*Meredith*, 446 F.2d at 799.

[188]*Moore*, 589 F.2d at 966; By-Prod Corp. v. Armer-Berry Co., 668 F.2d 956, 959 (7th Cir. 1982).

[189]Rathburn v. United States, 355 U.S. 107, 111 (1955).

[190]United States v. Robertson, 562 F. Supp 463, 465 (W.D. La. 1983).

[191]*Hearings on Invasion of Privacy, Before the Subcomm. on Admin. Practice & Procedure of the Senate Judiciary Comm.*, 89th Cong. 2d Sess. 2261 (1966) (statement of Senator Long); *Traficant*, 558 F. Supp. at 1001.

[192]*Moore*, 589 F.2d at 965.

[193]*Consumer*, 568 F. Supp. at 1197.

[194]*Consumer*, 568 F. Supp. at 1196; United States v. Phillips, 540 F.2d 319, 326 (8th Cir. 1976), *cert. denied*, 429 U.S. 1000 (1976).

Title III not only provides for suppression of evidence obtained in violation of its provision, but also allows a civil cause of action for harm inflicted as a result of this violation.[195] Title III allows recovery of one hundred dollars for each day the violation occurs or one thousand dollars, whichever is greater,[196] plus reasonable attorney fees.[197] Recovery under Title III is to be the exclusive remedy available to the injured party.[198] A defense to a claim for civil damages is a good faith reliance[199] on a court order authorizing electronic surveillance.[200]

A CASE IN POINT: *Boddie v. American Broadcasting Companies, Inc.*

A party to a conversation can record that conversation for defensive purposes.[201] He may do so in an attempt to preserve the contents of the conversation or for future reference to the actual terms that were agreed upon. However, if a party to the conversation discloses the conversation so that he may profit or gain some advantage over the non-consenting party, this is an offensive[202] purpose and prohibited by §2511(2)(d). *Boddie v. American Broadcasting Co., Inc.*[203] is an excellent example of a consenting party attempting to use the "one-party consent" exception to justify the recording of a conversation that he used for his benefit and, in the end, to the detriment of the non-consenting party. ABC was investigating judicial corruption in preparation for a broadcast entitled "Injustice For All".[204] During the investigation, on the pretext of having a private conversation for background material,[205] ABC interviewed Sandra Boddie.[206] ABC's investigative reporter, Geraldo Rivera, carried a concealed radio transmitter and hidden camera into Boddie's living room to record the interview.[207] Boddie brought suit against ABC. In count three, her complaint alleged that ABC had violated Title III.[208] This count was dismissed *sua sponte*.[209] After a seven-week trial, the jury returned a verdict for defen-

[195] 18 U.S.C. § 2520.

[196] *Id.*

[197] Wolf v. Wolf, 570 F. Supp. 826, 827 (D.S.C. 1983).

[198] S. REP. NO. 1097, *supra* note 4, at 2196.

[199] Carr, *supra* note 19, at § 8.05; Jandak v. Village of Brookfield, 520 F. Supp. 815, 820 (N.D. Ill. 1981) (consent is not a good faith defense under § 2520).

[200] Abramson v. Mitchell, 459 F.2d 955 (8th Cir. 1972).

[201] 114 CONG. REC. 14,694 (1968).

[202] *Consumer*, 568 F. Supp. at 1197.

[203] 731 F.2d 333 (6th Cir. 1984).

[204] *Id.* at 335.

[205] Plaintiff's Complaint at 4, Boddie v. ABC, Inc., No. C80-675A (N.D. Ohio filed May 1, 1980).

[206] The interview with Sandra Boddie took place at her home on April 17, 1980. Appellant's Brief at 6, Boddie v. ABC, Inc., 731 F.2d 333 (6th Cir. 1984).

[207] *Id.*

[208] Boddie's complaint alleged, "The information was obtained through the interception of an oral communication in violation of 18 U.S.C. § 2511(1)(a)(c) & (d) (1979)." Plaintiff's Complaint at 8-9, Boddie v. ABC Inc., No. C80-67A (N.D. Ohio filed May 1, 1980).

[209] On Feb. 12, 1982, the court dismissed count three of Plaintiff's complaint, stating "that the area of law is one which the court is eminently familiar." Judge Aldrich said Plaintiff had not stated a cause of action.

dants on the remaining two counts[210] of the complaint. Boddie only appealed the dismissal of count three.[211] On appeal, the Sixth Circuit Court of Appeals reversed and remanded the district court's decision.[212]

ABC claimed that they recorded the conversation to preserve an accurate record of the interview.[213] Clark R. Mollenhoff, ABC's expert witness and a highly respected investigative reporter, claimed "it would have been irresponsible not to have used the hidden camera."[214] The appellate court did not agree.[215] The purpose of the recorded interview was a question for the jury to decide.[216] Boddie alleged in her complaint that she had suffered personal humiliation and embarrassment.[217] The recording of the interview for the purpose of televising a report concerning judicial corruption did not allow ABC to seek protection under the "one-party consent" exception.[218] ABC did not use the recorded conversation for the defensive purpose of preserving an accurate account of the interview. Instead, ABC broadcast the recording to their television viewers in a highly controversial investigative report. Although ABC claimed their reason for recording the conversation was a defensive purpose, their disclosure of the conversation to their viewing audience was for their own benefit and detrimental to the private individual, Sandra Boddie. The electronic surveillance was committed for the purpose of committing an injurious act,[219] public embarrassment,[220] to Boddie.

Because ABC intercepted an oral communication,[221] Boddie's expectation of privacy[222] is an important factor to consider. Boddie invited Rivera to her house and knew he was an investigative reporter.[223] However, she was not

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Boddie, 731 F.2d at 336. This familiarity with Title III may have been, in the criminal context, due to the litigation heard by Judge Aldrich concerning electronic surveillance in United States v. Traficant, 588 F. Supp. 996 (N.D. Ohio 1983).

[210]Count one alleged the broadcast placed Boddie in false light as well as public disclosure of private facts. count two alleged defamation. *Boddie*, 731 F.2d. at 335.

[211]On appeal, Boddie claimed that ABC criminally violated 47 C.F.R. 2.701, 15.4, 15.11, 15.154 (1982) all FCC regulations attempting to negate the one-party consent exception under 18 U.S.C. § 2511(2)(d) (1979). *Id.* at 336. The appellate court held the recording of the conversation was not a violation of FCC regulations. *Id.* at 339. *See also*, Gordon v. NBC, 287 F.Supp. 452 (S.D.N.Y. 1968); Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4 (1942).

[212]*Boddie*, 731 F.2d at 339.

[213]Appellee's Brief at 14, Boddie v. ABC, Inc. 731 F.2d 333 (6th Cir. 1984).

[214]*Id.* at 16.

[215]*Boddie*, 731 F.2d at 338.

[216]*Id.*

[217]Plaintiff's Complaint at 11, Boddie v. ABC, Inc., No. C80-675A (N.D. Ohio May 1, 1980).

[218]18 U.S.C. § 2511(2)(d).

[219]*Id.*

[220]114 CONG. REC. 14,694 (1968).

[221]18 U.S.C. § 2510(2).

[222]*See supra* text accompanying notes 145-54.

[223]Appellee's Brief at 13, Boddie v. ABC, Inc. 731 F.2d 333 (6th Cir. 1984).

aware that the conversation was being filmed or recorded.[224] The expectation of privacy in this situation is not an inflexible standard.[225] Although Boddie voluntarily exposed herself to the personal observation of Rivera, she did not voluntarily expose herself to the "televised or video-taped monitoring of her every action."[226] The devastating effect the surreptitious recording and filming has on the privacy of the individual is not the type of risk a private individual in a conversation must assume.[227]

The private individual should be afforded some protection from this invasion upon his privacy.[228] Though an integral part of the dissemination of news requires investigative reporting,[229] electronic surveillance is not an "indispensible tool of newsgathering."[230] The investigative reporter should not be allowed to invoke the "one-consent party" exception as a means to violate the "sacred precincts of private and domestic life."[231] Although our society does and should protect the free dissemination of news,[232] it should not afford newsmen immunity from harming private individuals during the course of their newsgathering.[233] If ABC's purpose had been defensive to preserve an accurate reproduction of the interview in the event any of the facts were disputed, then the electronic surveillance would be a legitimate application of the "one-party consent" exception. However, when ABC broadcast this surreptitiously recorded interview to their advantage, publicly embarrassing Boddie, this was not within the acceptable boundaries of the "one-party consent" exception.

Some may suggest that this unfavorably restricts the free gathering and dissemination of news. However, upon closer examination, it allows the investigative reporter the necessary freedom to gather this information, but not to use electronic surveillance to sensationalize the story. He can preserve and protect himself from changes, fabrications, and distortions, while protecting society from the fear that every conversation may be the subject of electronic surveillance. This still allows the press free access to the essential facts for an accurate presentation of newsworthy material. In this way, the few who abuse the right to surreptitiously record interviews will only be subjected to liability

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[224] *Boddie*, 731 F.2d at 335.

[225] Ashdown, *supra* note 148, at 1315.

[226] *Id.* at 1316.

[227] *See supra* text accompanying notes 123-38.

[228] W. PROSSER, THE LAW OF TORTS § 117 (4th ed. 1971).

[229] Dietemann v. Time, Inc., 449 F.2d 245, 249 (1971).

[230] *Id.*

[231] Warren, *supra* note 98, at 195.

[232] U.S. CONST. amend. I. Even under the protection of the First Amendment, the press cannot publish or broadcast information that is obscene, libelous, fighting words, or purely commercial speech. *See*, Roth v. United States 354 U.S. 476, 481 (1957) (obscene, lewd, lascivious or filthy), Valentine v. Chrestensen, 316 U.S. 52, 55 (1942) (commercial speech); Chaplinsky v. New Hampshire, 315 U.S. 568, 574 (1942) (false utterances likely to provoke a breach of the peace).

[233] *Dietemann*, 449 F.2d at 249.

if that recording is disclosed to the detriment of the other individual.[234].

CONCLUSION

Title III has been a successful tool to combat organized crime and eliminate private unauthorized electronic surveillance.[235] The application of the "one-party consent" exception does have an essential purpose in both the criminal and private context. Title III recognizes this exception, but must be interpreted to protect an unacceptable intrusion into private conversations.[236] It is because of this potential intrusion that some authors have advocated a ban on all private unauthorized electronic surveillance.[237]

But by strictly adhering to the interpretation and application of the "one-party consent" exception, the complete prohibition of electronic surveillance is not necessary.[238] Although the language of §2511(2)(d) may be somewhat ambiguous as to the true intention of the drafters, an interpretation consistent with the purpose of Title III would only allow disclosure of the conversation for a defensive purpose. By establishing this distinction between offensive and defensive disclosure of the conversation, private unauthorized electronic surveillance will not threaten the privacy of the law-abiding citizen.[239]

This application of the "one-party consent" exception would protect persons who use electronic surveillance for defensive purposes as well as protect unsuspecting subjects from injurious uses of electronic surveillance. However, the application of the "one-party consent" exception has not consistently been applied to effectuate this protection. It has become a cloak of immunity for many who abuse the use of electronic surveillance while at the same time it has become an intrusion into the lives of many individuals. If the "one-party consent" exception is correctly applied, Title III's purpose to protect individuals from private unauthorized electronic surveillance will be fulfilled.[240]

THOMAS C. DANIELS

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[234]"A free society prefers to punish the few who abuse the rights of speech after they break the law then to throttle them and all others beforehand." Vance v. Universal Amusement Co., Inc., 445 U.S. 308, 316 n.13 (1980).

[235]115 CONG. REC. 23,238 (1969) (View of Mr. McClellan, Wiretapping, Privacy, and Title III).

[236]Carr, *supra* note 19 at § 2.05[4].

[237]Greenwalt, *supra* note 114, at 231.

[238]Goldsmith, *supra* note 11, at 4.

[239]*See*, Special Project, *Electronic Surveillance*, 71 GEO. L.J. 397 (1982).

[240]Goldsmith, *supra* note 11, at 3.