Boston College Law Review

Volume 29
Issue 5 *Number 5*

Article 4

9-1-1988

Interceptors and Innocent Recipients: Applying the Federal Wiretapping Law's Exlcusionary Rule to Private Participant Monitoring

Thomas A. Knowlton

NOTES

INTERCEPTORS AND INNOCENT RECIPIENTS: APPLYING THE FEDERAL WIRETAPPING LAW'S EXCLUSIONARY RULE TO PRIVATE PARTICIPANT MONITORING

Electronic surveillance has always provoked sharp debate. Those in favor of electronic surveillance praise its ability to provide law enforcement officials with the tools to fight organized crime. Those who oppose it fear the arrival of Orwell's "Big Brother" and the corresponding loss of personal privacy. By the mid-1960s, however, both proponents and opponents of electronic surveillance agreed on two issues: 1) tremendous technological advances had increased the potential for the abuse of wiretapping, bugging and other forms of electronic surveillance, and 2) the federal law regarding electronic surveillance had become intolerable.[1] The law failed to assist law enforcement officials, and did not adequately protect personal privacy.[2] In response to both concerns, Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Title III).[3]

Title III both regulates governmental electronic surveillance and limits the conditions under which private citizens may lawfully intercept wire or oral communications.[4] In particular, section 2511(2)(d) restricts the circumstances under which private persons may lawfully intercept wire or oral communications in which they participate, and restricts the circumstances under which participants may consent to an interception by a third person.[5] This type of electronic surveillance is termed "private participant monitoring."

Private participant monitoring refers to three distinct electronic surveillance techniques: 1) when a participant records the conversation; 2) when a participant uses an electronic device to transmit the conversation to a third party; or 3) when a participant

---

[1] *See* S. REP. No. 1097, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 2112, 2154 [hereinafter SENATE REPORT]. "Wiretapping" is the monitoring of wire communications, usually telephone communications. J. CARR, THE LAW OF ELECTRONIC SURVEILLANCE § 1.1(a) (2d ed. 1987). Wiretapping generally is accomplished by cutting into the wires over which the communication is carried. "Bugging" is the monitoring of a speaker's conversation. *Id.* § 1.1(b), at 3–4. A bug is a miniature electronic device that is usually located close to the person whom one seeks to overhear. A wiretap only overhears communications on a particular telephone, whereas a bugging device hears all conversations that are within its range. *Id.* § 1.1(b), at 3.

[2] SENATE REPORT, *supra* note 1, at 2154.

[3] Act of June 19, 1968, Pub. L. No. 90-351, 82 Stat. 212 (codified as amended at 18 U.S.C. §§ 2510–2521 (1982 & Supp. IV 1986)) [hereinafter Title III].

[4] *See* SENATE REPORT, *supra* note 1, at 2113. Title III applies to all governmental agents and private citizens. *Id.*

[5] 18 U.S.C. § 2511(2)(d) (1982 & Supp. IV 1986).

consents to a third party's interception.[6] Participant monitoring is the most commonly used eavesdropping method.[7] Section 2511(2)(d), which prohibits private participant monitoring that has an unlawful purpose, is the first federal restriction of private participant monitoring.[8]

Historically, electronic surveillance of any kind, private or governmental, did not violate federal statutory or constitutional law. Section 605 of the Federal Communications Act of 1934 launched the modern era[9] of federal regulation of electronic surveillance.[10] Although section 605 restricted some forms of electronic surveillance, it was grossly inadequate.[11] Section 605 permitted private participant monitoring[12] and had little deterrent value because it lacked an express exclusionary rule.[13] In addition to permissive statutory law, until 1967 courts would not apply the fourth amendment to electronic surveillance unless a government official trespassed into a constitutionally protected area.[14] Even if wiretapping or bugging violated the fourth amendment, such a violation would not affect private participant monitoring because such private surveillance does not involve state action, and consequently does not trigger constitutional protections.[15] Until the late 1960s, therefore, federal law pertaining to electronic surveillance was permissive. Not until 1968, when Congress passed Title III, did a comprehensive law concerning electronic surveillance come into existence.[16]

---

[6] *See* Greenawalt, *The Consent Problem in Wiretapping & Eavesdropping: Surreptitious Monitoring with the Consent of a Participant in a Conversation*, 68 COLUM. L. REV. 189, 190 n.9 (1968).

[7] J. CARR, *supra* note 1, § 3.5, at 56.

[8] Section 2511(2)(d) states:

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

Id.

[9] The first federal wiretapping regulation, enacted in 1917 as part of World War I's security program, expired with the end of the war. Act of Oct. 29, 1918, ch. 197, 40 Stat. 1017. *See* Goldstone, *The Federal Wiretapping Law*, 44 TEX. B.J. 382, 387 (1981).

[10] Act of June 19, 1934, ch. 652, § 605, 48 Stat. 1103, *as amended*, 47 U.S.C. § 605 (1970). The pertinent part of section 605 stated: "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 communication to any person . . . ." *Id.*; see also *infra* notes 45–50 and accompanying text for a discussion of section 605.

[11] J. CARR, *supra* note 1, § 1.3(b), at 9–16, § 1.4(b)(1).

[12] Rathbun v. United States, 355 U.S. 107, 109 (1957).

[13] *See* J. CARR, *supra* note 1, § 1.3(b), at 9.

[14] *See infra* notes 33–41 and accompanying text.

[15] The first clause of the fourth amendment states that the "rights of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. CONST. amend. IV. The Supreme Court has consistently construed the protections of the fourth amendment as proscribing only governmental action. The fourth amendment is wholly inapplicable "to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the government or with the participation or knowledge of any government official." United States v. Jacobsen, 466 U.S. 109, 113 (1984) (quoting Walter v. United States, 447 U.S. 649, 662 (1980) (Blackmun, J., dissenting)); *see also* Greenawalt, *supra* note 6, at 189, 203 n.69.

[16] *See* Goldsmith, *The Supreme Court and Title III: Rewriting the Law of Electronic Surveillance*, 74 J. CRIM. L. & CRIMINOLOGY 1, 3–4 (1983).

Title III has two purposes. Title III's major purpose is to combat certain serious crimes by allowing law enforcement personnel, under strict conditions, to intercept wire and oral communications.[17] Its other purpose is to protect personal privacy. Unlike section 605, Title III contains both a provision limiting private participant monitoring and an express exclusionary provision.[18] Consequently, Title III provides more protection for personal privacy than section 605 because it restricts more types of private electronic surveillance and excludes from court proceedings evidence obtained from unlawful electronic surveillance. Most commentators agree that Title III vastly improves the federal law pertaining to electronic surveillance.[19]

Unfortunately, courts have not applied Title III consistently. In 1987, two federal appellate courts reached conflicting decisions regarding how Title III's exclusionary rule should apply to violations of its restrictions on private participant monitoring. In *United States v. Underhill*, the United States Court of Appeals for the Sixth Circuit denied the defendants' motion to suppress tape recordings of telephone conversations.[20] Two of the defendants made these recordings to further their gambling operation; the other defendants did not make the recordings, but participated in the gambling operation, and their voices were on the tape recordings. The court held that those who intercept wire communications, and their co-conspirators, waive any privacy right that Title III was intended to protect.[21] In contrast, in *United States v. Vest*, the Court of Appeals for the First Circuit granted the defendant's motion to suppress tape recordings of oral communications between the defendant and his co-conspirator, which his co-conspirator made to further their conspiracy.[22] The court held that co-conspirators who do not consent to an interception possess a legitimate privacy right in conversations that were intercepted to further a conspiracy.[23] These decisions demonstrate that courts treat cases involving private participant monitoring inconsistently.

This note analyzes the federal law concerning private participant monitoring. It also considers under what circumstances courts should suppress evidence obtained from unlawful private participant monitoring. Section I examines the origins of section 2511(2)(d), the Title III provision governing private participant monitoring, and section 2515, the statutory exclusionary provision.[24] The section recounts briefly the history of the federal law concerning electronic surveillance and provides the legislative history of sections 2511(2)(d) and 2515. Section II traces the judicial interpretation of sections 2511(2)(d) and 2515.[25] Section III describes two 1987 decisions involving the attempted suppression of evidence derived from unlawful private participant monitoring.[26] These two decisions reach conflicting results concerning the appropriate interrelationship of sections 2511(2)(d) and 2515. Section IV suggests a two step framework for courts to

---

[17] SENATE REPORT, *supra* note 1, at 2153, 2157; *see also* 18 U.S.C. §§ 2516–2519 (1982 & Supp. IV 1986).

[18] 18 U.S.C. §§ 2511(2)(d), 2515 (1982 & Supp. IV 1986).

[19] *See* Goldsmith, *supra* note 16, at 5.

[20] United States v. Underhill, 813 F.2d 105, 113 (6th Cir.), *cert. denied*, 107 S. Ct. 2484, 3268 (1987), 108 S. Ct. 81, 141 (1988).

[21] *Id.* at 112.

[22] United States v. Vest, 813 F.2d 477, 481, 484 (1st Cir. 1987).

[23] *See Vest*, 813 F.2d at 481.

[24] *See infra* notes 29–135 and accompanying text.

[25] *See infra* notes 136–84 and accompanying text.

[26] *See infra* notes 185–277 and accompanying text.

use in cases involving evidence obtained in violation of section 2511(2)(d).[27] Under this framework, courts should first examine the intercepted conversation to ensure that it meets the statutory definition of a "wire" or "oral communication." If the conversation meets the initial requirement, courts should next examine the relationship among the party moving to suppress, the proponent of the evidence and the intercepted communication. If the party seeking to suppress is also the unlawful interceptor, a court should deny the motion. Allowing interceptors to suppress evidence derived from their own illegal monitoring would enable them to use Title III to shield themselves from the consequences of their unlawful acts. When the proponent of the evidence is the unlawful interceptor, however, and the party moving to suppress is the victim of the interception, a court should grant the motion. Suppressing the evidence would deter the interceptor and protect the personal privacy of the nonconsenting party. When neither the person seeking suppression nor the proponent of the evidence is the unlawful interceptor, a court should suppress only if disclosure at trial would harm a material privacy right of the party seeking suppression. Suppression under these circumstances would not deter the unlawful interceptor because an innocent recipient is attempting to use the evidence. Thus, because suppression would only promote one of the purposes of Title III, persons seeking suppression should demonstrate a material privacy interest — one distinct from and in addition to the right to control public disclosure of personal information. This framework strikes the appropriate balance between the conflicting purposes of Title III: securing evidence to investigate and prosecute criminals, and protecting material privacy rights. Section IV concludes by applying the framework to two 1987 decisions, *United States v. Underhill* and *United States v. Vest*.[28]

I. The Origins of the Federal Law Concerning Private Participant Monitoring

Two pieces of federal legislation have had a great impact on electronic surveillance: section 605 of the Federal Communications Act of 1934, and Title III.[29] Legislation that regulates electronic surveillance represents a compromise between conflicting goals: reducing crime by providing the police with the tools to investigate and prosecute criminals, and protecting privacy by imposing criminal and civil penalties for the unauthorized use of electronic surveillance.[30] Judicial interpretation of both statutes illustrates the tension between these competing interests.[31]

A. *Historical Background of Title III*

Wiretapping and bugging devices have been used for political, industrial and military purposes since the mid-nineteenth century.[32] Not until 1928, in *Olmstead v. United States*, however, did the United States Supreme Court consider the constitutionality of wiretap-

---

[27] *See infra* notes 278–358 and accompanying text.

[28] *See infra* notes 359–86 and accompanying text.

[29] *See* J. Carr, *supra* note 1, § 1.1, § 1.3, at 8–16.

[30] *See* Goldsmith, *supra* note 16, at 3–4.

[31] *See, e.g.*, United States v. Donovan, 429 U.S. 413, 432–39 (1977) (interpreting Title III); United States v. Giordano, 416 U.S. 505, 524–29 (1974) (interpreting Title III); Rathbun v. United States, 355 U.S. 107, 108–11 (1957) (interpreting section 605); Nardone v. United States, 302 U.S. 379, 380–85 (1937) (interpreting section 605).

[32] Relatively sophisticated communications systems had developed by the mid-19th century. Goldsmith, *supra* note 16, at 7. Electronic surveillance was used for gathering intelligence during the Civil War, as well as for industrial and political espionage. *Id.*

ping.[33] The *Olmstead* Court held that, absent a physical intrusion into a person's home, wiretapping did not violate the fourth amendment of the United States Constitution.[34]

In *Olmstead*, the police placed wiretaps on the defendants' home and office telephone lines at points outside the defendants' premises.[35] The Court admitted evidence from these wiretaps over the defendants' objections that the wiretaps violated their fourth amendment rights.[36] The Court held that, because the federal agents had not intruded onto the defendants' premises, no search or seizure had occurred for fourth amendment purposes.[37]

The *Olmstead* holding — that a fourth amendment search or seizure does not occur absent a government trespass into a constitutionally protected area — stood for forty years.[38] Although *Olmstead* involved wiretapping, throughout the next forty years the Supreme Court applied the *Olmstead* rationale to cases involving bugging devices and wired informants.[39] For example, the Supreme Court held that police officers who taped a conversation between themselves and a defendant, or transmitted a conversation to another officer, did not violate the fourth amendment.[40] The Court reasoned that, because the defendant consented to speak with the person who secretly taped their conversation, the defendant assumed the risk that the person to whom he or she spoke was a federal agent who would either repeat their conversation to the police, or would record the conversation and bring the tape to the police.[41]

In addition to placing only limited restrictions on governmental surveillance, the *Olmstead* decision did not protect persons from private electronic surveillance. The *Olmstead* holding addressed only fourth amendment violations. Because the fourth amendment does not apply to private electronic surveillance, the *Olmstead* decision did not render evidence derived from a private wiretap inadmissible at criminal trials.[42] Therefore, even if a private party trespassed onto another's property to conduct a wiretap, and the police inadvertently obtained the wiretap evidence, it would be admissible in a criminal trial of the wiretap's victim.[43]

The *Olmstead* Court suggested that Congress enact legislation if it wished to outlaw wiretapping.[44] Six years after *Olmstead*, Congress enacted section 605 of the Federal

---

[33] 277 U.S. 438, 464–67 (1928).

[34] *Id.* at 466.

[35] *Id.* at 456–57.

[36] *Id.* at 466–69.

[37] *Id.* at 464, 466.

[38] The Supreme Court finally repudiated the *Olmstead* trespass doctrine in Katz v. United States, 389 U.S. 347, 353 (1967). See *infra* notes 59–66 and accompanying text for a discussion of *Katz*.

[39] *See, e.g.*, Lopez v. United States, 373 U.S. 427, 438–39 (1963) (applied to wired informant); Silverman v. United States, 365 U.S. 505, 510, 512 (1961) (applied to bugging devices); On Lee v. United States, 343 U.S. 747, 753–54 (1952) (applied to wired informant); Goldman v. United States, 316 U.S. 129, 135–36 (1942) (applied to bugging devices).

[40] *Lopez*, 373 U.S. at 438–39; *On Lee*, 343 U.S. at 753–54.

[41] *Lopez*, 373 U.S. at 438–39.

[42] *See* Burdeau v. McDowell, 256 U.S. 465, 473–75 (1921) (fourth amendment is inapplicable when a former employee took papers incriminating a discharged employee from the office safe and turned the papers over to the United States Justice Department); *see also supra* note 15.

[43] *See* Greenawalt, *supra* note 6, at 203 & n.69.

[44] *Olmstead*, 277 U.S. at 465–66 ("Congress may of course protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in federal criminal trials, by direct legislation, and thus depart from the common law of evidence.").

Although Congress considered an array of legislation that would have overruled *Olmstead*, none was enacted. Goldsmith, *supra* note 16, at 11. Congress's authority to legislate in this area, however,

Communications Act of 1934.[45] Congress enacted section 605 to define the jurisdiction of the newly-established Federal Communication Commission.[46] Although neither the statute's language nor its legislative history indicates that Congress was addressing wiretapping,[47] the Supreme Court later interpreted section 605 to preclude the admission of nonconsensual wiretap evidence in federal court.[48]

Evidence obtained in violation of section 605 was inadmissible in federal court.[49] Nevertheless, several weaknesses in section 605 prevented it from significantly reducing unlawful electronic surveillance. For instance, section 605 did not prohibit participant monitoring.[50] In addition, because section 605 applied only to communications transmitted over communication systems, it did not prohibit bugging devices or wired informants.[51] United States Attorney General Nicholas Katzenbach commented that section 605 was the "worst of all possible solutions."[52] Law enforcement personnel could not use electronic surveillance effectively to investigate and prosecute serious crimes. Moreover, both public officials and private citizens could ignore section 605's sanctions and invade personal privacy with little fear of prosecution.[53]

Realizing that section 605 was inadequate both as a tool for fighting crime and as a deterrent to invasions of privacy, Congress considered many amendments to section 605.[54] Most attempts at reform failed because of a conflict between those who favored

---

is not all encompassing. *See* United States v. Duncan, 598 F.2d 839, 853–56 (4th Cir.), *cert. denied*, 444 U.S. 871 (1979); *see also* Comment, *Federal Nexus in Electronic Surveillance*, 37 WASH. & LEE L. REV. 568, 568–77 (1980).

[45] Act of June 19, 1934, ch. 652, § 605, 48 Stat. 1103, *as amended*, 47 U.S.C. § 605 (1982). The pertinent part of section 605 stated that "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such communication to any person . . . ." *Id.*

[46] Goldsmith, *supra* note 16, at 11.

[47] *Id.*; *see also* S. REP. No. 781, 73d Cong., 2d Sess. 11 (1934).

[48] Nardone v. United States, 302 U.S. 379, 382–85 (1937). Notwithstanding the lack of an exclusionary provision in section 605, the Supreme Court interpreted the statutory language that "no person shall divulge" to prohibit even reciting the contents in testimony. *Id.* at 382 (direct evidence); Nardone v. United States, 308 U.S. 388, 341 (1939) (evidence indirectly obtained, the "fruit of the poisonous tree" doctrine).

The first *Nardone* decision was widely criticized as judicial legislation. Its sweep was potentially much broader than the fourth amendment's exclusionary rule. For example, it applied in both federal and state courts. It also applied even if a private party not acting under color of law had effected the wiretapping. Goldsmith, *supra* note 16, at 12.

[49] *Nardone*, 302 U.S. at 382–85.

[50] Rathbun v. United States, 355 U.S. 107, 111 (1957). In *Rathbun*, the Court held that an "interception" did not occur when one party to a telephone conversation allowed another to listen in. The Court stated that "[e]ach party to a telephone conversation takes the risk that the other party may allow another [to] . . . hear the conversation." *Id.*

[51] J. CARR, *supra* note 1, § 1.4(b)(1); On Lee v. United States, 343 U.S. 747, 753–54 (1952); Goldman v. United States, 316 U.S. 129, 135–36 (1942).

[52] J. CARR, *supra* note 1, § 2.1, at 2. Section 605's other inadequacies include a requirement that the government prove both an interception and a disclosure in order to obtain a conviction. *Id.* § 1.3(b)(5), at 16. The Justice Department defended its wiretapping by asserting that if one agent wiretapped and another disclosed, then neither violated section 605. *Id.* In addition, section 605 lacked a civil remedy or damage provision. *Id.* § 1.3(b)(4). *But see* Reitmeister v. Reitmeister, 162 F.2d 691, 694 (2d Cir. 1947) (proof that the defendant had both intercepted and divulged the communication was held to provide the basis for a civil damage claim).

[53] J. CARR, *supra* note 1, § 2.1, at 2.

[54] *Id.* § 2.2, at 4–5. This legislation uniformly attempted to add a national security exception to section 605. *Id.*

limited official eavesdropping and those who sought an absolute ban.[55] The Eighty-Ninth and Ninetieth Congresses forged a compromise between these two conflicting groups.[56] Two bills introduced in the first session of the Ninetieth Congress ultimately combined to become Title III.[57]

In addition to these bills, 1967 Supreme Court decisions also affected Title III's final language.[58] In *Katz v. United States*, the Court overturned the *Olmstead* trespass doctrine and held that the fourth amendment protects reasonable expectations of privacy.[59] In *Katz*, the police had attached a bug to the outside of a telephone booth.[60] Although it found no trespass into a constitutionally protected area, the Court held that the action constituted a search and seizure.[61] In ruling that the search and seizure violated the fourth amendment, the Court emphasized that the fourth amendment "protects people, not places."[62] Justice Harlan's concurring opinion sets forth the standard [63] that is now generally accepted as the *Katz* rule of law.[64] Pursuant to this standard, most courts now hold that a fourth amendment violation occurs where the police violate a person's reasonable expectation of privacy.[65] Congress drafted Title III to conform with the principles of *Katz*.[66]

Both proponents and opponents of electronic surveillance agreed that the pre-Title III federal law regarding electronic surveillance — the constitutional law arising from *Olmstead* and its progeny, and section 605 of the Federal Communications Act of 1934

---

[55] Greenawalt, *supra* note 6, at 190; *see also* Goldsmith, *supra* note 15, at 33 n.183.

[56] Goldsmith, *supra* note 16, at 3.

[57] SENATE REPORT, *supra* note 1, at 2153; J. CARR, *supra* note 1, § 2.3, at 5–6. Senator John McClellan introduced the Federal Interception Act. J. CARR, *supra* note 1, § 2.3, at 5–6. This Act contained many elements crucial to Title III, but lacked the procedural requirements soon required by Berger v. New York, 388 U.S. 41, 58–60 (1967). *Id.* Senator Roman Hruska introduced the Electronic Surveillance Act. *Id.* Although similar to the McClellan bill, Hruska drafted his bill to contain the restrictions of *Berger*. *Id.* Professor G. Robert Blakey of Notre Dame Law School, a former Justice Department attorney, was the primary draftsman of Title III, a combination of the McClellan and Hruska bills. In drafting Title III, Blakey also relied on his own conceptions of what should comprise a model electronic surveillance statute. *See* Blakey & Hancock, *A Proposed Electronic Surveillance Control Act*, 43 NOTRE DAME LAW. 657 (1968).

[58] SENATE REPORT, *supra* note 1, at 2153 (Title III drafted to comply with Berger v. New York, 388 U.S. 41, 58–60 (1967) and Katz v. United States, 389 U.S. 347 (1967)). The Supreme Court decided *Berger* on June 12, 1967, and *Katz* on December 18, 1967.

In *Berger*, the Supreme Court declared the New York wiretapping statute unconstitutional on its face. 388 U.S. at 64. The Court established eight criteria that law enforcement officials must follow to obtain authorization for a wiretap. *Id.* at 50–64; *see also* SENATE REPORT, *supra* note 1, at 2161–62 (listing the eight criteria); Comment, *Does the "One-Party Consent" Exception Effectuate the Underlying Goals of Title III?*, 18 AKRON L. REV. 495, 498–500 (1985). The *Berger* decision provided Congress with a framework for designing Title III. SENATE REPORT, *supra* note 1, at 2163.

[59] *Katz*, 389 U.S. 347, 351–53 (1967). For a discussion of *Olmstead*, see *supra* notes 33–39 and accompanying text.

[60] *Katz*, 389 U.S. at 348.

[61] *Id.* at 353.

[62] *Id.*

[63] *Id.* at 361 (Harlan, J., concurring) ("[T]here is a twofold requirement, first that a person have an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'").

[64] Goldsmith, *supra* note 16, at 29 n.160.

[65] *See, e.g.*, Rakas v. Illinois, 439 U.S. 128, 143 (1978); *see also* Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 383–87 (1974).

[66] SENATE REPORT, *supra* note 1, at 2153.

— was inadequate.[67] The law neither assisted law enforcement agents in their attempts to limit serious crime nor protected personal privacy.[68] Thus, although federal restriction of electronic surveillance gradually increased during the forty years following *Olmstead*, Title III represents the first comprehensive federal legislation in this area.

B. *Title III*

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 became law on June 19, 1968.[69] Congress enacted Title III for two purposes. Title III's major purpose is to combat organized crime by allowing law enforcement personnel, under strict conditions, to intercept wire and oral communications.[70] Its other purpose is to protect personal privacy.[71]

Title III contains several provisions designed to protect personal privacy. Title III imposes strict procedural requirements for law enforcement officials who wish to use electronic surveillance.[72] In addition, Title III imposes criminal penalties on persons who violate its provisions,[73] and provides civil remedies to any person who is a party to a communication that is intercepted, used or disclosed in violation of Title III.[74] Title III also contains an express exclusionary provision that prevents an unlawful interceptor from using the fruits of his or her unlawful actions.[75] For the purposes of this note, the most important provision designed to protect privacy is section 2511(2)(d), which restricts private participant monitoring.[76]

The provisions that protect personal privacy make Title III significantly more restrictive than the legislation it replaced.[77] Although persons were criminally prosecuted for violating section 605, section 605 did not contain an express exclusionary rule nor did it provide a civil cause of action.[78] In addition to containing specific protections that section 605 lacked, Title III has a much wider scope. Title III applies to all electronic surveillance, whereas section 605 applied only to communications transmitted over a communication system.[79]

---

[67] *Id.* at 2154.

[68] *Id.*

[69] Act of June 19, 1968, Pub. L. No. 90-351, 82 Stat. 212 (codified as amended at 18 U.S.C. §§ 2510–2521 (1982 & Supp. IV 1986)).

At the time it enacted Title III, Congress amended section 605 so that it applied only to radio communications. Act of June 19, 1968, § 803.

[70] SENATE REPORT, *supra* note 1, at 2153, 2157.

[71] *Id.* at 2153.

[72] 18 U.S.C. §§ 2516–2519 (1982 & Supp. IV 1986). Among other procedural requirements of Title III, the principal state or federal prosecutor must apply to a local judge of competent jurisdiction for an order authorizing the interception. *Id.* § 2516. The judge must find probable cause that one of the crimes enumerated in section 2516 has been, or is about to be committed, and that relevant communications will be intercepted. *Id.* § 2518(3). The judge must also find that normal investigative procedures will likely fail or be too dangerous. *Id.* Also, a judge who has issued an order may require the officers conducting the surveillance to periodically report to the judge regarding the success of their surveillance. *Id.* § 2518(6). *See generally* J. CARR, *supra* note 1, § 4.

[73] 18 U.S.C. § 2511.

[74] *Id.* § 2520.

[75] *Id.* § 2515; *see also* SENATE REPORT, *supra* note 1, at 2156.

[76] 18 U.S.C. § 2511(2)(d) (1982 & Supp. IV 1986).

[77] *See* Goldsmith, *supra* note 16, at 32–40.

[78] J. CARR, *supra* note 1, §§ 1.3(b)(1), (b)(4).

[79] *Id.* § 1.4(b). In addition to containing specific provisions that section 605 lacked, and a wider

1. Section 2511(2)(d) — Restricting Private Participant Monitoring

Section 2511(2)(d) prohibits a private participant from monitoring wire and oral communications for the purpose of committing a criminal or tortious act.[80] Section 2511(2)(d) complements section 2511(2)(c), which authorizes warrantless participant monitoring by persons acting under color of law.[81] Together, these two sections comprise Title III's restrictions on participant monitoring.

As originally drafted, Title III did not limit private participant monitoring.[82] The original version of section 2511(2)(c) made all participant monitoring lawful, whether private or governmental. Thus, so long as one of the parties consented to the interception, the monitoring was lawful.[83] By allowing participant monitoring, Congress codified existing Supreme Court case law, which held that participant monitoring violated neither the fourth amendment nor section 605.[84]

---

scope than section 605, Title III legitimized the law of electronic surveillance by specifically addressing and systematizing many of the problems posed by electronic surveillance. *See* Goldsmith, *supra* note 16, at 3–6. Moreover, prior distinctions between wiretapping and other forms of eavesdropping such as bugging were now legally irrelevant because Title III applied equally to all methods of electronic surveillance, as long as someone had "intercepted" a communication. See *infra* note 90 for the definition of "intercept."

Title III also affected state electronic surveillance law. States must enact their own legislation if they wish to utilize the authority granted by section 2516(2) to conduct electronic surveillance. J. CARR, *supra* note 1, § 2.4(b). Moreover, the Senate Report made clear that state statutes must "meet the minimum standards reflected as a whole" in Title III. SENATE REPORT, *supra* note 1, at 2187. Generally, however, federal courts admit evidence obtained in violation of a more restrictive state electronic surveillance statute as long as the evidence was obtained in compliance with Title III. United States v. Hall, 543 F.2d 1229, 1232 (9th Cir.), *cert. denied*, 429 U.S. 1075 (1976). *See generally* Note, United States v. McNulty: *Title III and the Admissibility in Federal Court of Illegally Gathered State Evidence*, 80 NW. U.L. REV. 1714 (1986).

[80] 18 U.S.C. § 2511(2)(d). Section 2511(2)(d) provides:

> It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral or electronic communication where such person is a party to the communication or where one of the parties to the communication has given 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.

Id.

[81] *Id.* § 2511(2)(c). Section 2511(2)(c) provides: "It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception." *Id.*

Although Title III sanctions almost all forms of participant monitoring, many states limit both private and governmental participant monitoring. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 272, § 99 (West 1984). In *Commonwealth v. Blood*, the Massachusetts Supreme Judicial Court held that section 99(B)(4), which permitted participant monitoring in certain circumstances, violated the Massachusetts Constitution. 400 Mass. 61, 507 N.E.2d 1029 (1987); *see also* Abramovsky, *Surreptitious Recording of Witnesses in Criminal Cases: A Quest for Truth or a Violation of Law and Ethics?*, 57 TUL. L. REV. 1, 10–12 (1982).

[82] *See* SENATE REPORT, *supra* note 1, at 2182, 2236. Originally, section 2511(2)(c) provided: "It shall not be unlawful under this chapter for a party to any wire or oral communication, or a person given prior authority by a party to this communication to intercept such communication." Meredith v. Gavin, 446 F.2d 794, 797–98 n.4 (8th Cir. 1971).

[83] SENATE REPORT, *supra* note 1, at 2182.

[84] *Id.* The Senate Report cited the following three cases as illustrations of the then-existing case

Several Senators were dissatisfied with Title III in its original form. They believed that Title III should prohibit all participant monitoring that had an unlawful purpose.[85] Therefore, when the bill reached the Senate floor for debate, Senators Hart and McClellan proposed, and Congress approved, that the exception for participant monitoring, section 2511(2)(c), be split into two subsections, (c) and (d).[86] Revised section 2511(2)(c) applied only to participant monitoring by persons acting under color of law.[87] Revised section 2511(2)(d) prohibited a private participant from monitoring for the purpose of committing a criminal, tortious or other injurious act.[88]

Although Senator Hart specified the general purposes of newly-created section 2511(2)(d) when he introduced it on the Senate floor, the precise scope of the section is unclear.[89] Section 2511(2)(d) comprised numerous phrases that Title III defined in other sections.[90] For example, by its limiting definition of "oral communication," Title III protects only those oral communications uttered by persons having a reasonable expectation that their conversation "is not subject to interception."[91] Title III does not, however, define or explain what circumstances would justify a participant's expectation that

---

law regarding participant monitoring. Lopez v. United States, 373 U.S. 427, 438–39 (1963) (a federal agent who tape records a conversation between himself and the defendant, who did not know about the taping, did not violate the fourth amendment); Rathbun v. United States, 355 U.S. 107, 108–11 (1957) (evidence obtained by a police officer who listened on an extension telephone to a conversation between the defendant and the consenting party did not violate section 605 of the Federal Communications Act of 1934); On Lee v. United States, 343 U.S. 747, 753–54 (1952) (an informant who transmits an incriminating conversation between himself and the defendant to the police did not violate the fourth amendment).

[85] SENATE REPORT, *supra* note 1, at 2222–38.

[86] 114 CONG. REC. 14,694 (1968).

[87] 18 U.S.C. § 2511(2)(c). For the text of section 2511(2)(c), see *supra* note 81.

[88] 18 U.S.C. § 2511(2)(d) (1982 & Supp. IV 1986). For the text of section 2511(2)(d), see *supra* note 80. In 1986, Congress amended section 2511(2)(d) to omit from its prohibition the phrase "or for the purpose of committing any other injurious act." The Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, § 101(b)(2), 100 Stat. 1848, 1850.

[89] For Senator Hart's comments regarding section 2511(2)(d), see *infra* note 100.

[90] Section 2510(4) defines "intercept": "[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 & Supp. IV 1986).

Section 2510(1) defines "wire communication":

> [W]ire communication means any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception (including the use of such connection in a switching station) furnished or operated by any person engaged in providing or operating such facilities for the transmission of interstate or foreign communications or communications affecting interstate or foreign commerce and such term includes any electronic storage of such communication, but such term does not include the radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit.

Id. § 2510(1).

[91] Section 2510(2) defines "oral communication": "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 an expectation, but such term does not include any electronic communication." 18 U.S.C. § 2510(2). See *infra* notes 141–46 and accompanying text for a discussion of how courts have interpreted the scope of "oral communication."

The definition of wire communication does not explicitly require such an expectation of privacy. Congress evidently assumed that all telephone conversations deserve protection from interception.

his or her conversation was not subject to interception by another party to the communication.

The Senate Judiciary Committee Report, Title III's official legislative history, discusses what circumstances would constitute such an expectation.[92] The Report suggests that certain factors — the person's subjective intent and the place where the communication is uttered — are significant in determining a justifiable expectation.[93] The Report does not, however, specify any other factors. Instead, the Report states that the person's expectation is to be "gathered and evaluated from and in terms of *all* the facts and circumstances."[94]

The Report also states that the definition of an oral communication should reflect existing law and cites *Katz v. United States* as an illustration.[95] As the Supreme Court has applied *Katz* to participant monitoring, however, a person does not have a reasonable expectation that another party to the conversation will not record it.[96] Thus, strict application of *Katz* would exclude all private participant monitoring from the statutory definition of an oral communication.[97] Consequently, the Senate Report, although it suggests some of the relevant factors, does not provide a clear answer to the question of which circumstances justify a speaker's expectation that his or her words will not be intercepted.[98]

The specific legislative history of section 2511(2)(d), like that of Title III as a whole, also sheds little light on precisely what circumstances constitute a justifiable expectation.[99]

---

[92] The legislative history of section 2510(2) — the Senate Report — states:

> The definition is intended to reflect existing law. See Katz v. United States, 88 S. Ct. 507 (1967) . . . . The person's subjective intent or the place where the communication is uttered is not necessarily the controlling factor. Nevertheless, such an expectation would clearly be unjustified in certain areas; for example, a jail cell or an open field. Ordinarily, however, a person would be justified in relying on such expectation when he was in his home or office, but even there, his expectation under certain circumstances could be unwarranted, for example, when he speaks too loudly. The person's expectation that his communication is or is not subject to interception . . . is thus to be gathered and evaluated from and in terms of all the facts and circumstances.

SENATE REPORT, *supra* note 1, at 2178 (citations omitted); *see also* Blakey & Hancock, *supra* note 57, at 661–62.

[93] *See id.*

[94] *See id.* (emphasis added).

[95] *Id.*

[96] United States v. White, 401 U.S. 745, 751 (1971). Many commentators have criticized *White*. *E.g.*, Donovan, *Informers Revisited: Government Surveillance of Domestic Political Organizations and the Fourth and First Amendments*, 33 BUFFALO L. REV. 333, 367–79 (1984); Walinski & Tucker, *Expectations of Privacy: Fourth Amendment Legitimacy Through State Law*, 16 HARV. C.R.-C.L. L. REV. 1, 16 n.57 (1981); Case Comment, *Electronic Eavesdropping and the Right to Privacy*, 52 B.U.L. REV. 831 (1972). In addition, in 1987 the Massachusetts Supreme Judicial Court refused to adopt the *White* rationale, and held that one provision of the Massachusetts wiretap statute violated the Massachusetts Constitution. *See* Commonwealth v. Blood, 400 Mass. 61, 507 N.E.2d 1029 (1987).

[97] *See White*, 401 U.S. at 751.

[98] *See* SENATE REPORT, *supra* note 1, at 2178. The Senate Report fails to provide a clear answer to the question of how the definition of an oral communication should apply to private participant monitoring cases in large part because Congress wrote and published the Senate Report before Title III was amended to contain section 2511(2)(d). The Report is dated April 29, 1968, and Congress amended Title III to include section 2511(2)(d) on May 23, 1968. At the time the Report was published, Title III made all participant monitoring lawful.

[99] *See* 114 CONG. REC. 14,694 (1968); SENATE REPORT, *supra* note 1, at 2236–37.

The only "official" legislative history of section 2511(2)(d) is Senator Hart's speech on the Senate floor immediately before the Senate amended Title III to include section 2511(2)(d).[100] Senator Hart stated that, in order to prevent abuses of the right of privacy, Title III should permit monitoring by a private person only when that person monitors for a defensive reason, such as keeping an accurate record of a conversation.[101] Another defensive purpose Senator Hart approved was private participant monitoring of criminal activity for the purpose of taking evidence to the police. According to Senator Hart, however, Title III should prohibit private participant monitoring when the party intercepting the communication has an unlawful motive. In particular, Senator Hart stated that Title III should prohibit monitoring when the purpose of the interception is harming the other party to the conversation.[102]

Senator Hart also stated that section 2511(2)(d) would protect against "abuses of the right of privacy."[103] Neither Title III nor Senator Hart, however, defines or explains what "right to privacy" means. Moreover, the fourth amendment "right to privacy" established by *Katz* does not prohibit participant monitoring.[104] It is unclear, therefore, precisely which "privacy rights" the definition of "oral communication" incorporates.

Senator Hart's statements also create uncertainty regarding which unlawful purposes section 2511(2)(d) should reach.[105] The statutory language, which, at that time, prohibited intercepting for the purpose of committing *any* criminal, tortious or injurious act,

---

[100] 114 CONG. REC. 14,694–95 (1968). In introducing the amendment containing section 2511(2)(d), Senator Hart stated:

> The bill as we reported it out of committee leaves a gaping hole, which would permit surreptitious monitoring of a conversation by one of the parties to the conversation without the consent of the other. It leaves wide open the problem of industrial espionage and many other abuses of the right to privacy.
>
> In the substitute that is now pending we propose to prohibit a one-party consent tap, except for law enforcement officials, and for private persons who act in a defensive fashion. In other words, whenever a private person acts in such situations with an unlawful motive, he will violate the criminal provisions of Title III and will also be subject to a civil suit. Such one-party consent is also prohibited when the party acts in any way with an intent to injure the other party to the conversation in any other way. For example the secret conversation recording may be made for the purpose of blackmailing the other party, threatening him, or publicly embarrassing him. The provision would not, however, prohibit such activity when the party records information of criminal activity by the other party with the purpose of taking such information to the police as evidence. Nor does it prohibit such recording in other situations when the party acts out of a legitimate desire to protect himself and his own conversations from later distortions or other unlawful or injurious uses by the other party.

Id.

The Senate Report accompanying Title III foreshadowed the arrival of section 2511(2)(d). Senator Hart's statements in the Report were substantially the same as his introduction of the amendment containing section 2511(2)(d). *See* SENATE REPORT, *supra* note 1, at 2236–37. The following passage encapsulates Senator Hart's dissent in the Report: "[Title III] is totally permissive with respect to surreptitious monitoring of a conversation by a party to the conversation, even though the monitoring may be for insidious purposes such as blackmail, stealing business secrets, or other criminal or tortious acts in violation of Federal or State laws." *Id.* at 2236.

[101] 114 CONG. REC. 14,694–95 (1968).

[102] *Id.*

[103] *Id.*

[104] *See* United States v. White, 401 U.S. 745, 751 (1971).

[105] *See* 114 CONG. REC. 14,694–95 (1968). For the text of these statements, see *supra* note 100.

encompassed all unlawful purposes.[106] Senator Hart's statements, however, focus on those purposes that harm other participants to the conversation. Senator Hart did not mention interceptions that harm someone other than a party to the intercepted conversation.[107] Nor did Senator Hart mention interceptions that have an unlawful purpose, but do not have a victim, such as interceptions to further a conspiracy.[108] Congress eliminated some of the uncertainty inherent in section 2511(2)(d) in 1986.

In 1986, Congress passed the Electronic Communications Privacy Act of 1986 (the Act).[109] The Act amended several provisions in Title III. One section of the Act deleted from section 2511(2)(d) the phrase "or for the purpose of committing any other injurious act."[110] According to the Senate Report accompanying the Act, Congress deleted the phrase because it believed that several courts had misconstrued the phrase "other injurious act."[111] Congress expressed particular concern about the chilling effect on first amendment rights caused by persons seeking money damages from journalists who taped conversations without the speakers' consent. The Report concluded that Title III would still forbid intercepting for the purpose of committing a crime or a tort, and would thus offer the public sufficient protection from improper electronic surveillance.[112] The Report does not, however, explain which unlawful purposes section 2511(2)(d) should reach.

Thus, an examination of all the relevant legislative history — the description of oral communication in the Senate Report accompanying Title III, Senator Hart's statements concerning section 2511(2)(d), and the Senate Report accompanying the Electronic Communications Privacy Act — does not clarify the precise scope and purposes of section 2511(2)(d).[113] Congress intended section 2511(2)(d) to protect personal privacy by prohibiting private participant monitoring motivated by an unlawful purpose.[114] Congress also intended its prohibition to apply only to those oral communications uttered under circumstances warranting the protection of privacy.[115] The precise contours of those purposes and circumstances, however, are uncertain.[116]

---

[106] *See* 18 U.S.C. § 2511(2)(d) (1982 & Supp. IV 1986).

[107] *See* 114 CONG. REC. 14,694–95 (1968).

[108] *Id.* It is difficult to see how intercepting another's conversation for the purpose of harming a third party invades a nonconsenting party's "right to privacy" any more than does intercepting for a lawful purpose. *See* People v. Hopkins, 93 Misc. 2d 501, 504–07, 402 N.Y.S.2d 914, 916–17 (Sup. Ct. 1978) (nonconsenting party has no standing to suppress tapes made in violation of section 2511(2)(d) where the purpose of the interception was to harm a person other than the nonconsenting party). Although Congress may wish to prohibit all interceptions with an unlawful purpose, and provide for the prosecution of all who intercept with an unlawful purpose, it may be unwarranted to grant civil causes of action or motions to suppress to a nonconsenting party unless the interceptions were done for the purpose of harming the nonconsenting party.

[109] The Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848. Essentially, the Act modernized Title III so as to include within its scope such technological advances as electronic mail, cellular telephones, and data transmission.

[110] *Id.* § 101(b)(2), 100 Stat. 1848, 1850.

[111] S. REP. No. 99-541, 99th Cong., 2d Sess., *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 3555, 3571–72 [hereinafter 1986 SENATE REPORT].

[112] *Id.*

[113] *See* SENATE REPORT, *supra* note 1 at 2178; 114 CONG. REC. 14,694–95 (1968); 1986 SENATE REPORT, *supra* note 111.

[114] *See* 18 U.S.C. § 2511(2)(d).

[115] *See id.* § 2510(2).

[116] A further problem may exist with section 2511(2)(d). As the legislative history and several

2. Section 2515 — The Suppression Provision

Title III's intricate statutory framework prescribes the conditions under which persons may use or disclose evidence derived from intercepted communications,[117] who may move for suppression,[118] and on what grounds.[119] Section 2515 establishes a precondition to the admissibility of electronic surveillance evidence: evidence may not be admitted unless expressly authorized by other provisions of Title III.[120] The provisions that

---

cases have made clear, Congress's power to regulate purely intrastate conversations that have no apparent effect on interstate commerce is severely in doubt. *See* SENATE REPORT, *supra* note 1, at 2180; United States v. Duncan, 598 F.2d 839, 853–56 (4th Cir.), *cert. denied*, 444 U.S. 871 (1979); United States v. Burroughs, 564 F.2d 1111, 1113–16 (4th Cir. 1977); *see also* Comment, *supra* note 44, at 568–77. *Duncan* and *Burroughs* held that a federal nexus is an essential element of crimes charged under 2511(a). *Duncan*, 598 F.2d at 853–56; *Burroughs*, 564 F.2d at 1113–16. One court held that, because the right to privacy as set forth in Griswold v. Connecticut, 381 U.S. 479, 484 (1965) is a right that the Constitution protects, and because the fourth amendment protects against all unreasonable searches, not just governmental ones, there is a constitutional basis for prosecuting a private person under section 2511(1)(a). United States v. Perkins, 383 F. Supp. 922, 926–27 (N.D. Ohio 1974).

Finally, although the legislative history pertaining to section 2511(2)(d) may be sparse, the Committee Report accompanying the rest of Title III is extremely detailed concerning what Congress intended for each provision and subsection of the Act. The preface to this section of the Senate Report states: "Because of the complexity in the area of wiretapping and electronic surveillance, the Committee believes that a comprehensive and in-depth analysis of Title III would be appropriate in order to make explicit congressional intent in this area." SENATE REPORT, *supra* note 1, at 2177.

[117] 18 U.S.C. § 2517 (1982 & Supp. IV 1986).

[118] *Id.* § 2510(11). Section 2510(11) defines the class of aggrieved persons who have standing to object to the admission of intercepted communications. Section 2510(11) states that: "'aggrieved person' means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed." *Id. See* SENATE REPORT, *supra* note 1, at 2179–80; *see also* Blakey & Hancock, *supra* note 57, at 664; Alderman v. United States, 394 U.S. 165, 175 n.9 (1969).

Courts have generally disallowed motions to suppress brought by "aggrieved persons" unless they were also participants at the trial where the unlawfully obtained evidence was to be admitted. J. CARR, *supra* note 1, § 6.2(c)(2); *see, e.g.*, United States v. Dorfman, 690 F.2d 1217, 1226–29 (7th Cir. 1982). For a discussion of Title III's standing rules, see Goldsmith, *supra* note 16, at 56–63, 120–25.

[119] 18 U.S.C. § 2518(10)(a). Section 2518(10)(a) enumerates the grounds on which a person with standing may move for suppression. It states:

> Any aggrieved person . . . may move to suppress . . . on the grounds that-
>
> (i) the communication was unlawfully intercepted;
>
> (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
>
> (iii) the interception was not made in conformity with the order of authorization or approval.

Id.; *see also* United States v. Donovan, 429 U.S. 413, 432 (1977).

Section 2518(10)(a), therefore, provides the remedy for the right that section 2515 creates, for aggrieved persons as defined by section 2510(11). *See* SENATE REPORT, *supra* note 1, at 2195.

[120] 18 U.S.C. § 2515 (1982 & Supp. IV 1986). Section 2515 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 disclosure of that information would be in violation of this chapter.

Id.; *see also* J. CARR, *supra* note 1, § 6.2(e), at 68–69.

authorize admission generally require that the communication have been intercepted lawfully and that persons testifying concerning the contents of the communication have learned of the contents lawfully.[121]

Section 2515's language is all-encompassing and unequivocal.[122] Section 2515 applies to both state and federal proceedings,[123] whether governmental, judicial, or administrative.[124] Furthermore, the suppression rule is not limited to criminal proceedings and police actions, but applies also to civil matters and to the actions of private citizens.[125] The Report of the Senate Judiciary Committee, the official legislative history of Title III, specifies section 2515's purposes.[126]

The Senate Report reveals two primary purposes.[127] First, by not allowing the illegal interceptors to use the fruits of their acts, section 2515, like the fourth amendment exclusionary rule, is designed to deter unlawful interceptions.[128] Second, unlike the judicially-fashioned exclusionary rule, this statutory provision is designed to protect the

---

[121] 18 U.S.C. § 2517(2), (3). The precise meaning of section 2515's prohibitory language is unclear. The phrase "if disclosure would be in violation of this chapter" probably does not refer to the criminal violations contained in section 2511. Instead, the phrase refers to sections 2517(2) and (3), Title III's provisions authorizing the use and disclosure of the contents of intercepted communications. *See* United States v. Horton, 601 F.2d 319, 324 (7th Cir.), *cert. denied*, 444 U.S. 937 (1979) (although section 2515's meaning is unclear with respect to evidence derived from section 2511(2)(c) interceptions, such evidence should be admitted because section 2515 is intended to exclude only evidence that was intercepted unlawfully).

Also, section 2511(1)(c) does not impose criminal liability for disclosing information obtained from unlawful electronic surveillance unless the disclosure is intentional and the discloser knows that he or she obtained the information in violation of section 2511(1). *See* United States v. Giordano, 416 U.S. 505, 529 n.18 (1974). Therefore, a court will more likely suppress evidence under Title III than find a criminal violation of Title III. *See id.*

[122] But see *infra* notes 159–84 and accompanying text for exceptions to section 2515.

[123] SENATE REPORT, *supra* note 1, at 2195.

[124] *Id.*; *see also* Goldsmith, *supra* note 16, at 40.

[125] Goldsmith, *supra* note 16, at 40 n.232. Although Title III applies to the actions of private parties, it is not clear whether Congress intended Title III to supplant the traditional innocent recipient exception to the fourth amendment's exclusionary rule. Under this exception, when a private person unlawfully obtains evidence, and gives the evidence to the police, the government may use it at the criminal trial of the person from whom the evidence was wrongfully obtained. See *infra* note 330 for a discussion of whether Title III's legislative history indicates that Title III should recognize the innocent recipient exception.

[126] SENATE REPORT, *supra* note 1, at 2184–85.

[127] *Id.* The Senate Report stated that:

> Section 2515 . . . imposes an evidentiary sanction to compel compliance with the other prohibitions of this chapter . . . . It largely reflects existing law. It applies to suppress evidence directly (Nardone v. United States, 302 U.S. 379 (1937)) or indirectly obtained in violation of this chapter. (Nardone v. United States, 308 U.S. 338 (1939) There is, however, no intention to change the attenuation rule. See Wong Sun v. United States, 371 U.S. 471 (1963). Nor generally to press the scope of the suppression role [sic] beyond present search and seizure law. See Walder v. United States, 347 U.S. 62 (1954) . . . . Such a suppression rule is necessary to protect privacy. The provision thus forms an integral part of the system of limitations designed to protect privacy . . . it should serve to guarantee that the standards of the new chapter will sharply curtail the unlawful interception of wire and oral communications.

Id. (citations omitted). *See generally* Blakey & Hancock, *supra* note 57, at 678. The Senate Report also stated that "[t]he perpetrator must be denied the fruits of his unlawful actions in civil and criminal proceedings." SENATE REPORT, *supra* note 1, at 2156.

[128] *Id.* at 2184–85; *see also* Goldsmith, *supra* note 16, at 40; United States v. Leon, 468 U.S. 897, 906 (1984) (deterrence is the purpose of the fourth amendment exclusionary rule).

privacy of innocent persons.[129] When an unlawful interception violates someone's privacy rights, Title III's suppression provision prevents a further privacy violation by prohibiting disclosure of the tape's contents at trial.[130]

Although section 2515's language is unequivocal, the Senate Report reveals that Congress intended the section to recognize a number of exceptions.[131] The Report states that section 2515 was not meant to extend beyond 1968 search and seizure law and cites *Walder v. United States*.[132] *Walder* established a limited exception to the fourth amendment exclusionary rule by permitting the prosecution to use evidence obtained in violation of the fourth amendment for impeachment purposes.[133] The Senate Report also indicates that section 2515 should recognize the "attenuation of the taint" rule.[134] Pursuant to this exception, courts admit evidence when police have acted unlawfully, but have obtained the evidence not by exploiting that illegality, but by sufficiently distinguishable means so as to dissipate the taint of the unlawful act.[135] Thus, Congress intended that section 2515 recognize the traditional common law exceptions to the fourth amendment exclusionary rule.

In sum, section 2515 establishes a precondition to the admissibility in federal court of evidence derived from electronic surveillance. The statutory language is absolute — admission is permissible only when Title III authorizes it. The Senate Report, however, reveals that Congress intended that the section recognize a number of exceptions.

II. Judicial Interpretation of Sections 2511(2)(d) and 2515

Judicial interpretation of section 2511(2)(d), Title III's private participant monitoring provision, has not followed any set pattern. Instead, courts have determined on a case-by-case approach whether a person has intercepted a wire or oral communication for the purpose of committing a criminal, tortious or other injurious act.[136] In addition, the Supreme Court has never decided a case in which the scope of section 2511(2)(d) was at issue. Consequently, tracking the judicial development of the statute's scope requires examining the decisions in the various federal district and appellate courts.[137]

---

[129] Senate Report, *supra* note 1, at 2185. *Compare* United States v. Calandra, 414 U.S. 338, 354 (1974) (using the fruits of a past unlawful search "work[s] no new fourth amendment wrong").

[130] *See* Gelbard v. United States, 408 U.S. 41, 51–52 (1972). In *Gelbard*, the Court notes a third purpose of section 2515: protecting the integrity of courts and administrative proceedings. In other words, the *Gelbard* Court stated that Congress passed 2515 to "ensure that the courts do not become partners to illegal conduct." *Id.* at 51.

[131] Senate Report, *supra* note 1, at 2184–85.

[132] *Id.* at 2185.

[133] 347 U.S. 62, 65 (1954).

[134] Senate Report, *supra* note 1, at 2185.

[135] Wong Sun v. United States, 371 U.S. 471 (1963).

[136] *See, e.g.*, Meredith v. Gavin, 446 F.2d 794, 799 (8th Cir. 1971).

[137] *See, e.g.*, United States v. Underhill, 813 F.2d 105, 112–13 (6th Cir.), *cert. denied*, 107 S. Ct. 2484, 3268 (1987), 108 S. Ct. 81, 141 (1988); United States v. Vest, 639 F. Supp. 899, 908 (D. Mass. 1986), *aff'd*, 813 F.2d 477 (1st Cir. 1987); United States v. Truglio, 731 F.2d 1123, 1131–32 (4th Cir.), *cert. denied*, 469 U.S. 862 (1984); By-Prod Corp. v. Armen-Berry Co., 668 F.2d 956, 959–60 (7th Cir. 1982); Moore v. Telfon Communications Corp., 589 F.2d 959, 966 (9th Cir. 1978); United States v. Phillips, 564 F.2d 32, 33–34 (8th Cir. 1977), *cert. denied*, 435 U.S. 974 (1978); United States v. Turk, 526 F.2d 654, 657–59 (5th Cir.), *cert. denied*, 429 U.S. 823 (1976); United States v. Harpel, 493 F.2d 346, 348–52 (10th Cir. 1974); *Gavin*, 446 F.2d at 799; United States v. Traficant, 558 F. Supp. 996, 1001–02 (N.D. Ohio 1983).

Courts interpreting section 2511(2)(d) usually have focused on one of two issues.[138] One issue, determined at the threshold, is whether the intercepted communication meets the statutory definition of either an "oral" or "wire communication."[139] A second issue is whether the communication was intercepted for the purpose of committing a criminal or tortious act.[140] Both of these criteria must be met before a court may find a violation of section 2511(2)(d).

Courts focusing on the threshold issue of whether a person has intercepted an "oral" or "wire communication" have reached different conclusions about what sort of oral communications meet the statutory definition.[141] To meet the statutory definition, a person must have a reasonable expectation that his or her conversation is not subject to interception.[142] Several appellate courts have stated that this definition of oral communication tracks the fourth amendment "reasonable expectation of privacy" that *Katz v. United States* established.[143] Other courts have disagreed, holding that the statutory definition affords more protection than the *Katz* reasonable expectation of privacy standard.[144] The courts finding greater protection in the statute have held that, although a person may not have a reasonable expectation of privacy under the Constitution, a person may have a justifiable expectation under Title III that his or her conversation is not subject to interception.[145] This conflict, which centers around the proper interpretation of the statutory requirement that a person have a justifiable expectation that his or her conversation is not subject to interception, continues today.[146]

---

[138] Only a few cases have discussed both issues. *E.g.*, Boddie v. ABC, Inc., 731 F.2d 333, 336–39 (6th Cir. 1984). The question of whether an "interception" has occurred may also arise. Section 2510(4) defines "intercept." See *supra* note 90 for the definition of "intercept." Two cases that discuss this definition are *Turk*, 526 F.2d at 657–58, and *Harpel*, 493 F.2d at 348–52; *see also* J. CARR, *supra* note 1, § 3.2(c).

[139] See *supra* note 91 for the definition of "oral communication." Many courts assume that all oral communications meet the statutory definition, and overlook this criterion. See *supra* note 90 for the definition of "wire communication." Another threshold issue is whether a federal court should even have jurisdiction over the crime alleged. *See supra* note 108.

[140] 18 U.S.C. § 2511(2)(d) (1982 & Supp. IV 1986).

[141] *Compare* United States v. Pui Kan Lam, 483 F.2d 1202, 1206 (2d Cir. 1973) (holding that the statutory definition of oral communication "tracks" the constitutional definition of a justifiable expectation of privacy set forth in *Katz*), *cert. denied*, 415 U.S. 984 (1974) *and* United States v. Hall, 488 F.2d 193, 198–99 (9th Cir. 1973) *with* Boddie v. ABC, Inc., 731 F.2d at 339 n.5, *and* Benford v. ABC, Inc., 502 F. Supp. 1159, 1162 (D. Md. 1980) (holding that the statutory definition may provide more protection than the constitutional standard of a justifiable expectation of privacy), *aff'd*, 661 F.2d 917 (4th Cir.), *cert. denied*, 454 U.S. 1060 (1981). *See also* United States v. Carroll, 337 F. Supp. 1260, 1263 (D.D.C. 1971) (where the person intercepting the conversation could hear the nonconsenting party's words without any contrivance or augmentation, no "oral communication" exists for the purposes of Title III).

[142] See *supra* note 91 for the definition of "oral communication."

[143] *E.g.*, *Pui Kan Lam*, 483 F.2d at 1206; *Hall*, 488 F.2d at 198–99; *see also* Fishman, *The Interception of Communications Without a Court Order: Title III, Consent, and the Expectation of Privacy*, 51 ST. JOHN'S L. REV. 41, 54 (1976).

[144] *E.g.*, *Boddie*, 731 F.2d at 339 n.5; *Benford*, 502 F. Supp. at 1162.

[145] *Boddie*, 731 F.2d at 339 n.5; *Benford*, 502 F. Supp. at 1162.

[146] One way to resolve this conflict is to apply the *Katz* standard only to "oral communications" that do not involve participant monitoring. Such an application would avoid the problems that *White/Hoffa* line of cases poses. For oral communications involving private participant monitoring, a different standard is required. This note's "totality of the circumstances" test, developed *infra* notes 288–98 and accompanying text, is one possibility.

Assuming that the intercepted communication meets the statutory definition, a section 2511(2)(d) violation occurs only when a person also has intercepted the communication for the purpose of committing a criminal or tortious act.[147] Many courts have implied that the tape recording's unlawful purpose must be directed against the nonconsenting party.[148] Several courts have held that intercepting for the purpose of blackmailing the nonconsenting party violates section 2511(2)(d).[149] Other courts have recognized that intercepting for the purpose of obtaining evidence to invade the privacy of the nonconsenting party,[150] or to inflict emotional distress on the nonconsenting party[151] also violates section 2511(2)(d). Other interceptions, in which the interceptor did not have such an unlawful motive, are lawful.[152] Courts have not developed clear standards for determining the issue of unlawful purpose. Instead, courts have determined that they will decide the issue on a case-by-case basis.[153]

---

[147] *See* 18 U.S.C. § 2511(2)(d) (1982 & Supp. IV 1986). Before the 1986 amendments deleting the phrase "or for the purpose of committing any other injurious act," courts faced the difficult issue of determining whether a communication was intercepted for the purpose of committing an injurious act. In the 1971 decision of *Meredith v. Gavin*, the Eighth Circuit Court of Appeals held that taping a telephone conversation to keep an accurate record of it was not an "injurious act" in violation of section 2511(2)(d). 446 F.2d 794, 799 (8th Cir. 1971). The plaintiff in *Gavin* contended that the defendant's recording a telephone conversation between himself and the defendant for the purpose of impeaching the plaintiff's testimony at a worker's compensation hearing constituted an "injurious act." *Id.* at 798. The *Gavin* court disagreed, reasoning that because the defendant intercepted the communication to protect his own position, and did not intend to harm the plaintiff's, the interception did not violate section 2511(2)(d). *Id.* at 799. Interpreting the meaning of "injurious" act in light of Senator Hart's comments on the Senate floor, *supra* note 100, the *Gavin* court stated:

> A perfectly legitimate act may often be injurious. A judgment at law can be injurious to the losing party . . . .
>
> . . . .
>
> . . . It seems apparent from the context in which the statute was enacted that the sort of conduct contemplated was an interception by a party to a conversation with an intent to use that interception against the non-consenting party in some harmful way and in a manner in which the offending party had no right to proceed.

Id. The *Gavin* court stated that courts should determine what constitutes an "injurious act" for the purposes of section 2511(2)(d) on a case-by-case basis. *Id.*

Although *Gavin* is a less important decision since the 1986 amendment of section 2511(2)(d), its description of which unlawful activities section 2511(2)(d) prohibits is still helpful. The *Gavin* court held that Congress intended section 2511(2)(d) to prohibit unlawful interceptions in which the animus of the interceptor was directed toward the nonconsenting party, not toward a third party. *Id.* Thus, although the language of section 2511(2)(d) would permit the section to apply to interceptions with all types of unlawful motives, section 2511(2)(d) was intended to prohibit interceptions directed at harming the nonconsenting party. *Id.*

[148] *See, e.g.*, Moore v. Telfon Communications Corp., 589 F.2d 959, 965–66 (9th Cir. 1978); *Gavin*, 446 F.2d at 799.

[149] *See, e.g.*, Consumer Elec. Prods. v. Sanyo Elec., Inc., 568 F. Supp. 1194, 1197 (D. Colo. 1983); United States v. Traficant, 558 F. Supp. 996, 1000 (N.D. Ohio 1983).

[150] *See, e.g.*, Brown v. ABC, Inc., 704 F.2d 1296, 1301 (4th Cir. 1983).

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

[152] *See, e.g.*, By-Prod Corp. v. Armen-Berry Co., 668 F.2d 956, 959 (7th Cir. 1982) (a desire to make an accurate record of a conversation to which a person is a party is lawful even if the person plans to use the recording as evidence).

[153] *See, e.g.*, Boddie v. ABC, Inc., 731 F.2d 333, 338 n.4 (6th Cir. 1984); Moore v. Telfon Communications Corp., 589 F.2d 959, 966 (9th Cir. 1978); United States v. Phillips, 540 F.2d 319, 325 (8th Cir.), *cert. denied*, 429 U.S. 1000 (1976); *Gavin*, 446 F.2d at 799.

Many courts interpreting section 2511(2)(d) have emphasized that to violate the section, the purpose underlying the interception, not just the purpose underlying the conversation, must be unlawful.[154] These courts hold the mere fact that a conversation concerns criminal or tortious activities does not imply that the purpose underlying its taping must also be unlawful.[155] Thus, several courts have held that a desire to make an accurate record of a conversation concerning unlawful activity does not violate section 2511(2)(d), even if the person who intercepted the communication intended to use the recording as evidence in a lawsuit against the nonconsenting party.[156]

Although the United States Supreme Court has not yet interpreted section 2511(2)(d), the private participant monitoring provision, it has interpreted section 2515, Title III's exclusionary provision, several times.[157] The trend in both the Supreme Court and the lower federal courts has been to read the statutory suppression provision in a flexible, non-technical way.[158] As evidence of this trend, the Supreme Court has held that, notwithstanding the unconditional language of section 2515, not every violation of Title III requires suppression.[159] Instead, the Court has held that suppression is warranted only for violations of those procedural requirements of Title III that "directly and substantially implement the Congressional intention" in enacting Title III.[160]

One example of this Supreme Court trend toward nonliteral interpretation of section 2515 is the 1974 case of *United States v. Chavez*.[161] In *Chavez*, the United States Attorney General authorized an application for a wiretap, but the application and the court order incorrectly identified an Assistant Attorney General as the authorizing official.[162] The Court held that misidentification, by itself, violated a reporting function designed only to fix responsibility for the authorization. Because the reporting function did not directly implement the congressional intent to limit interceptions, the Court admitted the evidence from the wiretap notwithstanding the technical violation of Title III.[163]

Similarly, several lower federal courts have looked beyond a literal reading of Title III to carve out exceptions to section 2515.[164] In 1973, in *United States v. Liddy*, the Federal District Court for the District of Columbia held that the prosecution could use as evidence in its case-in-chief a tape recording made by a private party, in this case the defendant, in violation of Title III.[165] In *Liddy*, the government was prosecuting the defendant for violating Title III. The district court conceded that the defendant had

---

[154] *E.g.*, United States v. Truglio, 731 F.2d 1123, 1131 (4th Cir.), *cert. denied*, 469 U.S. 862 (1984); United States v. Turk, 526 F.2d 654, 657 n.1 (5th Cir.), *cert. denied*, 429 U.S. 823 (1976).

[155] *E.g.*, *Truglio*, 731 F.2d at 1131; *Turk*, 526 F.2d at 657 n.1.

[156] *See* By-Prod Corp. v. Armen-Berry Co., 668 F.2d 956, 959 (7th Cir. 1982); *Turk*, 526 F.2d at 657 n.1.

[157] *E.g.*, United States v. Donovan, 429 U.S. 413, 432–40 (1977); United States v. Chavez, 416 U.S. 562, 571–80 (1974); United States v. Giordano, 416 U.S. 505, 524–29 (1974).

[158] *See, e.g.*, *Chavez*, 416 U.S. at 571–80; *see* Goldsmith, *supra* note 16, at 56–117; *see also* United States v. Traficant, 558 F. Supp. 996, 1001–02 (N.D. Ohio 1983) (dictum); United States v. Liddy, 354 F. Supp. 217, 220–21 (D.D.C. 1973).

[159] *Donovan*, 429 U.S. at 433–34 (quoting United States v. Giordano, 416 U.S. at 527).

[160] *Id.*

[161] 416 U.S. at 571–80.

[162] *Id.* at 565–66.

[163] *Id.* at 579–80.

[164] *E.g.*, United States v. Traficant, 558 F. Supp. 996, 1001–02 (N.D. Ohio 1983) (dictum); United States v. Liddy, 354 F. Supp. 217, 220–21 (D.D.C. 1973).

[165] 354 F. Supp. at 221.

complied with the literal statutory criteria for suppression. The district court nevertheless rejected the motion to suppress evidence derived from the unlawful taping.[166] The court reasoned that, if it did not permit the prosecution to use this evidence at trial, the government could never successfully prosecute persons who violated Title III because the same statute would also prohibit disclosing the evidence derived from the interception.[167] The court concluded that, if it adopted the defendants' argument, the statute would be "self-emasculating."[168] Although the court recognized that divulging the evidence at trial might invade the defendants' constitutional right to privacy, the court noted that the right to control the admission of evidence at trial is often subordinated to society's interest in successfully prosecuting criminals. Accordingly, the district court held that a limited exception to a literal reading of the statute was required in order to prosecute the illegal wiretapper.

Apart from the exception carved out by the *Liddy* court, most other courts have assumed without discussion that section 2515, the statutory exclusionary rule, applies to all violations of 2511(2)(d), regardless of who uses the evidence.[169] In the 1976 decision of *United States v. Phillips*, the Eighth Circuit Court of Appeals summarily rejected the prosecution's argument that a tape made in violation of section 2511(2)(d) should nonetheless be admissible where the government was an innocent recipient of the tape and not the procurer.[170] The *Phillips* court reasoned that, because section 2515 involves a specific statutory directive and not an interpretation of the fourth amendment's exclusionary rule, the fact that the government inadvertently discovered the evidence, and was not the unlawful procurer, was irrelevant.[171]

In the 1983 case of *United States v. Traficant*, the Federal District Court for the Northern District of Ohio, without specifically discussing the innocent recipient issue, disagreed with the result in *Phillips*.[172] In *Traficant*, the district court stated that the prosecution may use evidence from an interception made in violation of section 2511(2)(d).[173] The *Traficant* court reasoned that Congress did not intend discussions of criminal activity to lie within the statute's protected privacy interests.

In *Traficant*, the government prosecuted the defendant for violating the Racketeering Influenced and Corrupt Organizations Act.[174] A man named Carrabia had recorded his conversations with the defendant.[175] The defendant argued that, because Carrabia made these tapes for the purpose of blackmailing him, sections 2511(2)(d) and 2515 required their suppression.[176]

---

[166] *Id.*

[167] *Id.* In reaching this conclusion, the *Liddy* court relied on the Senate Report accompanying Title III. In particular, the court relied on the Report's statement that law enforcement officers may disclose the contents of illegally intercepted communications to other officers, and use the contents of such communications to the extent appropriate to the proper performance of their duties. *Id.* (quoting SENATE REPORT, *supra* note 1, at 2188).

[168] *Id.*

[169] *See, e.g.*, United States v. Ruppel, 666 F.2d 261, 270–71 (5th Cir.), *cert. denied*, 458 U.S. 1107 (1982).

[170] 540 F.2d 319, 327 n.5 (8th Cir.), *cert. denied*, 429 U.S. 1000 (1976).

[171] *Id.*

[172] United States v. Traficant, 558 F. Supp. 996, 1001–02 (N.D. Ohio 1983) (dictum).

[173] 558 F. Supp. at 1001–02.

[174] *Id.* at 998.

[175] *Id.*

[176] *Id.* at 999–1000.

The district court rejected the defendant's claim, ruling that the defendant had not carried his burden of proving the unlawful motive underlying the taping.[177] The court also stated, however, that even if Carrabia made the tapes in order to blackmail the defendant, it should not interpret section 2511(2)(d) so as to result in suppression of the tapes.[178] The *Traficant* court, interpreting sections 2511(2)(d) and 2515 in light of Title III's stated purpose of combatting organized crime, held that barring admission of the tapes under these circumstances would "add a new category to the list of protected privacy interests — illegal activities."[179]

Another generally recognized exception to section 2515 allows the prosecution to use evidence obtained from interceptions made in violation of Title III for impeachment purposes.[180] This exception to the statutory exclusionary provision, based on the exception to the fourth amendment exclusionary rule, arises directly out of Title III's legislative history.[181] The Senate Report states that section 2515 should "largely reflect existing law" and that section 2515 should not extend the scope of the suppression rule beyond current search and seizure law.[182] The Report then cites with approval case law that established a limited exception to the fourth amendment exclusionary rule by permitting the use of evidence obtained through an illegal search and seizure for impeachment purposes.[183] Courts have generally found that this specific reference in the legislative history is sufficient support for engrafting the same exception onto Title III.[184]

In summary, courts disagree over the proper interpretation of section 2515. Some courts construe the statute literally, and suppress all evidence obtained from an unlawful interception. Other courts reject a literal application of Title III. Instead, these courts construe the statute in accord with its purposes, and admit evidence when suppression would not promote Title III's purposes of fighting crime and protecting legitimate, material, privacy interests.

III. A Recent Conflict Concerning the Application of Section 2515 to Violations of Section 2511(2)(d): *United States v. Underhill* and *United States v. Vest*

Two 1987 decisions illustrate the divergent results that occur in private participant monitoring cases. In *United States v. Underhill*, the Sixth Circuit Court of Appeals held that interceptors and their co-conspirators waive any right to privacy protected by Title III.[185] The court therefore denied the defendants' motion to suppress.[186] In contrast, in *United States v. Vest*, the First Circuit Court of Appeals held that an interceptor's co-conspirator has a genuine privacy right in the contents of conversations intercepted for

---

[177] *Id.* at 1001. The defendant has the burden of proving an impermissible purpose by a preponderance of the evidence. *Id.* at 1000.

[178] *Id.* at 1001–02.

[179] *Id.* at 1002.

[180] United States v. Winter, 663 F.2d 1120, 1154 (1st Cir. 1981), *cert. denied*, 460 U.S. 1011 (1983); United States v. Caron, 474 F.2d 506, 509–10 (5th Cir. 1973).

[181] *See* Senate Report, *supra* note 1, at 2185.

[182] *Id.*

[183] Senate Report, *supra* note 1, at 2185. Walder v. United States, 347 U.S. 62, 65 (1954) established the exception.

[184] *See, e.g., Caron*, 474 F.2d at 509–10.

[185] 813 F.2d 105, 112–13 (6th Cir. 1987).

[186] *Id.* at 107, 113.

the purpose of furthering their criminal conspiracy.[187] The *Vest* court therefore granted the defendant's motion to suppress because it found that disclosure at trial would violate further the defendant's privacy right.[188] Although both courts stated that they were interpreting Title III in accord with its purposes, the courts emphasized different purposes to reach conflicting results.[189]

The *Underhill* court held that a person who unlawfully records a conversation — an interceptor — waives any right of privacy protected by Title III by his or her act of unlawful recording.[190] The court also held that an interceptor's co-conspirator is bound by the interceptors' acts and therefore waives his or her right to privacy in any communications made to further the conspiracy.[191] Recognizing that the tapes were made in violation of Title III, the court nevertheless reasoned that a literal application of sections 2511(2)(d) and 2515 would produce an absurd result that Congress could not have intended.[192]

In *Underhill*, the defendant and his co-defendants were indicted for conspiracy and various substantive offenses related to the ownership and operation of an illegal gambling business.[193] Defendants Underhill and Rokitka had recorded telephone conversations with persons wishing to place bets with the defendants.[194] Because these recordings created a gambling record as defined under Tennessee law, the defendants argued that they had violated the Tennessee law that makes it a misdemeanor to knowingly make, store or possess a gambling record.[195] The defendants further argued that they had intercepted wire communications for the purpose of committing a criminal act in violation of section 2511(2)(d). Finally, as aggrieved persons as defined in section 2510(11), the defendants claimed standing to seek suppression pursuant to section 2515 on the grounds that the communications were intercepted unlawfully.[196]

The court of appeals first stated that, if the purpose of the taping was merely to memorialize the transaction, the taping might be deemed a noncriminal act.[197] Because the transactions were unlawful in themselves, the court reasoned, recording them did not make them more incriminating.[198] According to the court, when the purpose of an interception is to preserve an accurate record of an event in order to prevent future distortion by a participant, the interception is generally lawful.[199] But because the taping itself constituted a criminal offense under Tennessee law, the court reluctantly ruled that the defendants had violated section 2511(2)(d).[200]

Notwithstanding this ruling, the court held that defendant interceptors waive any right of privacy protected by Title III.[201] The court recognized that one of section 2515's

---

[187] 813 F.2d 477, 481, 484 (1st Cir. 1987).
[188] *Id.* at 481.
[189] *Vest*, 813 F.2d at 480–84; *Underhill*, 813 F.2d at 112–13.
[190] 813 F.2d at 112.
[191] *Id.*
[192] *Id.*
[193] *Id.* at 107.
[194] *Id.*
[195] *Id.* at 112.
[196] *Id.* at 108.
[197] *Id.* at 110.
[198] *Id.* at 111.
[199] *Id.* at 110.
[200] *Id.* at 111.
[201] *Id.* at 112.

purposes is to protect against invasions of personal privacy. The court noted, however, that Congress was concerned with protecting the victims of such invasions, not the perpetrators.[202] According to the court, to apply the language of sections 2511(2)(d) and 2515 literally and thereby allow defendants Underhill and Rokitka to suppress evidence from tape recordings that they made would allow an absurd result that Congress did not intend.[203] Rather than allow this absurd result, the *Underhill* court denied the defendants' motion, reasoning that denial would be more in harmony with Title III's purposes.

In addition to ruling that the evidence was admissible against the interceptors, the court held that defendant Person, whose voice was on the tape, but who had not participated in making the tapes, also waived his right to privacy.[204] Because the taping furthered a conspiracy of which Person was a member, the court held that Person was bound by his co-conspirators' actions.[205] Therefore, the court also denied defendant Person's motion to suppress.[206]

The *Underhill* court rejected the defendants' literal reading of Title III. The court stated that Congress did not create Title III so that violators could use its suppression provision to shield themselves from the consequences of other unlawful activities.[207] Instead of interpreting the statute literally, the court examined the purposes underlying Title III — combatting crime and protecting privacy — and interpreted the statute in a way that the court found furthered those purposes. The court noted that literal application would provide an unintended benefit to organized crime.[208] In addition, according to the court, the defendants had no genuine privacy right at stake.[209] The *Underhill* court, therefore, denied the defendants' motion to suppress by holding that interceptors and their co-conspirators waive any rights of privacy that Title III was meant to protect.

In *United States v. Vest*, another 1987 case construing the reach of section 2515 in conjunction with section 2511(2)(d), the United States Court of Appeals for the First Circuit affirmed a Massachusetts district court's partial grant of the defendant's motion to suppress.[210] The district court found that a man named Jesse James Waters recorded a conversation in order to further a criminal conspiracy.[211] Therefore, the district court held that sections 2511(2)(d) and 2515 required suppressing evidence derived from the recording in the prosecution's case-in-chief.[212] The district court rejected the prosecution's argument that the court should read an exception into section 2515 for evidence that the prosecution has obtained inadvertently.[213] On appeal, the court of appeals affirmed the district court's decision.[214] Noting that section 2515 served different purposes than the judicially-created exclusionary rule, the appeals court agreed with the district court that to allow the prosecution to use evidence from unlawful private partic-

---

[202] *Id.*
[203] *Id.*
[204] *Id.*
[205] *Id.*
[206] *Id.*
[207] *Id.* at 111–13.
[208] *Id.*
[209] *See id.*
[210] 813 F.2d 477, 481, 484 (1st Cir. 1987).
[211] 639 F. Supp. 899, 907–08 (D. Mass. 1986).
[212] *Id.* at 911, 912, 914–15.
[213] *Id.* at 913–15.
[214] 813 F.2d at 481, 484.

ipant monitoring would "eviscerate the statutory protection of privacy from intrusion by illegal private interception."[215]

In *Vest*, the police arrested Waters in May 1983 and charged him with several crimes arising from the shooting of Boston Police Officer Francis Tarantino.[216] Prior to his trial in October of 1984, Waters met with Tarantino and George Vest, another Boston Police detective.[217] They agreed that Waters would pay Tarantino $300,000 in exchange for Tarantino's efforts to "fix" the case against Waters. On June 15, 1984, Vest met with Waters at Waters's office.[218] Waters gave Vest $35,000 for Tarantino. Waters recorded the transaction and the accompanying conversation to create a receipt in the event that Vest double-crossed him, or Tarantino later claimed that Waters had failed to make the payment.[219] In October 1984, Waters was tried and convicted in Suffolk Superior Court on several charges relating to Tarantino's shooting.[220] In November 1984, he was sentenced to eight to ten years at MCI-Walpole.[221] In December 1984, Waters gave the tape to a federal agent.[222]

After receiving the tape, the federal law enforcement authorities began investigating the payoff scheme.[223] They called Vest to testify before the grand jury concerning his role in the scheme. Although Vest was given immunity, he denied that he had ever participated in a payoff scheme and stated that he had never received any money from Waters. The June 1983 tape recording was then played for the grand jury, who subsequently indicted Vest on three counts of making false statements to a grand jury.[224]

Before his trial for perjury, Vest moved to suppress the tape.[225] Vest claimed that Waters's recording of the illegal transaction furthered their conspiracy.[226] The defendant also claimed that having a receipt was simply preliminary to the purpose of blackmailing Tarantino to enforce the agreement.[227] Either purpose, the defendant claimed, violated section 2511(2)(d).[228] Because the interception was unlawful, the defendant argued that introducing the tape recording into evidence would violate section 2515.[229]

At the motion to suppress hearing, the prosecution raised several defenses. The prosecution first argued that, because Waters recorded the tape as a receipt to protect himself against double-crossing by Vest, Tarantino, or both, the recording had a lawful purpose.[230] The prosecution's second defense, analogizing to the fourth amendment exclusionary rule, was that even if Waters's interception violated section 2511(2)(d), the court should admit the evidence because the prosecution was the inadvertent recipient,

---

[215] *Id.* at 481.
[216] 639 F. Supp. at 906.
[217] *Id.*
[218] *Id.*
[219] *Id.* at 907.
[220] *Id.* at 906.
[221] *Id.*
[222] *Id.* at 907.
[223] *Vest*, 813 F.2d at 479.
[224] *Id.*
[225] *Vest*, 639 F. Supp. at 901.
[226] *Id.* at 905.
[227] *Id.*
[228] *Id.* at 901.
[229] *Id.* at 901.
[230] *Id.* at 905.

rather than the procurer of the illegal recording.[231] The prosecution noted that allowing into evidence the fruits of unlawful private actions that the police obtain inadvertently was already a well-established exception to the judicially-created fourth amendment exclusionary rule.[232] The government's third defense, again analogizing to the fourth amendment exclusionary rule, urged the court to carve out of section 2515 an exception for perjury prosecutions.[233] Finally, the prosecution argued that, if it could not use the tape in its case-in-chief, it should be allowed to use the tape to impeach the defendant's testimony should the defendant take the stand.[234] The court denied all of the government's arguments except for the last one.[235]

The district court agreed with the government that Waters made the tape as a receipt, but nevertheless found that this purpose encompassed the subsidiary purpose of furthering his conspiratorial plan.[236] Taping to further a conspiracy, the court said, was taping for the purpose of committing a criminal, tortious or other injurious act, and violated section 2511(2)(d).[237] Therefore, the court found that section 2515 required suppressing the evidence from the prosecution's case-in-chief.[238]

In responding to the prosecution's remaining three defenses, the district court examined both Title III's legislative history and the case law that existed when Congress enacted Title III.[239] The district court also stressed that its task was to construe a statutory exclusionary rule, not the judicially-fashioned fourth amendment exclusionary rule.[240] Accordingly, the district court emphasized the fact that Congress intended the statutory exclusionary provision to protect privacy as well as deter potential unlawful interceptors.[241]

The district court rejected the prosecution's argument that section 2515 did not apply when the government was the innocent recipient, rather than the procurer, of the illegal tape.[242] The court held that neither precedent nor legislative history supported the prosecution's contention that the court should create an exception for innocent recipients.[243] The district court concluded that carving out an innocent recipient exception would eviscerate Title III's privacy protection.[244]

The district court distinguished *United States v. Liddy*, in which a federal district court allowed the prosecution to use a tape recording made illegally by a private party.[245] In *Liddy*, the government used the recording to prosecute the interceptor for violating Title III.[246] In *Vest*, the prosecution claimed that *Liddy* demonstrated that section 2515 does not provide a blanket prohibition against the prosecution's use of private, unlawfully

---

[231] *Id.* at 913.
[232] *See id.*
[233] 639 F. Supp. at 908, 911–12.
[234] *Id.* at 908, 910.
[235] *Id.* at 908, 911, 915.
[236] *Id.* at 908.
[237] *Id.*
[238] *Id.* at 911, 915.
[239] *Id.* at 909–14.
[240] *Id.* at 910.
[241] *Id.* at 914.
[242] *Id.*
[243] *Id.*
[244] *Id.* at 914–15.
[245] *Id.* at 914. For a discussion of *Liddy*, see *supra* notes 164–168 and accompanying text.
[246] United States v. Liddy, 354 F. Supp. 217, 221 (D.D.C. 1973).

intercepted communications.[247] Although the district court acknowledged the *Liddy* exception, it stated that the *Liddy* decision necessarily flowed from the text of the statute and its legislative history.[248] The district court concluded that *Liddy* did not even imply the innocent recipient exception that the prosecution sought.[249]

The court also rejected the government's contention that, because exclusion under these circumstances would not serve any deterrent purposes, exclusion would not substantially implement the congressional intention in enacting Title III.[250] The court instead agreed with the defendants that exclusion would promote a central, fundamental and substantive statutory purpose — protecting privacy.[251] The district court warned that the prosecution's construction of the statute would not protect against invasions of privacy occurring when one person engages a private investigator to gather evidence to take to the government for use in a criminal prosecution.[252]

In addition to the government's argument based on precedent, the government presented legislative history indicating that courts should confine the sanction against private consent recording to tort remedies and the exclusion of any evidence the unlawful procurer attempted to introduce.[253] Because this legislative history reflected discussion about preliminary versions of Title III, however, and was not part of the official legislative history, the court questioned its probative value.[254] Finding the prosecution's legislative history argument "far from persuasive on the issue," the court rejected the prosecution's argument that Congress only intended to prevent the procurer of illegal interceptions from introducing into evidence the fruits of his or her unlawful taping.[255]

The district court also rejected the government's third argument that, like the fourth amendment exclusionary rule, section 2515 should contain an exception for perjury prosecutions.[256] The court ruled that the legislative history permitting the impeachment exception did not authorize the courts to develop and apply exceptions to section 2515 to the same extent as courts develop and apply exceptions to the fourth amendment exclusionary rule.[257] Although the court conceded that the issue was a close one, it concluded that neither Title III's language nor its legislative history warranted granting the courts such sweeping discretion.[258]

The district court did hold, however, that the prosecution could use the illegal recording to impeach the defendant should he take the stand.[259] In deciding for the prosecution on this issue, the court was persuaded by the precedent in support of this exception and by the legislative history. The court concluded that because the legislative history specifically cited *Walder*, the case that established the impeachment exception to the fourth amendment exclusionary rule, Congress intended Title III to recognize the

---

[247] 639 F. Supp. at 914; Brief for Appellant at 17, United States v. Vest, 813 F.2d 477.
[248] 639 F. Supp. at 914.
[249] *Id.*
[250] *Id.*
[251] *Vest*, 639 F. Supp. at 914.
[252] *Id.* at 915.
[253] *Id.* at 914.
[254] *Id.*
[255] *Id.*
[256] *Id.* at 912.
[257] *Id.*
[258] *Id.* at 911.
[259] *Id.*

same exception. Thus, the district court in *Vest* found that the prosecution could only use the tape to impeach the defendant should he take the stand.

On appeal, the Court of Appeals for the First Circuit affirmed the district court's partial grant of the defendant's motion to suppress.[260] The prosecution raised two of the three claims that the district court had rejected.[261] The prosecution argued that section 2515 should not apply when the government is merely the innocent recipient, and not the procurer of the tape.[262] The prosecution also claimed that section 2515 should recognize an exception for perjury prosecutions.[263] The court of appeals rejected both of the prosecution's arguments, using essentially the same rationale as the district court.[264]

The court of appeals first stated that the congressionally-created rule of section 2515 served different purposes than the fourth amendment exclusionary rule.[265] According to the circuit court, the purpose underlying section 2515 was not just to deter Title III violations, but also to protect personal privacy.[266] An invasion of privacy has not ended when an interception occurs, the court stated, but is compounded by disclosure in court or elsewhere.[267] That the disclosing party is merely the innocent recipient, and not the interceptor, the *Vest* court stated, does not lessen the impact of an invasion of privacy.[268] The court therefore rejected the innocent recipient argument. Agreeing with the lower court, the circuit court reasoned that carving out this exception would eviscerate Title III's ability to protect privacy.[269]

The court of appeals also rejected the argument that section 2515 should recognize an exception for perjury prosecutions.[270] The circuit court agreed with the lower perjury prosecutions. The circuit court agreed with the lower perjury prosecutions. The circuit court agreed with the lower perjury prosecutions. The circuit court agreed with the lower court that neither the case law that existed when Congress enacted Title III nor the legislative history supported such an exception.[271] Accordingly, the court of appeals affirmed the district court's partial grant of the defendant's motion to suppress.[272]

The *Underhill* and *Vest* courts reached different results in applying Title III's exclusionary rule to private participant monitoring. The *Underhill* court held that interceptors and their co-conspirators waive any right to privacy that Congress intended Title III to protect.[273] The *Vest* court, in contrast, held that an interceptor's co-conspirator has a legitimate privacy right in the contents of tapes intercepted in the furtherance of their

---

[260] 813 F.2d at 479. For the purposes of taking the appeal, the government moved to sever one of the perjury counts. *Id.* at 480. The case proceeded to trial on the other two counts, and Vest was convicted on both counts. *Id.*

[261] *Id.* at 480.

[262] *Id.* at 481.

[263] *Id.*

[264] *Id.* at 481, 484.

[265] *Id.* at 481.

[266] *Id.* at 480–81.

[267] *Id.* at 481.

[268] *Id.*

[269] *Id.*

[270] *Id.* at 482–84.

[271] *Id.* at 481–84.

[272] *Id.* at 484.

[273] *Underhill*, 813 F.2d at 112.

conspiracy.[274] Both courts stated that they interpreted the statute in harmony with its purposes.[275] Notwithstanding these claims, the decisions reflect different views on the relative importance of Title III's purposes. The *Underhill* court showed a great concern for fighting crime, and less interest in the privacy rights of participants in conversations concerning criminal activities that a co-conspirator intercepts.[276] The *Vest* court, in contrast, based its decision largely on the privacy interests of a participant whose conversation a co-conspirator taped for the purpose of furthering their conspiracy.[277]

IV. Furthering Title III's Purposes in Cases Involving Evidence Derived from Unlawful Private Participant Monitoring

In 1987, two United States Courts of Appeals reached inconsistent results applying section 2515, Title III's suppression provision, to violations of section 2511(2)(d), the provision that limits private participant monitoring.[278] The courts emphasized different purposes of Title III to reach their decisions.[279] Courts would reach more consistent results by applying a common framework to cases involving evidence obtained in violation of section 2511(2)(d).

This note suggests a two step framework for courts to use in cases involving the suppression of evidence derived from unlawful private participant monitoring. Under this framework, courts should first examine the intercepted conversation to ensure that it meets the statutory definition of a wire or oral communication. If the conversation meets the initial requirement, courts should next examine the relationship among the party seeking to suppress, the proponent of the evidence and the intercepted communication. Where the party seeking to suppress is also the interceptor, a court should deny the motion to suppress. Where the proponent of the evidence is the unlawful interceptor, however, and the party seeking to suppress is the nonconsenting participant, a court should grant the motion. Where neither the person seeking to suppress nor the proponent of the evidence is the unlawful interceptor, a court should suppress the evidence only if disclosure at trial would harm a material privacy interest of the party seeking suppression. This framework strikes the proper balance between the often conflicting goals of Title III — providing evidence to combat crime and protecting personal privacy.

A. *A Framework*

For the purposes of presenting this framework, assume that a private citizen has intercepted a communication in violation of section 2511(2)(d). The interceptor may be a defendant, a proponent of the intercepted evidence, or a third party. Assume that the defendant has filed a motion to suppress the evidence derived from the interception.

---

[274] *See Vest*, 813 F.2d at 480–81.

[275] *Vest*, 813 F.2d at 480–84; *Underhill*, 813 F.2d at 112–13.

[276] *Underhill*, 813 F.2d at 112.

[277] *Vest*, 813 F.2d at 480–81.

[278] *Compare Underhill*, 813 F.2d at 112 (finding no right of privacy in tapes made in furtherance of the conspiracy) *with Vest*, 813 F.2d at 481 (assuming without discussion that Vest, the co-conspirator of the interceptor, had a right to privacy in a tape made in furtherance of the conspiracy).

[279] *Compare Underhill*, 813 F.2d at 112 (emphasizing the protection of only legitimate privacy interests and using Title III to secure evidence for prosecuting criminals) *with Vest*, 813 F.2d at 481 (emphasizing the protection of privacy).

Further assume that the defendant was one of the parties to the intercepted communication.

The framework first requires that the intercepted conversation meet the statutory definition of a "wire" or "oral communication."[280] The definitions restrict the conversations protected by Title III to those that are uttered under circumstances in which people legitimately should expect privacy protection. Requiring that defendants demonstrate a reasonable belief that their oral communications were not subject to interception permits only persons with genuine privacy interests to use section 2515. Because Congress enacted Title III to protect legitimate privacy interests, defendants who lack such an interest should not be able to use Title III.[281]

The definition of "oral communication," however, is difficult to apply in participant monitoring cases. The language of the definition is vague.[282] Deciding precisely when a person "exhibit[s] an expectation that [a] communication is not subject to interception under circumstances justifying such an expectation" requires some guesswork. In addition to vague language, Title III's legislative history creates more uncertainty regarding under what circumstances oral statements will meet the statutory definition.[283]

The Senate Report states that the definition of an "oral communication" was meant to reflect existing law, and cites *Katz v. United States* as an illustration.[284] As the Supreme Court has applied *Katz* to participant monitoring, however, a person does not have a reasonable expectation that a party to a conversation will not record it.[285] Thus, strict application of *Katz* would exclude all private participant monitoring of oral conversations from the statutory definition.

This absurd result — reading section 2511(2)(d) completely out of Title III in cases involving oral communication — clearly is not what Congress intended. Both the language of section 2511(2)(d) and its stated purposes demonstrate that Congress intended to protect oral as well as wire communications.[286] Consequently, courts must focus on other portions of the legislative history in order to interpret the proper scope of "oral communication" in private participant monitoring cases.

The Senate Report also states in its description of "oral communication" that the expectation is "to be gathered and evaluated from and in terms of all the facts and circumstances."[287] This vague directive apparently calls for the application of a "totality of the circumstances test" to determine if a person's expectation that his or her communication is not subject to interception is justified.[288] Rather than apply *Katz* literally and interpret the legislative history to read section 2511(2)(d) completely out of Title III, courts should apply this test.

---

[280] *See* 18 U.S.C. §§ 2510(1), (2) (1982 & Supp. IV 1986). See *supra* notes 90, 91 for the texts of these definitions.

[281] *See* SENATE REPORT, *supra* note 1, at 2178.

[282] See *supra* note 91 for the definition of "oral communication."

[283] *See* SENATE REPORT, *supra* note 1, at 2178. See *supra* note 91–92 and accompanying text for a discussion of which oral communications meet the statutory definition.

[284] SENATE REPORT, *supra* note 1, at 2178 (citing *Katz*, 389 U.S. 347 (1967)).

[285] United States v. White, 401 U.S. 745, 751 (1971).

[286] Senator Hart's comments certainly suggest that section 2511(2)(d) was intended to apply to oral communications. For the text of Senator Hart's statements, see *supra* note 100.

[287] SENATE REPORT, *supra* note 1, at 2178.

[288] *See* Greenwald v. Wisconsin, 390 U.S. 519, 521 (1968) (applying a totality of the circumstances test to determine whether a defendant's statement was made voluntarily).

Under the totality of the circumstances test, courts should consider the factors listed in the legislative history of oral communication. A defendant's subjective intent and the place where the communication was uttered are important factors.[289] Outside of his or her own home or office, a defendant's expectation of privacy warrants less protection.[290] In particular, a defendant's expectation would clearly be unjustified in a jail cell or an "open field."[291] Even when in his or her own home or office, however, a defendant's expectation would be unwarranted under certain circumstances. For example, a defendant's expectation would be unjustified if he or she speaks too loudly.[292]

This test also should include other factors not mentioned in the legislative history. The subject matter of the conversation is important.[293] Courts historically have been loathe to afford much privacy protection to conversations concerning ongoing criminal activity.[294] Furthermore, Congress enacted Title III in part for the purpose of fighting crime by providing law enforcement with the means to obtain probative evidence.[295] Particularly in criminal prosecutions, therefore, courts should not discard too quickly evidence that may be not only probative and relevant, but also accurate and reliable.[296]

The personal relationship between the participants is also an important factor.[297] A defendant's expectation that his or her conversation is not subject to interception may be justified if a close friend or business colleague intercepts their conversation.[298] When a defendant converses with a stranger, or a mere acquaintance, and the stranger or acquaintance intercepts the conversation, however, the legitimacy of the defendant's expectation diminishes.

After ensuring that the wire or oral communication meets the statutory definition, courts should next examine the relationship among the party seeking suppression, the proponent of the evidence and the intercepted communication. This note will consider three possible interrelationships: 1) the person seeking to suppress — the defendant — is also the unlawful interceptor; 2) the proponent of the evidence is the unlawful interceptor; and 3) neither the person seeking to suppress nor the proponent is the unlawful interceptor. If a defendant — in this hypothetical also the person seeking to suppress — is also the interceptor, the court should deny the motion.[299] A court should

---

[289] *See* SENATE REPORT, *supra* note 1, at 2178.

[290] *See id*; *see also* Fishman, *supra* note 143, at 57 (a person's expectation of privacy is not reasonable when he or she is on a criminal associate's premises and that criminal associate has consented to the interception).

[291] SENATE REPORT, *supra* note 1, at 2178. For a discussion of the Supreme Court's "open fields" doctrine, see Oliver v. United States, 466 U.S. 170 (1984).

[292] SENATE REPORT, *supra* note 1, at 2178.

[293] *See, e.g.*, Benford v. ABC, Inc., 502 F. Supp. 1159, 1162 (D. Md. 1980) ("one contemplating illegal activities must realize and risk that his companions may be reporting to the police") (quoting United States v. White, 401 U.S. 745, 751 (1971)), *aff'd*, 661 F.2d 917 (4th Cir.), *cert. denied*, 454 U.S. 1060 (1981).

[294] *Id.*

[295] SENATE REPORT, *supra* note 1, at 2117.

[296] *See White*, 401 U.S. at 753.

[297] *See* Greenawalt, *supra* note 6, at 224.

[298] *See id.*

[299] *See* United States v. Underhill, 813 F.2d 105, 112 (6th Cir.), *cert. denied*, 107 S. Ct. 2484, 3268 (1987), 108 S. Ct. 81, 141 (1988); United States v. Liddy, 354 F. Supp. 217, 221 (D.D.C. 1973).

Analysis of the case in which the defendant is also the interceptor should be confined to cases involving only wire communications. Any person who intercepts his or her own oral communication would not have a legitimate expectation that such communication was not subject to interception

find that interceptors waive any right to privacy that Congress intended Title III to protect. Suppressing evidence under these circumstances, although warranted by a literal application of Title III, would not promote Title III's objectives.[300]

Literal application of Title III requires suppression in cases in which the defendant seeks to suppress evidence that he or she has obtained in violation of section 2511(2)(d).[301] An interceptor has standing because he or she was a party to an intercepted communication.[302] In addition, because the communication was unlawfully intercepted, the defendant satisfies the criteria for suppression pursuant to section 2518(10)(a).[303] Section 2515, therefore, seems to require that the court exclude the evidence.[304] Literal application under these circumstances, however, leads to one of two absurd results. One absurdity is that defendants who have violated Title III could never be prosecuted or sued successfully because the same statute would prohibit admitting evidence derived from the unlawful interceptions against the defendants, and render Title III "self-emasculating."[305] The second absurdity occurs when a defendant is on trial for violating a law other than Title III.[306] Granting the motion to suppress would allow such a defendant to use Title III's provisions to shield him or herself from the consequences of other unlawful acts.[307] Allowing persons who violate Title III's provisions to use the same statute's suppression provision as a shield is also absurd.[308] When literal application of a statute would lead to an absurd result, courts instead should interpret the statute in accordance with its purposes.[309]

Title III has two purposes: combatting organized crime and protecting the privacy of innocent persons' wire and oral communications.[310] Suppressing tape recordings of a defendant's conversations, which he or she made in violation of Title III, would directly contravene both purposes.[311] Suppression would allow a defendant to use Title III to benefit, rather than hinder organized crime.[312] Moreover, granting a defendant's motion would not protect any genuine privacy right of the defendants.[313] A defendant who intercepts his or her own telephone conversations for unlawful purposes demonstrates

---

and thus, the intercepted communication would not meet the statutory definition. *See* 18 U.S.C. § 2510(2) (1982 & Supp. IV 1986).

[300] *See Underhill*, 813 F.2d at 112.

[301] *See id.* at 110–11.

[302] *See* 18 U.S.C. § 2510(11) (1982 & Supp. IV 1986); see *supra* note 118 for the text of Title III's standing provision. The best solution to the problem of an interceptor trying to suppress the evidence derived from his or her own unlawful acts is to hold that the interceptor does not have standing. An interceptor is hardly "aggrieved" under traditional notions of standing. *See* United States v. Bragan, 499 F.2d 1376, 1380 (4th Cir. 1974) (finding no standing under these circumstances); *accord* McQuade v. Michael Gassner Mechanical, 587 F. Supp. 1183, 1189 n.1 (D. Conn. 1984).

[303] *See* 18 U.S.C. § 2518(10)(a). See *supra* note 119 for the text of section 2518(10)(a).

[304] *See Underhill*, 813 F.2d at 111.

[305] *See* United States v. Liddy, 354 F. Supp. 217, 221 (D.D.C. 1973).

[306] *See, e.g., Underhill*, 813 F.2d at 111–12.

[307] *Id.* at 112.

[308] *See id.*

[309] *See, e.g.*, United States v. American Trucking Ass'ns, 310 U.S. 534, 542–44 (1940); United States v. Rutherford, 442 U.S. 544, 551–52 (1979).

[310] SENATE REPORT, *supra* note 1, at 2153, 2157.

[311] *See Underhill*, 813 F.2d at 111–12.

[312] *Id.* at 112.

[313] *See id.*

little concern for the privacy of his or her wire communications.[314] Therefore, interception should constitute a waiver of any privacy interest that Title III was meant to protect.[315] Instead of protecting the privacy of innocent persons, suppression under these circumstances would allow those who violate Title III to use the same statute to shield themselves from the consequences of their illegal acts.[316]

In addition to contravening Title III's general purposes, allowing interceptors to suppress the fruits of their own unlawful acts does not further the narrower purposes of section 2515, the statutory exclusionary rule.[317] Congress enacted this rule to deter persons from violating Title III and to prohibit the invasion of personal privacy that disclosure at trial causes.[318] Allowing an interceptor to suppress evidence that he or she has obtained by violating Title III would not deter the interceptor.[319] In fact, allowing persons to suppress in order to shield themselves from the consequences of other illegal acts encourages more Title III violations.[320] In addition, the interceptor has waived any right to privacy protected by Title III.[321] Disclosure at trial would not, therefore, harm any legitimate privacy interest.

When the proponent of electronic surveillance evidence is also the interceptor, however, and the defendant is the nonconsenting party, courts should grant the motion to suppress. For instance, suppose a proponent-plaintiff sues the defendant for libel. Further suppose that, when the plaintiff conducted the private participant monitoring, he or she had an unlawful purpose, such as blackmailing the defendant. Later, however, the plaintiff decided to use the evidence in a civil suit against the defendant, and the defendant moved to suppress it. Under these circumstances, both the language of Title III, and its underlying policies warrant suppression of the evidence.

As detailed above,[322] the defendant literally has fulfilled Title III's requirements for suppression. Furthermore, unlike the situation in which the defendant is the interceptor, suppression would promote both policies underlying section 2515, the statutory exclusionary provision, by deterring unlawful interceptors and by protecting personal privacy. Suppression would further section 2515's deterrent purpose by not permitting those who violate section 2511(2)(d), the private participant monitoring provision, to use the fruits of their unlawful acts.[323] Suppression would also further section 2515's goal of protecting personal privacy by preventing the disclosure at trial of the contents of the unlawfully intercepted communications.[324] Disclosure at trial compounds the original invasion of privacy caused by the unlawful interception.[325]

This is not a case in which the plaintiff has intercepted a conversation for the purpose of preserving evidence to use at trial against the defendant.[326] The plaintiff's

---

[314] *Id.*

[315] *Id.*

[316] *Id.*

[317] *See* SENATE REPORT, *supra* note 1, at 2184–85.

[318] *Id.* For the legislative history accompanying section 2515, see *supra* note 127.

[319] *See Underhill*, 813 F.2d at 112.

[320] *See id.* at 111–12.

[321] *Id.* at 112.

[322] See *supra* notes 301–04 and accompanying text.

[323] *See* SENATE REPORT, *supra* note 1, at 2156, 2184–85.

[324] *See Vest*, 813 F.2d at 481.

[325] *Id.*

[326] *Cf.* By-Prod Corp. v. Armen-Berry Co., 668 F.2d 956, 959 (7th Cir. 1982).

purpose in recording was unlawful, and thus violated Title III. A court should not allow the perpetrator to use the fruits of his or her unlawful actions.[327] Therefore, because both the statute's language and its underlying purposes warrant it, a court should suppress the evidence obtained by violating section 2511(2)(d) when the unlawful interceptor later attempts to introduce the evidence at trial.

The final relationship among a defendant, proponent of the evidence and intercepted communication is one in which neither the defendant nor the proponent of the evidence is the unlawful interceptor. More specifically, the defendant is the victim, not the perpetrator of an interception that violates section 2511(2)(d), and the proponent is the innocent recipient of the evidence. Courts should suppress evidence under these circumstances only when disclosure at trial would harm a material privacy right of the defendant — a privacy right distinct from and in addition to the right to control public disclosure of personal information.

Applied literally, Title III requires suppression regardless of whether the proponent is the innocent recipient or the unlawful procurer.[328] The legislative history, however, suggests the possibility that Title III should recognize an exception, analagous to the fourth amendment exclusionary rule's,[329] for evidence that a private person intercepted unlawfully and the police subsequently obtained inadvertently.[330] To date, two courts,

---

[327] *See* SENATE REPORT, *supra* note 1, at 2156.

[328] *See Vest*, 813 F.2d at 480–81.

[329] *See, e.g.*, United States v. Jacobsen, 466 U.S. 109, 113 (1983).

[330] First, section 2515 states that evidence derived from an intercepted communication may be introduced in court only if Title III authorizes its admission. 18 U.S.C. § 2515 (1982 & Supp. IV 1986). Section 2517(2) authorizes prosecutors who have obtained knowledge of the contents of intercepted communications by any means authorized by Title III to use such contents "to the extent such use is appropriate to the proper performance of [their] official duties." *Id.* § 2517(2). Arguably, "performance of [their] duties" includes introducing evidence that they have innocently received. Section 2517(3), in contrast, allows any *person* to disclose in court evidence derived from electronic surveillance only if such person received the evidence by means authorized by Title III *and* if the communication was intercepted in accordance with Title III. *Id.* § 2517(3). Therefore, because section 2517(2) does not contain the requirement that the interception itself was lawful, perhaps section 2517(2) authorizes the innocent recipient exception for criminal trials.

At a minimum, section 2517(2)'s meaning with respect to cases in which the government is the innocent recipient is unclear. Arguably, because section 2517(3) specifically authorizes divulgence at trial, then section 2517(2) only authorizes divulgence among law enforcement personnel. Another point of uncertainty is that, regardless of whether a private person intercepts a communication lawfully or unlawfully, if the police inadverteintly recover it, the police have obtained the contents in a means neither expressly authorized nor prohibited by Title III. Consequently, it is difficult to see where Title III authorizes the admission of evidence derived from interceptions lawfully effected pursuant to sections 2511(2)(c) or 2511(2)(d). *See* United States v. Horton, 601 F.2d 319, 324 (7th Cir.), *cert. denied*, 444 U.S. 937 (1979) (although section 2515's meaning is unclear with respect to evidence derived from section 2511(2)(c) interceptions, such evidence should be admitted because section 2515 is intended to exclude only evidence that was intercepted unlawfully).

The official legislative history of section 2515 creates more uncertainty. It states that section 2515 was not meant "to press the scope of the suppression role [sic] beyond present search and seizure law." SENATE REPORT, *supra* note 1, at 2185. This statement is anomalous because much of section 2515 did extend 1968 search and seizure law. *See* United States v. Manuszak, 438 F. Supp. 613, 616–17 (E.D. Pa. 1977). In particular, section 2515 extended prior law by suppressing evidence derived from private unlawful acts, and by suppressing evidence at civil trials. *See* Goldsmith, *supra* note 16, at 40 & n.232. One commentator states that the reference to "present search and seizure law" was meant to ensure the retention of certain common law exceptions to suppression, such as attenuation of the taint and use for impeachment. *Id.* at 40 n.232. In 1968, pursuant to one well-

relying on Title III's plain meaning and on its stated concern for protecting personal privacy, have rejected the argument that Title III should recognize the innocent recipient exception.[351]

Title III should not recognize the bright line innocent recipient exception. Such an exception contravenes the express language of Title III. In addition, the legislative history, although it suggests the possibility of the innocent recipient exception is, at best, inconclusive.[352] Although Title III should not recognize the bright line exception, it should allow innocent recipients to use the evidence under certain circumstances. Section 2515 has two purposes: deterring Title III violations and protecting the privacy of innocent persons.[353] By preventing interceptors from using evidence that they obtained unlawfully, section 2515 would deter these wrongdoers.[354] By preventing the disclosure in court of evidence that may invade the defendants' privacy, section 2515 would protect personal privacy.[355] Courts should suppress evidence only when it directly and substantially implements these purposes.[356]

Suppressing evidence obtained innocently, however, promotes only one of the two purposes underlying section 2515 — protecting privacy.[357] If the prosecution has inno-

---

established common law exception to the exclusionary rule, the police could use evidence that a private person not acting under color of law had obtained unlawfully. *See* Burdeau v. McDowell, 256 U.S. 465, 473–75 (1921). The legislative history to section 2515, therefore, also suggests the possibility that Title III should contain the innocent recipient exception. *But see* State of Michigan v. Meese, 666 F. Supp. 974, 978 (E.D. Mich. 1987) (following the quashing of a grand jury subpoena because of Title III violations, the district court held that section 2515 did not violate the tenth amendment). The *Meese* decision shed little light on the innocent recipient question, however, as the decision focused mainly on federalism concerns.

The only legislative history of section 2511(2)(d), Senator Hart's comments in the Senate Report accompanying Title III and his statements on the Senate floor, is just as ambiguous as the other legislative history of Title III. *See* 114 CONG. REC. 14,694–95 (1968). Although he never explicitly mentioned the innocent recipient exception, Senator Hart emphasized that section 2511(2)(d) would not prohibit private participant monitoring when a person recorded evidence of criminal activity with the intention of taking the evidence to the police. *Id.* Senator Hart's comments, however, do not directly address the question of what Title III requires if the private participant monitor had an unlawful purpose when taping, and therefore violated section 2511(2)(d), but later turned the evidence over to the police.

Apart from the legislative history of sections 2511(2)(d) and 2515, the general legislative history to Title III states that "the perpetrator must be denied the fruits of his unlawful actions." SENATE REPORT, *supra* note 1, at 2156. Furthermore, at a congressional hearing discussing private participant monitoring, one member of Congress stated that the sanction against unlawful private participant monitoring should be limited to civil remedies and the exclusion of any evidence brought by the procurer of the unlawful recording. 114 CONG. REC. 14,477 (1968). This general legislative history indicates that Congress was particularly concerned about preventing unlawful procurers from using the fruits of their acts. Unfortunately, the legislative history does not conclusively settle the innocent recipient question.

[351] United States v. Vest, 813 F.2d 477, 481 (1st Cir. 1987); United States v. Phillips, 540 F.2d 319, 327 n.5 (8th Cir.), *cert. denied*, 429 U.S. 1000 (1976).

[352] *See supra* note 330.

[353] *See* SENATE REPORT, *supra* note 1, at 2184–85; *see also Vest*, 813 F.2d at 480–81.

[354] SENATE REPORT, *supra* note 1, at 2184–85.

[355] *Vest*, 813 F.2d at 481.

[356] *See* United States v. Giordano, 416 U.S. 505, 527 (1974).

[357] Arguably, suppression would prevent the courts from becoming "partners to illegal conduct," which is sometimes considered a third purpose underlying section 2515. *See* Gelbard v. United States, 408 U.S. 41, 51 (1972).

cently received the evidence, then suppression would not further the deterrent purpose of section 2515.[338] The wrongdoer in these circumstances is a private person, not the government. By penalizing the prosecution, a court would comply with the literal mandate of section 2515, but would not deter anyone from violating Title III. Therefore, because suppression would further only one purpose of section 2515, courts should require a defendant to demonstrate a material privacy interest before suppressing the evidence.

Applying Title III to protect personal privacy presents analytical problems because privacy is a term that is susceptible of many interpretations.[339] In addition, neither Title III nor its legislative history provides a meaningful definition of privacy. Simply referring to Title III's expressed concern for the protection of individual privacy does not resolve the issue.[340]

The privacy that Congress intended sections 2511(2)(d) and 2515 to protect cannot be the privacy that *Katz* protects pursuant to the fourth amendment.[341] Each willing participant to a conversation takes the risk that another participant may record the conversation and turn over the evidence to the police.[342] Thus, divulging that evidence at trial does not violate the defendant's fourth amendment privacy right.[343]

The privacy right that Congress intended sections 2511(2)(d) and 2515 to protect must be a privacy concept other than what *Katz* protects. One noted commentator has defined privacy as the right to control public disclosure of personal information.[344] Disclosure at trial of the contents of a communication intercepted without a person's consent undoubtedly intrudes on this concept of privacy. The right to control public disclosure of personal information, however, is not absolute. Courts frequently have subordinated this privacy right to the public's need to prosecute criminals.[345] Furthermore, Congress enacted Title III in part to provide law enforcement personnel with the tools to obtain probative evidence to prosecute criminals more successfully.[346] That the police obtain the evidence inadvertently, rather than from their own authorized wiretap, should not vitiate this stated purpose of combatting crime. In fact, section 2511(2)(c), which authorizes participant monitoring by persons under color of law, demonstrates a congressional intent to use evidence obtained by participant monitoring. Literal application of Title III when the prosecution is the innocent recipient of the evidence, absent the defendant demonstrating a privacy right in addition to his or her right to control public disclosure of personal information, would not promote Title III's overall purposes. In effect, a court in many instances would allow a criminal to go free because a private

---

[338] *See Vest*, 813 F.2d at 480.

[339] For example, "privacy" could refer to the fourth amendment reasonable expectation of privacy as set forth in *Katz*. Or, privacy may refer to the privacy rights found in the penumbra of the bill of rights by the majority in Griswold v. Connecticut, 381 U.S. 479, 484 (1965). Alternatively, privacy may mean the right to control the disclosure of personal information. A. WESTIN, PRIVACY AND FREEDOM 67–132 (1967).

[340] *See* United States v. Kahn, 415 U.S. 143, 151 (1974).

[341] *See* United States v. White, 401 U.S. 745, 749–53 (1971). *See generally* Middleton, *Journalists and Tape Recorders: Does Participant Monitoring Invade Privacy?*, 2 COMM/ENT L.J. 287 (1979).

[342] *White*, 401 U.S. at 749–53.

[343] *Id.*

[344] A. WESTIN, *supra* note 339, ch.2. *See generally* Comment, *Investigations by Secret Agents*, 45 WASH. L. REV. 785, 790–94 (1970).

[345] *See, e.g.*, United States v. Liddy, 354 F. Supp. 217, 221 (D.D.C. 1973).

[346] SENATE REPORT, *supra* note 1, at 2177.

citizen — the unlawful private monitor — has blundered.[347] To promote Title III's overall purposes in innocent recipient cases, therefore, courts should require the defendant to demonstrate a material privacy right — one distinct from and in addition to the right to control disclosure of personal information.[348]

Courts should consider several factors to determine whether disclosure would harm a material privacy right of the defendant. The subject matter of the conversation should be an important factor.[349] For instance, conversations concerning criminal activity should receive minimal privacy protection.[350] In *United States v. Traficant*, the Federal District Court for the Northern District of Ohio concluded that defendants do not have a legitimate privacy interest in conversations concerning criminal activities.[351] Conversations disclosing intimate or embarrassing details in a person's life, or trade or business secrets, however, deserve more protection.[352]

The amount of material to be disclosed should also be a relevant factor.[353] Generally, relatively small disclosures cause less harm than more extensive ones. Courts therefore should also consider the quantity of evidence to be disclosed at trial in determining the nature of the defendant's privacy interest.

A third factor for the courts to consider is the objective of the unlawful interception.[354] If the interceptor monitored the conversation for the purpose of harming the defendant, then a serious privacy right of the defendant is at stake.[355] If the interceptor monitored for such other unlawful purposes as furthering a criminal conspiracy[356] or harming a person other than the defendant, however, the defendant's privacy interest diminishes.[357]

Admitting the evidence against the defendant, though contrary to Title III's language, would not undermine its provisions. Successfully prosecuting the defendant will further Title III's stated purpose of fighting crime. In addition, the defendant would still have a civil claim for damages against the interceptor pursuant to section 2520. Recovery through a civil claim will compensate the defendant for any injury caused by the interception. Interceptors are also criminally liable for violating section 2511(2)(d). The possibility of a civil suit and a criminal prosecution should deter interceptors from

---

[347] *Cf.* People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926) (under the exclusionary rule, "[t]he criminal is to go free because the constable has blundered.").

[348] *See* United States v. Rutherford, 442 U.S. 544, 551–52 (1979) (courts should construe statutes in accord with the policy of the whole enactment).

[349] *See* Benford v. ABC, Inc., 502 F. Supp. 1159, 1162 (D. Md. 1980), *aff'd*, 661 F.2d 917 (4th Cir.), *cert. denied*, 454 U.S. 1060 (1981); *see also* Comment, *supra* note 58, at 507–08.

[350] *See* United States v. White, 401 U.S. 745, 753 (1971); United States v. Traficant, 558 F. Supp. 996, 1002 (N.D. Ohio 1983) (dictum).

[351] *Traficant*, 558 F. Supp. at 1002.

[352] *See* Greenawalt, *supra* note 6, at 225.

[353] *See id.*

[354] *See generally* Meredith v. Gavin, 446 F.2d 794, 799 (8th Cir. 1971).

[355] *See id.*

[356] The trial court found this type of unlawful purpose in United States v. Vest, 639 F. Supp. 899, 908 (D. Mass. 1986).

[357] Although Congress certainly may want to limit these other unlawful interceptions, and provide for their prosecution, they do not invade the nonconsenting person's "privacy" any more than does intercepting for a lawful purpose. *Cf.* People v. Hopkins, 93 Misc. 2d 501, 504–07, 402 N.Y.S.2d 914, 916–17 (Sup. Ct. 1978) (nonconsenting party has no standing to suppress tapes made in violation of section 2511(2)(d) where the purpose of the interception was to harm a person other than the nonconsenting party).

violating Title III. Consequently, admitting the evidence against the defendant where disclosure does not invade a material privacy interest, in combination with the possibility of criminal and civil actions, would further Title III's overall purposes more than would suppressing the evidence.[358]

This note has discussed two different tests: a totality of the circumstances test for determining what constitutes an "oral communication," and a "material privacy right" test to determine when a court should allow an innocent recipient to use evidence obtained unlawfully. The first test suggests factors to analyze a person's reasonable expectations at the time of an interception, whereas the second test suggests factors to analyze the extent of the privacy invasion caused by introducing evidence at trial. Courts should construe the first test liberally. Persons should be able to avail themselves of Title III's provisions. A narrow construction would frustrate Title III's purposes by preventing both the government and private persons from using it. The second test, however, should be construed more narrowly. Punishing the prosecution, and thus society, for a private citizen's wrong is unjustified, especially in light of section 2511(2)(c), Title III's exception for governmental participant monitoring, and the availability of other remedies for the victim of the unlawful interception.

This note's framework attempts to strike the appropriate balance between Title III's conflicting purposes. At times, the framework rejects a literal interpretation of the statute when such an interpretation would not further Title III's purposes. By applying a common framework, such as the one this note suggests, courts may be able to reach decisions that are not only more consistent with each other, but also more consistent with Title III's purposes.

B. *Applying the Framework to* United States v. Underhill *and* United States v. Vest

In *United States v. Underhill*, the Court of Appeals for the Sixth Circuit denied the defendants' motion to suppress tape recordings of telephone conversations made to further their gambling operation.[359] The court held that those who intercept wire communications, and their co-conspirators, waive any right to privacy that Title III was intended to protect. The *Underhill* court agreed with the defendants that literal application of Title III required suppression.[360] Nevertheless, the court of appeals ruled that interceptors waive any right of privacy protected by Title III.[361] The court also held that, because a co-conspirator is bound by the interceptors' acts in furthering the conspiracy, co-conspirators also waive any right to privacy in communication intercepted to further their conspiracy.[362]

Had the *Underhill* court applied this note's framework to the defendant-interceptors, it would have reached the same result.[363] First, the intercepted telephone calls meet the

---

[358] *See* Fishman, *supra* note 143, at 76–77 (the proper course of action in the case of unlawful private interceptions is to prosecute the interceptor, grant the nonconsenting party a civil cause of action against the interceptor, and allow the government to use the evidence to prosecute the nonconsenting party).

[359] 813 F.2d at 112.

[360] *Id.* at 111.

[361] *Id.* at 112.

[362] *Id.*

[363] This framework's response to the problem posed by the interceptors seeking to suppress derives from the *Underhill* court's analysis.

statutory definition of a wire communication.[364] In the next step of the framework, a court examines the relationship among the defendant, the proponent of the evidence and the intercepted communication. Because the *Underhill* defendants were also the interceptors, they should not be permitted to use Title III's suppression provision to shield themselves from the consequences of their own acts.[365] Suppression under these circumstances would undermine, rather than further the purposes of Title III.[366]

With respect to the defendant co-conspirator, applying this framework suggests the same result as the *Underhill* court, although the analysis differs slightly from the court's. As above, the intercepted telephone calls meet the statutory definition of a wire communication.[367] Furthermore, in this case, neither the defendant nor the proponent of the evidence was the interceptor. Therefore, the court should suppress the evidence only when disclosure at trial would harm a material privacy interest of the defendant.

Disclosure would harm no such interest in this case. The conversations concerned gambling activities.[368] Conversations about such criminal activities deserve little privacy protection. In addition, the interceptors did not intend to harm the defendant.[369] On the contrary, the purpose of intercepting the telephone calls was to further the gambling conspiracy of which all the *Underhill* defendants were a part.[370] Therefore, after considering the factors that might comprise a legitimate privacy interest distinct from merely controlling the public disclosure of personal information, a court should conclude that the co-conspirator did not have a material privacy right that disclosure at trial would harm.[371]

In *United States v. Vest*, the Court of Appeals for the First Circuit held that the prosecution could not use in its case-in-chief evidence from a tape recording made by the defendant Vest's co-conspirator.[372] The trial court held that, because the defendant intercepted the communication for the purpose of furthering a criminal conspiracy, the interception violated section 2511(2)(d).[373] The appeals court held, therefore, that section 2515 warranted suppressing the evidence.[374] The court of appeals conceded that suppression would not further the deterrent aspect of section 2515.[375] The court nevertheless held that suppression was necessary to protect the defendant's privacy right.[376]

Applying this note's framework to the facts in *Vest* would result in a different decision. First, applying the totality of the circumstances test to the conversation between

---

[364] 18 U.S.C. § 2510(1) (1982 & Supp. IV 1986). The statute's definition of a "wire communication" does not contain any express requirement that the person have a justifiable expectation that his or her telephone call is not subject to interception. *See id.* § 2510(1). Had the definition contained such an expectation, any interceptor would certainly fail to meet it because a person who intercepts his or her own conversation does not have any such expectation.

[365] *See Underhill*, 813 F.2d at 112.

[366] *See id.*

[367] *See* 18 U.S.C. § 2510(1) (1982 & Supp. IV 1986).

[368] *See Underhill*, 813 F.2d at 107–08.

[369] *See id.*

[370] *See id.*

[371] The *Underhill* court reached the same result using conspiracy principles from Pinkerton v. United States, 328 U.S. 640, 646–48 (1946). The *Underhill* court held that co-conspirators are bound by interceptors' acts that furthered the conspiracy. 813 F.2d at 112.

[372] 813 F.2d 477, 481, 484 (1st Cir. 1987).

[373] 639 F. Supp. 899, 908 (D. Mass. 1986).

[374] *Vest*, 813 F.2d at 481.

[375] *Id.* at 480.

[376] *Id.* at 481.

Vest and Waters suggests that the conversation did not meet the statutory definition of an oral communication.[377] Even assuming that the conversation meets the statutory definition, disclosure at trial would not harm any material privacy right of the defendant.

A court applying the totality of the circumstances test should conclude that Vest could not justifiably expect that his conversation with Waters was free from interception. The conversation between Vest and Waters occurred at Waters's office.[378] A co-conspirator's office is not a place in which Vest reasonably should expect much privacy.[379] In addition, Vest and Waters were discussing their on-going conspiracy to "fix" Waters's criminal trial.[380] They were not discussing intimate, noncriminal matters. Consequently, the subject matter of their conversation should not receive much privacy protection. Finally, Waters and Vest were not intimate friends. Vest, a police officer, and Waters, a person under indictment for shooting another police officer, were co-conspirators.[381] Waters had given Vest $35,000 at this meeting.[382] That Waters made a tape of their conversation to ensure that Vest delivered the money to Tarantino is not at all surprising. Therefore, the facts and circumstances surrounding Vest and Waters's conversation suggest that any expectation Vest may have had that his conversation with Waters was not subject to interception was unjustified.[383]

Even if the conversation between Vest and Waters were to meet the statutory definition of an oral communication, the *Vest* court should have denied the motion to suppress. This was a case in which neither the defendant nor the proponent of the evidence was the interceptor. Therefore, suppression is warranted only when disclosure at trial would harm a material privacy right of Vest. After considering the factors that indicate when disclosure would harm a legitimate privacy right — the subject of the conversation, the amount to be disclosed, and the object of the interceptor's unlawful purpose — a court should conclude that disclosure would not have harmed such a privacy right in this case.

In the recording, Vest discussed ongoing criminal activity in which he was participating, not intimate or embarrassing personal facts, or trade or business secrets.[384] In addition, although the decision does not address the issue of how much of the tape would be disclosed, because this was a perjury prosecution, only a small disclosure was likely. Finally, the *Vest* trial court found that Waters's purpose in taping was to further the conspiracy.[385] Waters's motive, according to the district court, was not to harm Vest.[386] Disclosure would not, therefore, have harmed a material privacy right of Vest's.

Underhill and *Vest* represent two federal circuit courts' most recent interpretations of Title III's suppression provision in cases involving section 2511(2)(d) violations. Both

---

[377] See *supra* notes 288–98 and accompanying text for the development of the totality of the circumstances test.

[378] 813 F.2d at 479.

[379] *See* Alderman v. United States, 394 U.S. 165, 179 n.11 (1969); *see also* Fishman, *supra* note 143, at 57 (a person's expectation of privacy is not reasonable when he or she is on a criminal associate's premises and that criminal associate has consented to the interception).

[380] *Vest*, 813 F.2d at 479.

[381] *See Vest*, 813 F.2d at 479.

[382] *Id.*

[383] *See* Benford v. ABC, Inc., 502 F. Supp. 1159, 1162 (D. Md. 1980), *aff'd*, 661 F.2d 917 (4th Cir.), *cert. denied*, 454 U.S. 1060 (1981).

[384] *See Vest*, 813 F.2d at 479.

[385] *Vest*, 639 F. Supp. 899, 908 (D. Mass. 1986).

[386] *See id.*

courts looked beyond the statutory language in order, they claimed, to reach decisions that would further Title III's stated objectives. The *Underhill* court correctly rejected an unlawful interceptor's attempts to use Title III to shield himself from the consequences of other illegal activities. Suppression under the circumstances in *Underhill* would not have promoted any objective of Title III. In addition, the *Vest* court correctly rejected the bright line innocent recipient exception. Neither the words of the statute nor its legislative history warrant reading such a broad exception into Title III. Nevertheless, suppression must further some stated purpose of Title III in order to be justified. Suppression merely to comply with Title III's language, absent an identifiable privacy interest of the nonconsenting participant, is not consistent with sound statutory interpretation. Had the *Vest* court more closely examined the substance of the defendant's privacy interest, it would have found that the defendant did not have a material privacy interest at stake, and denied the motion to suppress.

Conclusion

The abuse of eavesdropping, wiretapping and other forms of electronic surveillance is a pervasive problem in modern society. Congress enacted Title III to restrict the use of electronic surveillance to those situations in which law enforcement officials comply with strict procedures, and to certain types of participant monitoring. In particular, section 2511(2)(d), the first federal law in this area, prohibits private participant monitoring with an unlawful purpose. Because Title III also has an express exclusionary provision, litigants frequently attempt to exclude evidence on the grounds that it derives from an unlawful private participant monitoring.

In part because Congress did not draft section 2511(2)(d) to fit coherently within the Title III structure, courts have not yet developed a consistent framework to deal with these problems. Although section 2511(2)(d)'s precise meaning is unclear, courts should not resolve difficult issues involving private participant monitoring simply by referring to Title III's expressed concern for protecting privacy. Only those persons with a genuine privacy interest should be allowed to use Title III to suppress evidence. In addition, courts should allow those who innocently obtain evidence derived from violations of section 2511(2)(d) to use the evidence unless such use would harm a privacy right of the nonconsenting party over and above the right to control the public disclosure of personal information. By following these suggestions, courts will be able to construe Title III in harmony with both its purposes: protecting privacy and combatting crime.

Thomas A. Knowlton