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Should "Clean Hands" Protect the Government Against § 2515 Suppression Under Title III of the Omnibus Crime Control and Safe Streets Act of 1968?

Francis Marion Hamilton, III

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I. Introduction

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Title III)[1] regulates wire and oral interceptions made by both private

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1. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 802,

individuals and government agents.[2] Essentially, Title III prohibits all wiretapping and the disclosure of information intercepted by wiretapping except that which is specifically authorized or exempted by the statute.[3]

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82 Stat. 197, 211 (1968) (codified at 18 U.S.C. §§ 2510-2520 (1994)).

2. 18 U.S.C. § 2511 (1994). An "interception" occurs under Title III upon "the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device." *Id.* § 2510(4). "'Wire communication' means any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception " *Id.* § 2510(1). "'Oral communication' means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but such term does not include any electronic communication." *Id.* § 2510(2). Under the 1986 amendments to Title III, interceptions of "electronic communications" are also prohibited. *Id.* § 2511(1)(a). With a few exceptions, "'electronic surveillance' means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted by a wire, radio, electromagnetic, photoelectronic, or photooptical system that affects interstate or foreign commerce." *Id.* § 2510(12).

3. *See id.* § 2511(1). Section 2511(1) states:

> (1) Except as otherwise specifically provided in this chapter any person who —
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> (a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;
>
> (b) intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication
>
> (c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;
>
> (d) intentionally uses, or endeavors to use, the contents of any wire, oral or electric communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;
>
> shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

Id., *see also infra* note 27 (enumerating exceptions to § 2511(1)'s general ban on wiretapping). For the two most important exceptions to Title III, see *infra* notes 28-29 and accompanying text. For discussions detailing the structure and organization of Title III, see Thomas W Jerry, Note, *The End of the Line?* In re Motion to Unseal Electronic Surveillance Evidence: *Limiting Private Civil RICO Litigants' Access to Government Wiretaps*, 38 ST. LOUIS U. L.J. 769, 776-78 (1994) and Thomas M. Smith, Comment, *The Suppression Sanction Under the Electronic Communications Privacy Act for Violations of the Private One-Party Consent Exception*, 34 VILL. L. REV 111, 118-29 (1989).

Section 2515 operates as an enforcement mechanism for the statute and suppresses the contents of any communication intercepted in violation of Title III.[4] Despite the expressly comprehensive scope of § 2515, however, courts have developed exceptions to Title III's suppression provision.[5] Recently, a new exception to § 2515 suppression has caused a split in the courts of appeals. The Courts of Appeals for the First and Sixth Circuits differ on whether courts may, in criminal prosecutions, receive illegally intercepted communications in evidence when the government is the innocent recipient of such communications.[6] The Sixth Circuit refers to this new exception to § 2515 as the "clean hands" exception.[7] This Note addresses the legitimacy of this newfound exception. Part II summarizes the legislative history of the pertinent Title III provisions.[8] Part III explains the clean hands exception.[9] Part IV critiques the reasoning of the Sixth Circuit's decision in *United States v. Murdock*.[10] Part V analyzes the deter-

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4. 18 U.S.C. § 2515. Section 2515 states in full:

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

Id. For the procedure by which the suppression provision is invoked, see 18 U.S.C. § 2518(10)(a). Section 2518(10)(a) provides in relevant part that "[a]ny aggrieved person may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter or evidence derived therefrom" if the communication is made in violation of Title III. *Id.* "'[A]ggrieved person' means a person who was a party to any intercepted wire, oral, or electronic communication or a person against whom the interception was directed." *Id.* § 2510(11).

5. *See* United States v. Underhill, 813 F.2d 105, 112 (6th Cir. 1987) (stating that perpetrators of illegal interception could not benefit from suppression protection); United States v. Caron, 474 F.2d 506, 509 (5th Cir. 1973) (concluding that illegally intercepted communications could be used for impeachment purposes); *see also infra* notes 112-33 and accompanying text (discussing *Underhill* decision); *infra* note 44 and accompanying text (examining *Caron* decision).

6. *Compare* United States v. Murdock, 63 F.3d 1391, 1404 (6th Cir. 1995) (affirming creation of "clean hands" exception to Title III suppression), *cert. denied*, 116 S. Ct. 1672 (1996) *with* United States v. Vest, 813 F.2d 477, 483 (1st Cir. 1987) (refusing to embrace clean hands exception to Title III suppression).

7. *Murdock*, 63 F.3d at 1404.

8. *See infra* notes 13-46 and accompanying text (summarizing legislative history of pertinent Title III provisions).

9. *See infra* notes 47-73 and accompanying text (explaining clean hands exception espoused in *Murdock*).

10. *See infra* notes 74-235 and accompanying text (critiquing reasoning of Sixth

rence-based argument in favor of the clean hands exception.[11] Part VI concludes that the Sixth Circuit erred in adopting a clean hands exception to Title III's exclusionary rule.[12]

II. A Summary of Title III's Legislative History

Prior to Title III, the severely criticized[13] Federal Communications Act of 1934 (FCA) governed the use of electronic surveillance.[14] Under the FCA, private persons could ignore the statute's restrictions because the restrictions only applied to governmental interceptions.[15] However, law enforcement agents could not employ electronic surveillance to investigate and prosecute even the most serious of crimes.[16] In addition to these statutory limitations, the Supreme Court, through its decisions in *Katz v. United States*[17] and *Berger v. New York*,[18] also created restrictions on the use of electronic surveillance.

Circuit's decision in *Murdock*).

11. *See infra* notes 236-87 and accompanying text (analyzing deterrence-based argument in favor of clean hands exception).

12. *See infra* notes 287-95 and accompanying text (concluding that Sixth Circuit erred in adopting clean hands exception to Title III's exclusionary rule).

13. *See* 1 JAMES G. CARR, THE LAW OF ELECTRONIC SURVEILLANCE § 2.1 (2d ed. 1986) (explaining that FCA was "worst of all possible solutions" to wiretapping problem).

14. 47 U.S.C.A. § 605 (West 1962 & Supp. 1988) (amended by Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 802, 82 Stat. 197, 211 (1968)) (codified at 18 U.S.C. §§ 2510-2520 (1994)) (inserting in introductory clause "[e]xcept as authorized by [Title III]"). The FCA provides in part that:

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

Id. After the enactment of Title III, Section 605 of the FCA was amended to supply all of the necessary restrictions on the interception of wire and oral communications not referenced in Title III. *Id.* For a discussion detailing the legislative history of Title III as well as the developments in the area of electronic surveillance prior to Title III, see 1 CARR, *supra* note 13, §§ 1.1-2.5. *See also* Jerry, *supra* note 3, at 776-78 (discussing Title III's legislative history); Smith, *supra* note 3, at 118-29 (same).

15. *See* 1 CARR, *supra* note 13, § 2.1.

16. *Id.* Title III remedied the FCA's flaw of not permitting law enforcement agents' use of electronic surveillance in the investigation of serious crimes by specifically identifying which crimes were subject to surveillance. *See* 18 U.S.C. § 2516 (1994) (enumerating exclusive list of crimes that law enforcement officers may investigate with Title III surveillance).

17. 389 U.S. 347 (1967).

18. 388 U.S. 41 (1967).

In *Katz*, the Supreme Court held that agents of the Federal Bureau of Investigation (FBI) violated the Fourth Amendment when they failed to obtain a warrant before using an electronic listening and recording device to intercept telephone calls made from a public telephone booth.[19] The *Katz* Court abandoned the traditional rule that Fourth Amendment violations only occur upon the government's physical trespass into a constitutionally protected area and concluded that, regardless of the individual's location, the Fourth Amendment protects the individual's reasonable expectation of privacy against unauthorized government intrusion.[20]

In *Berger*, the Supreme Court struck down New York's extremely permissive electronic surveillance statute.[21] The statute under review did

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19. *See* Katz v. United States, 389 U.S. 347, 359 (1967) (holding that use of listening and recording device attached to outside of public telephone booth requires warrant). In *Katz*, the Supreme Court considered whether the use of a listening and recording device attached to the outside of a public telephone booth constituted a search within the meaning of the Fourth Amendment. *Id.* at 349-53. FBI agents recorded the petitioner's telephone conversations by affixing a recording device to the outside of a public telephone booth from which the petitioner placed calls. *Id.* at 348. The FBI agents believed that the petitioner was using the public telephone to transmit gambling information. *Id.* at 359. The telephone recordings led to the petitioner's conviction of transmitting wagering information by telephone across state lines in violation of 18 U.S.C. § 1084. *Id.* The *Katz* Court concluded that the FBI's interception constituted a Fourth Amendment search. *Id.* at 353. In reaching this decision, the Supreme Court revolutionized Fourth Amendment thinking. According to the *Katz* Court, an individual's right to Fourth Amendment protection does not turn on the presence or absence of a physical trespass into a particular area. *Id.* Instead, Fourth Amendment protection depends upon an individual's reasonable expectation of privacy. *Id.* As the Court explained, the Fourth Amendment "protects people, not places." *Id.* at 351. Therefore, the *Katz* Court reasoned that the right to Fourth Amendment protection follows the individual into areas accessible by the public. *Id.* Applying these principles, the *Katz* Court decided that the petitioner possessed a justified expectation that his conversations behind the closed door of the public telephone booth would not be subject to unauthorized government intrusion. *Id.* at 352-53. Consequently, the *Katz* Court held that the FBI agents violated the Fourth Amendment by not obtaining a warrant before using the listening and recording device to intercept the petitioner's telephone calls. *Id.* at 359.

20. *Id.* at 352-53.

21. *See* Berger v. New York, 388 U.S. 41, 44 (1967) (holding that New York's electronic surveillance statute violated Fourth Amendment). In *Berger*, the Supreme Court considered whether New York's permissive eavesdropping statute violated the Fourth Amendment as incorporated through the Fourteenth Amendment. *Id.* at 43-44. New York state investigators received complaints that the New York State Liquor Authority was accepting bribes for liquor licenses. *Id.* at 44. In response to this and other complaints, New York authorities sent an undercover agent, wired with a recording device, to the Liquor Authority. *Id.* An employee informed the agent that the cost of a liquor license was $10,000 and told the agent to contact the employer's attorney, Harry Neyer. *Id.* During a later conversation, Neyer confirmed the price for the license. *Id.* Based on the conversations recorded by the agent, New York authorities obtained authorization to install a

not require state law enforcement agents to restrict their wire surveillance to conversations relevant to the alleged criminal activity.[22] The *Berger* Court concluded that the New York statute violated the particularity requirement of the Fourth Amendment because it authorized law enforcement agents to use electronic surveillance indiscriminately.[23] Thus, after *Berger* and *Katz*, to satisfy constitutional scrutiny the government's use of a wiretap had to be authorized by warrant, and the warrant had to order the agents to restrict their wire interceptions to specific conversations.

In response to the FCA's inherent deficiencies and to the *Berger* and *Katz* decisions, Congress passed Title III.[24] Generally, Title III serves two purposes: the need to protect individual privacy by prohibiting unwarranted

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recording device in Neyer's office. *Id.* at 45. The recording device revealed that petitioner Berger was part of a conspiracy involving the issuance of liquor licenses to two New York City clubs. *Id.* Berger argued that the recordings should be suppressed because the statute that authorized the state to implant the recording device violated the Fourth Amendment. *Id.* The Supreme Court agreed with Berger and held that the New York statute violated the Fourth Amendment. *Id.* at 58-60. The Court initially concluded that the Fourteenth Amendment protects individuals against state violations of the Fourth Amendment. *Id.* at 53. The Court then held that the New York statute violated the particularity requirement of the Fourth Amendment because it authorized the indiscriminate use of electronic recording devices by law enforcement personnel. *Id.* at 58-60. The statute did not require the agents to restrict their listening and recording to conversations relevant to the crime that the agents were investigating. *Id.* at 59. Thus, the statute essentially authorized state agents to engage in a "general search" of all conversations in Neyer's office. *Id.* As the *Berger* Court explained, the Fourth Amendment forbids general searches. *Id.* at 49-50.

22. *Id.* at 59.

23. *Id.* at 58-60. Title III attempts to satisfy the Fourth Amendment's particularity requirement in § 2518(5). 18 U.S.C. § 2518(5) (1994). This provision provides in relevant part that "[e]very order and extension thereof shall contain a provision that the authorization to intercept . . . shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under [Title III]." *Id.*

24. *See* Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90-351, § 802, 82 Stat. 197, 211 (1968) (codified at 18 U.S.C. §§ 2510-2520 (1994)) (authorizing law enforcement agents to employ wiretaps only in certain criminal investigations and generally prohibiting private wire interceptions); *see also* Omnibus Crime Control and Safe Streets Act of 1968, S. REP. NO. 90-1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2177 (indicating that Title III was response to deficiencies in then existing law). Section 801(b) of Title III states that:

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

Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90-351, § 801(b), 82 Stat. 197, 211 (1968).

electronic communication interceptions[25] and the need to equip law enforcement officials with a weapon necessary to battle organized crime.[26] In balancing these competing interests, Congress created a general ban on the interception of communications, with two major exceptions.[27] First, a court may authorize law enforcement agents to intercept certain communications.[28] Second, a private individual may intercept a communication to which he is a party as long as the interception is not for an "unlawful" or "tortious" purpose.[29] To enforce Title III's general prohibition and to

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25. *See* S. REP. NO. 90-1097, at 2153-58 (describing Title III goals of privacy protection and law enforcement); *see also* Gelbard v. United States, 408 U.S. 41, 47-50 (1972) (stating that protection of privacy overrode congressional concern in enacting Title III); Newcomb v. Ingle, 827 F.2d 675, 678 (10th Cir. 1987) (citing *Gelbard*, 408 U.S. at 48) (same); United States v. Vest, 813 F.2d 477, 481 (1st Cir. 1987) (concluding that privacy was major concern in enactment of Title III); United States v. Underhill, 813 F.2d 105, 112 (6th Cir. 1987) (stating that Congress did not intend to protect individuals who recorded their own conversations); United States v. Phillips, 540 F.2d 319, 324 (8th Cir. 1976) (concluding that Title III was intended to balance need to protect individuals from intrusive electronic surveillance with need to preserve law enforcement tools to fight organized crime); United States v. Traficant, 558 F. Supp. 996, 1001 (N.D. Ohio 1983) (indicating that Title III's legislative history shows intent to create balance between protection of privacy and equipping law enforcement officials with modern technology).

26. S. REP. NO. 90-1097, at 2177. Section 801(c) of Title III "recognizes the extensive use made by organized crime of wire and oral communications." *Id.* Section 801(c) also acknowledges that "the ability to intercept such communications is indispensable in the evidence gathering process in the administration of justice in the area of organized crime." *Id.*

27. *See* 18 U.S.C. §§ 2511(2)(d), 2516 (excepting authorized governmental interceptions and private interceptions when private interceptor is party to intercepted communication). Additional exceptions to Title III include: (1) a communication carrier intercepting communications in the normal course of employment, *id.* § 2511(2)(a); (2) an agent of the Federal Communications Commission intercepting a communication in the normal course of employment, *id.* § 2511(2)(b); (3) a person acting under color of law intercepting a communication if he is a party to the communication and has given his prior consent, *id.* § 2511(2)(c); (4) the acquisition of foreign intelligence information, which is governed by the Foreign Intelligence Surveillance Act of 1978, *id.* § 2511(2)(f); (5) the interception of electronic communications that are readily accessible to the general public, *id.* § 2511(2)(g); and (6) the use of a pen register or a trap and trace device, *id.* § 2511(2)(h).

28. *See id.* § 2511(2)(e). Section 2511(2)(e) exempts "an officer, employee or agent of the United States in the normal course of his official duty to conduct electronic surveillance." *Id.* Section 2516 enumerates the exclusive list of offenses that electronic interception may be used to combat. *Id.* § 2516.

29. *Id.* § 2511(2)(d). Section 2511(2)(d) allows for a private one-party consent exception and 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

ensure that clandestine surveillance is confined to the situations carved out by the statute, Congress criminalized the use of wire and oral communication interception by both private individuals and law enforcement agents in all circumstances that do not fit within a statutory exception,[30] and made such surveillance proper ground for a civil suit.[31] In addition, Congress included § 2515, a suppression provision, to ensure further compliance.[32] According to § 2515's plain language, the scope of the suppression provision extends to all violations of Title III, including violations perpetrated by private individuals.[33]

Although Title III suppression extends to private violations, the legislative history of § 2515 states that Congress did not intend to expand the scope of the suppression provision beyond then existing search and seizure law.[34] At the time Congress enacted Title III, the exclusionary rule for

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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.

30. *Id.* § 2511.

31. *Id.* § 2520. Title III provides for recovery of civil damages for any person whose "wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of [Title III]." *Id.* § 2520(a). Section 2520 further provides liquidated damages in the event actual damages cannot be shown. *Id.* § 2520(c). To recover under § 2520, the plaintiff must prove a violation of § 2511. *Id.* § 2511. Section 2511 prohibits an individual from intentionally intercepting or attempting to intercept wire or oral communications or intentionally disclosing or using the contents of wire or oral communications that the individual knows were procured in violation of Title III. *Id. See generally* Note, Wiretapping and Electronic Surveillance — Title III of the Crime Control Act of 1968, 23 RUTGERS L. REV. 319 (1969) (providing comprehensive discussion of Title III as originally enacted). For a discussion of private actions under Title III, see Bradford Frost Englander, *Fourth Circuit Review:* Statutes of Limitations and Private Actions Under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 41 WASH. & LEE L. REV. 493, 614-24 (1984). Additionally, Title III provides criminal penalties for those who violate the provisions of § 2511. *See* 18 U.S.C. § 2511(4) (1994).

32. 18 U.S.C. § 2515; *see supra* note 4 (providing full text of § 2515).

33. *See* 18 U.S.C. § 2515 (suppressing *any* interception if its disclosure would violate Title III); *id.* § 2511(1)(c) (prohibiting any disclosure of information if discloser knew or should have known that interceptor obtained information in violation of Title III); *id.* § 2511(1)(a) (prohibiting all private party interceptions except those exempted in statute); *see also supra* note 3 (providing full text of 18 U.S.C. § 2511(1)). Because § 2511(1)(c) makes it a Title III violation to disclose information obtained in violation of Title III, § 2515, by suppressing all interceptions the disclosure of which violates Title III, essentially operates to suppress all information obtained in violation of Title III.

34. *See* S. REP. NO. 90-1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2185. This portion of Title III's legislative history states:

Fourth Amendment violations operated to exclude unlawful governmental searches only.[35] According to the Supreme Court in 1968 and according to the Court now, private searches simply do not implicate the Fourth Amendment.[36] Nevertheless, because Title III prohibits private interceptions and because the plain language of § 2515 requires the suppression of all interceptions obtained in violation of Title III,[37] the suppression provision must necessarily operate to exclude evidence otherwise admissible under Fourth Amendment exclusionary jurisprudence.[38] Therefore, the plain language of § 2515 appears to conflict with its legislative history.

Given this inconsistency, it is not surprising that the scope of § 2515 suppression commonly arises as an issue in federal courts.[39] Questions primarily develop because the provision's overly broad language would, if taken literally, preclude the prosecution from introducing an illegal recording or any evidence obtained through the use of an illegal recording against

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> [Section 2515] must, of course, be read in light of [S]ection 2518 . . . which defines the class entitled to make a motion to suppress. It largely reflects existing law. It applies to suppress evidence directly or indirectly obtained in violation of the chapter. There is, however, no intention to change the attenuation rule. . . . Nor generally to press the scope of the suppression role beyond present search and seizure law.

Id. (citations omitted).

35. *See* Burdeau v. McDowell, 256 U.S. 465, 476 (1921) (holding that Fourth Amendment exclusionary rule limits government only and, therefore, evidence obtained by private illegal search need not be excluded from trial); *see also infra* notes 187-218 and accompanying text (discussing relationship between Fourth Amendment and private searches).

36. *See Burdeau*, 256 U.S. at 476 (concluding that Fourth Amendment does not protect individual against private search).

37. *See supra* note 33 (explaining why § 2515 essentially suppresses all interceptions obtained in violation of Title III).

38. 18 U.S.C. § 2515 (1994); *see supra* note 4 (providing full text of § 2515).

39. *See, e.g.*, Gelbard v. United States, 408 U.S. 41, 47 (1972) (holding that grand jury witnesses are entitled to invoke Title III's suppression provision in defending contempt charges brought against them for refusing to testify); United States v. Murdock, 63 F.3d 1391, 1404 (6th Cir. 1995) (refusing to suppress illegally intercepted communication under § 2515 because government was innocent recipient of evidence), *cert. denied*, 116 S. Ct. 1672 (1996); United States v. Vest, 813 F.2d 477, 484 (1st Cir. 1987) (suppressing illegally intercepted communication under § 2515 despite fact that government was innocent recipient of evidence); United States v. Underhill, 813 F.2d 105, 112 (6th Cir. 1987) (refusing to suppress illegally intercepted evidence when movant was perpetrator of illegal interception); Anthony v. United States, 667 F.2d 870, 880 (10th Cir. 1981) (concluding that defendant charged with illegal wiretapping is precluded from using information derived from illegally intercepted communications to impeach government witness); United States v. Caron, 474 F.2d 506, 509-10 (5th Cir. 1973) (allowing prosecution to use illegally intercepted information for impeachment purposes).

any "aggrieved person" for any purpose.[40] The plain language of the operative sections indicates that this broad interpretation of § 2515's scope would preclude the use of an illegal recording against its maker.[41] Notwithstanding the plain statutory language, courts have in certain circumstances utilized § 2515's legislative history to allow the introduction of recordings that § 2515 otherwise would suppress.[42] In *United States v. Caron*,[43] the Fifth Circuit concluded that illegally intercepted communications could be introduced into evidence for impeachment purposes.[44] In *United States v.*

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40. *See* 18 U.S.C. § 2515 (suppressing all interceptions obtained in violation of statute).

41. *Id.*; *see also* United States v. Underhill, 813 F.2d 105, 108 (6th Cir. 1987) (concluding that § 2515's language technically required suppression even though defendant had perpetrated interception for unlawful purpose).

42. *See Underhill*, 813 F.2d at 112 (stating that perpetrators of illegal interception could not benefit from suppression protection); United States v. Caron, 474 F.2d 506, 509 (5th Cir. 1973) (concluding that illegally intercepted communications could be used for impeachment purposes).

43. 474 F.2d 506 (5th Cir. 1973).

44. *See Caron*, 474 F.2d at 509-10 (concluding that Government could use intercepted tape recordings for impeachment purposes without proving that agents legally obtained recordings). In *Caron*, the Fifth Circuit considered whether the Government could use evidence that had been obtained by a wiretap for impeachment purposes without a prior determination by the trial court that the wiretap was lawful. *Id.* at 507. The United States charged Caron with two counts of perjury based upon Caron's denial of any previous bookmaking activity and Caron's denial of any relationship with Howard Gardner during federal grand jury proceedings. *Id.* After the prosecution's case in chief, Caron took the stand as the sole witness for the defense and admitted that he had made a mistake when questioned before the grand jury because he did in fact know Howard Gardner. *Id.* However, Caron continued to deny that he had engaged in any bookmaking activity. *Id.* at 508. During rebuttal, the Government sought to challenge Caron's credibility by offering several intercepted telephone conversations in which Caron discussed bookmaking activities. *Id.* The district court allowed the Government to use the tapes for impeachment purposes without a prior evidentiary hearing on the lawfulness of the Government's interception. *Id.* The jury found defendant guilty on both counts of perjury. *Id.* Defendant appealed to the Fifth Circuit on the basis that the district court committed reversible error by failing to determine the validity of the tapes before permitting prosecutors to use them for impeachment purposes. *Id.* On appeal, the Fifth Circuit affirmed the district court's decision. *Id.* at 510. The court of appeals relied primarily upon the Supreme Court's decision in *Walder v. United States*, 347 U.S. 62 (1954). In *Walder*, the Supreme Court reasoned that a defendant could not use the government's illegal method of obtaining evidence to shield himself "against contradiction of his untruths." *Walder*, 347 U.S. at 65. The Fifth Circuit then concluded that Title III's legislative history did not reflect congressional intent for the suppression provision to exceed the scope of present day search and seizure law. *Caron*, 474 F.2d at 510. Using this interpretation of Title III's legislative history along with *Walder*, the Fifth Circuit reasoned that even if the district court had concluded that the government illegally intercepted Caron's conversations, Title III did not require suppression of the interceptions. *Id.* Consequently,

Underhill,[45] the Sixth Circuit concluded that those who violate Title III by illegally intercepting communications cannot shield themselves from criminally incriminating information within the intercepted communications by invoking the protection of § 2515.[46] Part III of this Note introduces a new exception to Title III's suppression provision.

III. The Clean Hands Exception

In *United States v. Murdock*,[47] the United States Court of Appeals for the Sixth Circuit embraced the concept of a clean hands exception for the government's use of illegally intercepted wire or oral communications in criminal prosecutions when a state prosecutor is the innocent recipient of such information.[48] Harold D. Murdock, while serving as President of the Detroit School Board, became involved in a divorce action with his wife.[49] Mr. and Mrs. Murdock owned and operated a funeral home next to their residence.[50] Convinced that Mr. Murdock was engaged in inappropriate personal and business conduct, Mrs. Murdock recorded telephone calls to and from the funeral home on the business extension phones in her home.[51] After reviewing a particular recording some time later, Mrs. Murdock discovered that a local dairy company had bribed her husband in his capacity as President of the Detroit School Board.[52] Mrs. Murdock disclosed this information to the competing dairy company that had lost the milk contract.[53] The dairy company that lost the contract delivered the information to the local state prosecutor's office and a newspaper.[54] As a result of the newspaper's story, federal agents began an investigation that culminated in Mr. Murdock's federal indictment on tax evasion charges for failure to report the bribe as income.[55] Before trial, Mr. Murdock urged the court to dismiss the indictment or, in the alternative, to suppress the recorded

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the court of appeals upheld Caron's conviction. *Id.*

45. 813 F.2d 105 (6th Cir. 1986).

46. *See infra* notes 112-33 (detailing facts and holding of *Underhill*).

47. 63 F.3d 1391 (6th Cir. 1995).

48. *See* United States v. Murdock, 63 F.3d 1391, 1404 (6th Cir. 1995) (creating clean hands exception for prosecution's use of innocently received illegal interceptions), *cert. denied*, 116 S. Ct. 1672 (1996).

49. *Id.* at 1392.

50. *Id.*

51. *Id.*

52. *Id.* at 1393.

53. *Id.*

54. *Id.*

55. *Id.*

communications pursuant to the suppression provision of 18 U.S.C. § 2515.[56] The district court overruled Mr. Murdock's motion and found that the tape-recorded conversations fell within the telephone or business extension exemption of 18 U.S.C. § 2510(5)(a)(i) or, alternatively, that § 2515 suppression did not limit the prosecutor's use of illegally intercepted communications when the prosecutor played no part in the interception of the conversation.[57]

On appeal, the Sixth Circuit reversed in part and affirmed in part the district court's decision.[58] First, the court of appeals determined that § 2510(5)(a)(i) did not exempt Mrs. Murdock's recording.[59] The court then found a violation under § 2511.[60] Having found a violation under § 2511, the *Murdock* court was forced to consider the application of § 2515, Title III's suppression provision. The *Murdock* court first acknowledged the First Circuit's decision in *United States v. Vest*[61] and then summarily dismissed it.[62] Eight years earlier, the *Vest* court had expressly denied the application of a governmental clean hands exception in Title III cases.[63] Second, the *Murdock* court turned to *United States v. Underhill*[64] to support the proposition that the suppression provision of § 2515 does not absolutely exclude all illegally intercepted communications.[65] In *Underhill*, the Sixth Circuit held that the perpetrator of a Title III violation could not employ Title III's exclusionary provisions to protect himself against criminally incriminating information within the illegally intercepted communication.[66]

Next, the *Murdock* court looked to *United States v. Baranek*[67] to further support its decision.[68] In *Baranek*, the Sixth Circuit refused to suppress a recorded conversation that was obtained when officers, while executing an authorized wiretap of a telephone, recorded an extended

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56. *Id.*; *see supra* note 4 (providing full text of § 2515).
57. *Murdock*, 63 F.3d at 1393.
58. *Id.* at 1404.
59. *Id.* at 1400.
60. *Id.*
61. 813 F.2d 477 (1st Cir. 1987).
62. *Murdock*, 63 F.3d at 1400-01.
63. United States v. Vest, 813 F.2d 477, 481 (1st Cir. 1987).
64. 813 F.2d 105 (6th Cir. 1987).
65. *Murdock*, 63 F.3d at 1402.
66. United States v. Underhill, 813 F.2d 105, 111-12 (6th Cir. 1987).
67. 903 F.2d 1068 (6th Cir. 1990).
68. *See Murdock*, 63 F.3d at 1402.

nontelephonic conversation over the tapped line while the telephone receiver was inadvertently left off the hook.[69] The *Murdock* court employed the language of the *Baranek* court and reasoned that, like the officers in *Baranek*, the federal agents in *Murdock* simply got a "lucky break."[70] The *Murdock* court also analogized to Fourth Amendment exclusionary jurisprudence.[71] Specifically, the *Murdock* court stated that "[i]t is well established that evidence obtained by a private search is not subject to the Fourth Amendment exclusionary rule."[72] Using this Fourth Amendment principle, the *Murdock* court reasoned that because a private party with no connection to the prosecuting authority carried out the unlawful interception, the prosecutors had clean hands as the innocent recipient of such information and could legitimately use against Mr. Murdock the information illegally recorded by Mrs. Murdock.[73]

IV. A Critique of United States v. Murdock

A. Murdock*'s Attack of* Vest

The Sixth Circuit was not the first court of appeals to consider the clean hands exception to Title III. Eight years earlier in *United States v. Vest*,[74] the First Circuit examined the issue and expressly rejected any notion of a governmental clean hands exception for innocently received illegal interceptions.[75] In *United States v. Murdock*, the Sixth Circuit began its analysis of § 2515 by criticizing the reasoning of the First Circuit's decision in *United States v. Vest*.[76]

1. United States v. Vest

In *Vest*, the Government charged George H. Vest with perjury and attempted to introduce illegally recorded statements that incriminated Vest.[77] Originally, Jesse James Waters was charged with the shooting of a Boston

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69. United States v. Baranek, 903 F.2d 1068, 1072 (6th Cir. 1990); *see infra* notes 140-70 and accompanying text (discussing *Baranek* facts and holding).

70. *Murdock*, 63 F.3d at 1402 (quoting *Baranek*, 903 F.2d at 1072).

71. *Id.* at 1403.

72. *Id.* (citing United States v. Jacobsen, 466 U.S. 109 (1984)).

73. *Id.* at 1404.

74. 813 F.2d 477 (1st Cir. 1987).

75. United States v. Vest, 813 F.2d 477, 484 (1st Cir. 1987).

76. United States v. Murdock, 63 F.3d 1391, 1400 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 1672 (1996).

77. *Vest*, 813 F.2d at 479.

police detective.[78] Waters bribed an employee at the Boston police department in an effort to avoid imprisonment.[79] Vest agreed to serve as the conduit for the payments between Waters and the employee.[80] When delivering a particular payment to Vest, Waters electronically recorded the transaction and accompanying discussion without Vest's knowledge.[81] After his conviction and sentencing, Waters delivered the tape recording to the prosecutors.[82] While testifying before a grand jury, Vest denied that the voice on the tape recording was his own.[83] As a result, the United States prosecuted Vest for perjury.[84]

Because Waters allegedly recorded Vest's statements in violation of 18 U.S.C. §§ 2511(1)(a) and 2511(2)(d),[85] Vest moved to suppress the recording pursuant to 18 U.S.C. § 2515.[86] The district court granted Vest's motion.[87] On appeal, the Government argued that the First Circuit should adopt a clean hands exception to § 2515.[88] Specifically, the United States argued that § 2515 suppression does not apply when the government is merely the innocent recipient, rather than the procurer, of an illegally intercepted communication.[89] To support its position, the United States argued that the primary purpose of the exclusionary rule under § 2515 is to deter violations of Title III.[90] Accordingly, the prosecution claimed that suppressing the interception would serve no deterrent purpose because the government had not carried out the illegal interception of Vest's statement.[91]

2. Vest*'s Reliance on* United States v. Gelbard

In reaching its decision in *Vest*, the First Circuit relied on the findings of legislative intent in *Gelbard v. United States*[92] and, as a result, rejected

78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.* at 480.
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. 408 U.S. 41 (1972).

the Government's deterrence theory and refused to admit the illegal recording.[93] The *Gelbard* Court denied the Government the ability to use information obtained from an illegal wiretap when cross-examining a grand jury witness.[94] For the *Gelbard* Court, the overriding legislative intent within Title III was the protection of privacy.[95] Most importantly, the Court reasoned that an invasion of privacy does not cease upon the conclusion of an illegal interception, but continues with each subsequent disclosure.[96]

The *Vest* court adopted *Gelbard*'s understanding of the role of privacy protection in § 2515 problems.[97] The First Circuit then decided that the invasion of privacy that occurred through the disclosure of illegally intercepted communications was "not lessened by the circumstance that the disclosing party . . . [was] merely the innocent recipient of a communication

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93. United States v. Vest, 813 F.2d 477, 481 (1st Cir. 1987).

94. *See* Gelbard v. United States, 408 U.S. 41, 47 (1972) (holding that § 2515 operates to suppress illegally intercepted communications when such information is used to cross-examine grand jury witnesses). In *Gelbard*, the Supreme Court considered whether grand jury witnesses, in proceedings under 28 U.S.C. § 1826(a), were entitled to invoke Title III's suppression provision as a defense to contempt charges brought against them for refusing to testify. *Id.* at 43. In *Gelbard*, the petitioners refused to testify in certain grand jury proceedings because illegal interceptions of their conversations formed the basis of the Government's examination. *Id.* As a result of their refusal to testify, the petitioners were charged with civil contempt. *Id.* According to the *Gelbard* Court, the petitioners were victims of illegal governmental interceptions, and therefore, the disclosure of the contents of interceptions would be a violation of Title III under § 2511(1). *Id.* at 47. The Government intended to use this illegally intercepted information when questioning the petitioners before the grand jury. *Id.* at 45. In reaching its decision, the *Gelbard* Court first explained that under 28 U.S.C. § 1826(a), an individual who has "just cause" is immune from civil contempt charges for refusing to testify before a grand jury. *Id.* Accordingly, the Court addressed whether 18 U.S.C. § 2515, which suppresses information obtained in violation of Title III, can operate to provide "just cause" for the petitioners' refusal to testify. *Id.* For the Supreme Court, privacy protection was an "overriding congressional concern" in enacting Title III. *Id.* at 48. The Court reasoned that the invasion of privacy that Title III seeks to prohibit does not only occur during the unauthorized interception itself, but also continues when the interception is subsequently disclosed. *Id.* at 51-52. Following this reasoning, the Supreme Court concluded that grand jury questioning based on the illegally intercepted communication further invaded the petitioners' privacy beyond the original illegal interception. *Id.* at 47. Because Congress intended for § 2515 to limit such continuous invasions of privacy, the Court held that petitioners could "invoke the prohibition of § 2515 as a defense to contempt charges brought on the basis of their refusal to obey court orders to testify." *Id.*; *see also supra* notes 24-25 and accompanying text (describing Title III's goal of protecting privacy).

95. *Gelbard*, 408 U.S. at 48.

96. *Id.* at 51-52.

97. *Vest*, 813 F.2d at 481.

illegally intercepted by the guilty interceptor."[98] For the *Vest* court, this invasion of privacy was sufficient to warrant suppression under § 2515.[99]

3. *A Critique of* Murdock*'s Discussion of* Vest

The *Murdock* court contended that the *Vest* court misread and misapplied the *Gelbard* decision and, as a result, wrongly decided *Vest*.[100] Although the *Vest* court would apply *Gelbard*'s rationale in settings involving both private and governmental conduct, the *Murdock* court suggested that the scope of *Gelbard* is limited to governmental action.[101] This narrow reading of *Gelbard* by the *Murdock* court is countered both by *Gelbard*'s reasoning and the legislative history upon which *Gelbard* is based.[102] According to the *Gelbard* Court, the harm of the illegal interception — the invasion of privacy — does not depend upon the nature of the interceptor.[103] As *Vest* emphasized, the *Gelbard* Court concluded that the invasion of privacy that § 2515 is designed to prohibit is not over when an interception occurs.[104] Rather, the invasion continues and is compounded by disclosure in court or elsewhere.[105] The impact of the subsequent disclosure is not mitigated by the fact that a party different from the original interceptor is

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98. *Id.*

99. *Id.* at 484.

100. United States v. Murdock, 63 F.3d 1391, 1401 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 1672 (1996).

101. *See id.* (stating that "point of *Gelbard* was that *if* the government was eventually shown to have illegally intercepted the conversations, then the witness was entitled to [exclusion under Title III]"). The *Murdock* court reasoned:

> The *Gelbard* Court's discussion of the legislative history of Section 2515, read in context of the facts of the case, emphasized not that individuals are just generally entitled to have their privacy protected, but that they are specifically entitled to protection from unscrupulous law enforcement procedures which invade their privacy. The point of *Gelbard* was that *if* the Government was eventually shown to have illegally intercepted the conversations, then the witness was entitled under Title III to have that evidence suppressed and completely excluded from any line of questioning, including a grand jury proceeding. To cite *Gelbard* as standing for the proposition that the entire purpose of Title III is to prevent victimization in the form of invasion of privacy goes too far.

Id.

102. *See supra* notes 24-25 and accompanying text (discussing Title III's goal of protecting privacy).

103. *See* Gelbard v. United States, 408 U.S. 41, 48 (1972) (explaining that importance of § 2515 lies in protection against unlawful invasions of privacy).

104. United States v. Vest, 813 F.2d 477, 481 (1st Cir. 1987).

105. *Id.*

the one disclosing the information.[106] Furthermore, by prohibiting both private and governmental interceptions, the express language of the statute also rejects *Murdock*'s narrow interpretation of *Gelbard*.[107] Unless a specific statutory provision excepts a particular interception, *all* willful interceptions are prohibited by Title III.[108]

B. Murdock*'s Reliance on* Underhill *and* Baranek

After dismissing the *Vest* decision for an alleged misreading of the *Gelbard* holding, the *Murdock* court turned to *United States v. Underhill*[109] and *United States v. Baranek*[110] to further justify its clean hands exception.[111] In *Underhill,* the defendants were indicted for conspiracy and various substantive offenses related to the ownership and operation of an illegal gambling enterprise.[112] In the course of this gambling enterprise, the defendants recorded all conversations in which bets were exchanged.[113] The United States sought to introduce those recordings into evidence.[114] The defendants successfully argued at the trial level that they made the recordings "for the purpose of committing a criminal act."[115] As a result, the district court granted the defendants' motion to suppress the recordings on the grounds that the recordings were illegally intercepted.[116]

On appeal, the Sixth Circuit considered whether a defendant who makes an illegal interception is entitled to suppress the contents of the inter-

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106. *Id.*

107. *See* 18 U.S.C. § 2511(1) (1994); *supra* note 3 (providing full text of § 2511(1)).

108. 18 U.S.C. § 2511(1)(a).

109. 813 F.2d 105 (6th Cir. 1987).

110. 903 F.2d 1068 (6th Cir. 1990).

111. United States v. Murdock, 63 F.3d 1391, 1401-02 (6th Cir. 1995), *cert. denied,* 116 S. Ct. 1672 (1996).

112. United States v. Underhill, 813 F.2d 105, 107 (6th Cir. 1987).

113. *Id.* at 108.

114. *Id.* at 107.

115. *Id.* at 108. Because the appellees were parties to the recording, the recording was likely to be exempted from Title III restrictions pursuant to 18 U.S.C. § 2511(2)(d). *See supra* note 29 (discussing private one-party consent exception). However, if the appellees could prove that they made the recording for any criminal or tortious purpose, the recordings would once again be deemed illegal, and as a result, any disclosure of the contents of the recording would be illegal under 18 U.S.C. § 2511(2)(d). *See* 18 U.S.C. § 2511(2)(d) (1994). Consequently, appellees could then contend that § 2515 required suppression of the contents of the interception because disclosure of the contents would be in violation of Title III. *Id.* § 2515.

116. *Underhill,* 813 F.2d at 108.

ception as improper evidence pursuant to § 2515.[117] Underhill illegally intercepted the communications that the Government sought to use in its prosecution.[118] Under § 2511, the Government's subsequent disclosure of Underhill's illegally intercepted communications would violate Title III.[119] Consequently, the plain language of § 2515 required suppression of Underhill's illegal recording.[120] Therefore, in order to deny Underhill's suppression motion, the Sixth Circuit had to justify straying from the plain language of Title III.[121]

The Sixth Circuit began with the premise that courts must ordinarily treat the plain language of a legislative act as conclusive.[122] However, the court limited that general rule by asserting that the intent of Congress controls judicial interpretation of a statute.[123] Therefore, the court reasoned that a judicial holding that is contrary to the plain meaning of a statute is justified when the literal application of the statute will produce a result clearly at odds with the intentions of Congress.[124] After establishing this methodology, the Sixth Circuit considered the application of Title III to Mr. Underhill.[125] The court, referencing *Gelbard v. United States*,[126] explained that the desire to protect individual privacy overrode congressional intent in enacting Title III.[127] The Sixth Circuit reasoned, however, that the general purpose of protecting the privacy of those who use oral and wire communication would not be served by permitting Underhill, the perpetrator of the illegal interception, to invoke Title III's suppression provision.[128] The *Underhill* court concluded that Title III protects victims, not perpetrators.[129] The court based this conclusion on a waiver of privacy theory.[130] Although Title III protects

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117. *Id.* at 107.

118. *Id.* at 108.

119. 18 U.S.C. § 2511.

120. *Underhill*, 813 F.2d at 108-09.

121. *Id.* at 111.

122. *Id.*

123. *Id.*

124. *Id.* (citing Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 570 (1982)); *see* United States v. American Trucking Ass'n, 310 U.S. 534, 542-44 (1940).

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

126. 408 U.S. 41 (1972); *see supra* notes 92-96 and accompanying text (discussing facts and holding of *Gelbard*).

127. *Underhill*, 813 F.2d at 112; *see supra* notes 24-25 (explaining privacy interest in Title III's legislative history).

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

129. *Id.*

130. *Id.*

an individual's privacy against *other* interceptors of her conversations, the individual waives her privacy interest in her oral and wire communications by recording them herself.[131] According to the Sixth Circuit, Underhill thus waived any right of privacy in his communications when he recorded the gambling exchanges himself.[132] Based on Underhill's waiver of Title III privacy protection, the court concluded that Underhill could not invoke § 2515 to suppress the contents of the recorded communications despite the fact that the communications were illegally intercepted under a literal interpretation of Title III.[133]

In *Murdock*, the Sixth Circuit found *Underhill* particularly useful because, by forbidding perpetrators of Title III from invoking the § 2515 suppression protection, the exclusionary provisions of Title III do not absolutely bar all illegal recordings.[134] However, although *Underhill* clearly created a judicially fashioned exception to the plain language of § 2515, *Underhill* cannot by its own force justify the clean hands exception fostered by the *Murdock* decision. In *Murdock*, unlike *Underhill*, the person against whom the illegal recording was offered was the victim and not the perpetrator of the recording.[135] *Underhill* expressly drew a distinction between the perpetrator and victim of an illegal interception.[136] *Underhill*'s conclusion turned primarily upon the waiver of the Title III privacy right that occurred when the perpetrator purposefully recorded himself.[137] In contrast to *Underhill*, the *Murdock* court found there was no waiver of a privacy right in the intercepted communication because Mr. Murdock did not record the conversations between himself and the dairy company.[138] Therefore, the dispositive factor in *Underhill* — a privacy right waiver — did not exist in *Murdock*.

The *Murdock* court recognized this significant distinction[139] and looked to *United States v. Baranek*[140] to justify its clean hands exception.[141] In

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131. *Id.*

132. *Id.*

133. *Id.*

134. United States v. Murdock, 63 F.3d 1391, 1402 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 1672 (1996); *see supra* notes 122-33 and accompanying text (discussing how *Underhill* court strayed from plain meaning of Title III).

135. *Murdock*, 63 F.3d at 1402.

136. United States v. Underhill, 813 F.2d 105, 112 (6th Cir. 1987).

137. *Id.*

138. *See Murdock*, 63 F.3d at 1392-93 (stating that Mrs. Murdock made illegal recording given to government prosecution).

139. *Id.* at 1402.

140. 903 F.2d 1068 (6th Cir. 1990).

141. United States v. Murdock, 63 F.3d 1391, 1402 (6th Cir. 1995), *cert. denied*, 116

Baranek, government agents obtained a Title III order authorizing the interception of telephonic communications at the residence of co-defendant Patricia Borch.[142] On one occasion, Borch, after completing a telephone conversation, failed to hang up the telephone receiver, and the line remained open.[143] As a result, the agents were able to hear nontelephonic conversations within the interior of Borch's residence for a two-hour period.[144] During this two-hour period, defendants Borch and Baranek made statements that implicated them in a variety of drug offenses.[145] After listening to the recordings, the grand jury returned a sixty-two count indictment.[146]

The Title III order under which the agents were operating only authorized the agents to intercept wire communications.[147] By statutory definition, wire communications are transfers of information that contain the human voice at any point between the point of origin and the point of reception, including the point of origin and the point of reception.[148] The district court concluded that the nontelephonic conversations of the defendants were not wire communications.[149] As a result, the agents' surveillance exceeded the scope of the Title III order.[150] Consequently, the district court held that the agents' disregard of the limitations set forth within the wiretap authorization order warranted suppression under § 2515.[151]

On appeal, the Sixth Circuit reversed the district court's decision to suppress.[152] However, the Sixth Circuit did not create an exception to § 2515 suppression in reversing the lower court.[153] Rather, the court analogized to the "plain view" doctrine within Fourth Amendment jurispru-

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S. Ct. 1672 (1996).

142. United States v. Baranek, 903 F.2d 1068, 1069 (6th Cir. 1990).

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* (quoting 18 U.S.C. §§ 2510(1), 2510(18) (1994)). Section 2510(1) defines a "wire communication" essentially as an "aural transfer . . . between the point of origin and the point of reception . . . ." 18 U.S.C. § 2510(1) (1994). Section 2510(18) defines an "aural transfer" as "a transfer containing the human voice at any point between and including the point of origin and the point of reception." *Id.* § 2510(18).

148. 18 U.S.C. § 2510(1).

149. United States v. Borch, 695 F. Supp. 898, 901 (E.D. Mich. 1988).

150. *Id.* at 902.

151. *Id.* at 902-03 (citing United States v. George, 465 F.2d 772, 774 (6th Cir. 1972)).

152. *Baranek*, 903 F.2d at 1072.

153. *See id.* at 1069-72 (concluding that intercepted nontelephonic communications fell within agents' "plain hearing" rather than being violation of Title III authorization order).

dence and found that the agents' actions did not even violate Title III.[154] However, unlike the *Underhill* court,[155] the *Baranek* court provided little justification for departing from the plain meaning of § 2515.[156] Generally, courts invoke the plain view doctrine when law enforcement agents, while in the course of an independently justified search, come across unexpected, criminally incriminating evidence.[157] The plain view doctrine serves to extend the prior search justification to the inadvertently found item.[158] In other words, the plain view doctrine cloaks the unexpectedly discovered item with the justification of the initial intrusion in such a manner that the seizure of the found item does not require a new warrant to comport with the Fourth Amendment.[159] By analogy to the plain view doctrine, the Sixth Circuit reasoned that Borch's negligence in failing to replace the telephone receiver properly placed the criminally incriminating conversation between Borch and Baranek in the "plain hearing" of the government agents.[160] Similar to a Fourth Amendment search warrant, the Title III authorization order provided the agents with prior justification to listen to the defendants' telephone

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154. *Id.*

155. *See supra* notes 122-33 (discussing *Underhill*'s justification for departing from plain meaning of § 2515).

156. *See Baranek*, 903 F.2d at 1070-72 (referencing only unusual fact pattern and statutory silence to justify court's departure from § 2515's plain meaning).

157. *See* Texas v. Brown, 460 U.S. 730, 736-40 (1983) (summarizing plain view doctrine); Coolidge v. New Hampshire, 403 U.S. 443, 465-71 (1971) (outlining plain view doctrine, which was designed to deal with inadvertent discoveries); *see also* Horton v. California, 496 U.S. 128, 137-42 (1990) (holding that inadvertence is no longer required for discovery of item to fall within plain view doctrine). In *Horton*, the Court explained the plain view test:

> What the "plain-view" cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused. The doctrine serves to supplement the prior justification — whether it be a warrant for another object, hot pursuit, search incident to lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused — and permits the warrantless seizure. Of course, the extension of the original justification is legitimate only where it is immediately apparent to the police that they have evidence before them; the plain view doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges.

Id. at 135-36 (quoting *Coolidge*, 403 U.S. at 465-66).

158. *Horton*, 496 U.S. at 135-36.

159. *See id.* at 141-42 (concluding that officer's discovery of robbery weapons, even though not inadvertent, did not violate Fourth Amendment because officer had valid warrant to search for robbery proceeds).

160. United States v. Baranek, 903 F.2d 1068, 1071-72 (6th Cir. 1990).

lines.[161] Consequently, the Sixth Circuit concluded that § 2515 did not warrant suppression of the incriminating conversation. Based on the court's creative analogy to the plain view doctrine, no unlawful wire interception had occurred within the meaning of Title III.[162] To oversimplify the situation, the Government "got a lucky break."[163]

The *Murdock* court adopted *Baranek*'s "lucky break" remark in an effort to legitimize its clean hands exception.[164] The *Murdock* court contended that, like the agents in *Baranek*, the agents in *Murdock* were passive, innocent recipients of information.[165] However, a significant distinction between *Baranek* and *Murdock* exists. In *Baranek*, the court did not simply conclude that because the Government received a lucky break it was entitled to the information.[166] Rather, the court reasoned that the recording in question was not an unlawful interception and, as a result, the court never reached the § 2515 suppression question.[167] In contrast, the *Murdock* facts concerned the Government's use of an illegal interception.[168] Yes, the Government received a lucky break when the competing dairy company delivered the tapes; however, that transaction did nothing to change the illegal status of the recordings. The *Murdock* court did not attempt to reason that Mrs. Murdock's recordings of her husband's conversation were somehow legal.[169] Instead, and in direct contrast to the *Baranek* approach, the *Murdock* court carved out an exception to § 2515 suppression that created a clear Title III violation.[170]

C. Murdock*'s Analogy to Fourth Amendment Jurisprudence*

The legislative history of Title III states that § 2515 is not intended "generally to press the scope of the suppression role beyond present search and seizure law."[171] Relying upon this expression of legislative intent, the *Murdock* court imported Fourth Amendment exclusionary jurisprudence into

161. *Id.* at 1071.

162. *Id.* at 1072.

163. *Id.*

164. *See* United States v. Murdock, 63 F.3d 1391, 1402 (6th Cir. 1995) (stating that "[a]s in *Baranek*, the government here got 'a lucky break'"), *cert. denied*, 116 S. Ct. 1672 (1996).

165. *Id.*

166. *See* United States v. Baranek, 903 F.2d 1068, 1070-72 (6th Cir. 1990) (analogizing *Baranek* situation to Fourth Amendment plain view doctrine to find no violation of Title III authorization order).

167. *Id.*

168. *Murdock*, 63 F.3d at 1393.

169. *Id.* at 1401-04.

170. *Id.* at 1404.

171. S. REP. No. 90-1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2185.

its interpretation of § 2515.[172] In addition, the Sixth Circuit sought further support for its decision to invoke Fourth Amendment theory from *Scott v. United States*.[173] In *Scott*, the Supreme Court refused to extend Title III's suppression provision beyond current Fourth Amendment exclusionary jurisprudence.[174] The *Scott* defendants argued that the intercepting government agents' subjective disregard of Title III's minimization requirement[175]

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172. United States v. Murdock, 63 F.3d 1391, 1402 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 1672 (1996).

173. 436 U.S. 128 (1978).

174. *See* Scott v. United States, 436 U.S. 128, 137 (1978). In *Scott*, the Supreme Court considered whether lower courts should undertake a subjective or objective assessment of government agent conduct when deciding if the minimization requirement of 18 U.S.C. § 2518(5) has been followed. *Id.* at 130-31. In *Scott*, the district court granted the government agents authorization to intercept the communications of the defendants. *Id.* The contents of the recorded communications led to the arrest of the defendants for narcotics-related charges. *Id.* at 132. Under § 2518(5) of Title III, the wiretap authorization required that the agents conduct the interceptions "in such a way as to minimize the interception of communications not otherwise subject to interception under [Title III]." *Id.* at 130. Contending that the agents violated this minimization requirement, the defendants moved to suppress the recordings. *Id.* at 132. The district court agreed and suppressed the recordings. *Id.* The district court noted that the agents recorded almost all of the defendants' conversations and that only 40% of them related to narcotics. *Id.* The court of appeals rejected the district court's statistically-based decision and reversed and remanded the case. *Id.* The court of appeals ordered the district court to assess the "reasonableness of the agents' attempts to minimize in light of the purpose of the wiretap and the information available to the agents at the time of interception." *Id.* at 132-33. On remand, the district court suppressed the recordings again and found that the agents knew of the minimization order and did not subjectively intend to minimize their interceptions in accordance with Title III. *Id.* at 133. The court of appeals reversed again and concluded that the reasonableness of the actual interceptions, not the subjective intent of the agents, must ultimately decide the suppression motion. *Id.* at 134. Instead of remanding the case to the district court, the court of appeals denied the suppression motion and explained that the agents' conduct was entirely reasonable. *Id.* The Supreme Court affirmed the court of appeals. *Id.* at 142. The Supreme Court rejected the defendants' argument that the agents' failure to make good faith efforts to minimize their interceptions violated the minimization requirement of § 2518(5). *Id.* at 138. The Supreme Court emphasized that § 2518 contains no express "good faith" language. *Id.* The Supreme Court then imported the Fourth Amendment jurisprudence employed by the court of appeals and concluded that an objective reasonableness standard should govern the review of the agents' conduct. *Id.* In interpreting Title III, the Supreme Court primarily relied upon the statement from Title III's legislative history that § 2515, the suppression provision, was not intended "generally to press the scope of the suppression role beyond present search and seizure law." *Id.* at 139.

175. *See* 18 U.S.C. § 2518(5) (1994). This provision provides in relevant part that "[e]very order and extension thereof shall contain a provision that the authorization to intercept . . . shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under [Title III]." *Id.*

amounted to a Title III violation warranting § 2515 suppression.[176] However, § 2518(5) lacked an express subjective good faith requirement.[177] Therefore, the *Scott* defendants argued that the Supreme Court should extend the § 2518(5) minimization mandate beyond the express language of the provision to include a good faith requirement.[178] The Supreme Court looked beyond the express language of § 2518(5) in search of a standard to apply to alleged violations of the minimization requirement, but it nonetheless rejected the defendants' subjective good faith argument.[179] Instead, the *Scott* Court imported and applied the Fourth Amendment objective reasonableness test to the agents' conduct.[180]

Although the *Murdock* court properly cited the *Scott* opinion as a situation in which the Supreme Court refused to extend Title III suppression beyond the scope of Fourth Amendment suppression,[181] the *Scott* decision does not squarely support the adoption of a clean hands exception to Title III. In *Scott*, the Supreme Court turned to Fourth Amendment jurisprudence because § 2518(5) was silent as to the appropriate test for evaluating compliance with the minimization requirement.[182] In contrast, § 2515 quite clearly states that any oral or wire interception obtained in violation of Title III will be suppressed following a motion from a person who meets the standing requirements.[183] Thus, to the extent that a literal reading of § 2515 provides an answer to the problem of the government as an innocent recipient of illegally obtained information, the *Scott* Court's decision to import Fourth Amendment jurisprudence provides little assistance to the *Murdock* court. However, because precedent shows that § 2515 suppression is not absolute,[184] the *Murdock* court chose to craft the clean hands issue into a question unanswerable by the express language of the statute. As a result, the *Scott* decision provides persuasive authority to leave the confines of Title III and

176. *Scott*, 436 U.S. at 137.

177. *See supra* note 175 (providing relevant text of 18 U.S.C. § 2518(5)).

178. *Scott*, 436 U.S. at 138.

179. *Id.* at 139.

180. *Id.* at 138.

181. *See id.* at 139 (explaining that legislative history of § 2515 shows that Title III's exclusionary rule was not intended "generally to press the scope of the suppression role beyond present search and seizure law" (citing S. REP. NO. 90-1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112)).

182. *Id.* at 138.

183. *See supra* note 4 and accompanying text (providing full text of § 2515 and explaining standing requirements to move for suppression).

184. *See supra* note 44 and accompanying text (discussing *Caron* decision); *supra* notes 112-33 and accompanying text (discussing *Underhill* court's holding and reasoning).

venture into the realm of Fourth Amendment jurisprudence. After characterizing the *Murdock* issue as unanswerable by the plain language of the statute and thereby gaining admission to Fourth Amendment theory via *Scott*, the Sixth Circuit turned to a discussion of the relationship between private party searches and the Fourth Amendment exclusionary rule.[185] The *Murdock* court decided to examine that particular body of Fourth Amendment law because Mrs. Murdock, a private party, had illegally intercepted the telephone recordings that the Government wanted to introduce in prosecuting Mr. Murdock's bribery charge.[186] Part IV.C.1 of this Note describes the treatment of private searches under the Fourth Amendment and the relationship between a private search and a subsequent governmental search.

1. The Exclusionary Rule and Private Searches

In *Weeks v. United States*,[187] the Supreme Court held that items seized by federal agents in violation of the Fourth Amendment should be excluded from evidence at trial.[188] In *Burdeau v. McDowell*,[189] the Supreme Court reasoned that this Fourth Amendment exclusionary rule limits the government only, and as a result, evidence obtained by a private illegal search need not be excluded from a criminal trial.[190] In *Burdeau*, the United States

185. United States v. Murdock, 63 F.3d 1391, 1403 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 1672 (1996).

186. *Id.* at 1392-93, 1403.

187. 232 U.S. 383 (1914).

188. *See* Weeks v. United States, 232 U.S. 383, 398 (1914) (holding that lower court committed reversible error by allowing into evidence papers and property seized in violation of Fourth Amendment). In *Weeks*, the Supreme Court considered whether it was reversible error for the trial court to admit evidence that had been obtained in violation of the Fourth Amendment. *Id.* at 389. Authorities suspected that Mr. Weeks had been illegally transporting lottery tickets in interstate commerce. *Id.* at 386. After finding a spare key, police searched Weeks's home without a warrant, seized various papers and articles, and turned them over to a U.S. Marshal. *Id.* Later, without a warrant, the U.S. Marshal returned to Weeks's home, searched it, and seized other items. *Id.* Weeks petitioned the trial court to order the U.S. Marshal to return the seized items. *Id.* at 387. The trial court ordered the return of all property not relevant to the charge against the defendant. *Id.* at 388. At trial, the Government introduced the relevant items that had been seized from Weeks's residence and obtained a guilty verdict. *Id.* On appeal, the Supreme Court concluded that the U.S. Marshal violated the Fourth Amendment when he searched Weeks's home without a warrant and, as a result, held that the U.S. Marshal should have returned all the seized items upon Weeks's petition for return. *Id.* at 398. Consequently, the Court ruled that the trial court should not have admitted the wrongly seized items into evidence and reversed Weeks's conviction. *Id.*

189. 256 U.S. 465 (1921).

190. *See* Burdeau v. McDowell, 256 U.S. 465, 476 (1921) (concluding that private

charged J.C. McDowell with fraudulent use of the mails.[191] Prior to trial, nongovernment private investigators drilled into McDowell's private safe and desk and stole certain books, papers, and other personal materials.[192] McDowell objected to the United States's intention to present this privately seized evidence to the grand jury.[193] The Supreme Court rejected McDowell's claim and concluded that the Government, having received the incriminating evidence without violating McDowell's Fourth Amendment

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search does not implicate Fourth Amendment protections). In *Burdeau*, the Supreme Court considered whether the Fourth Amendment's exclusionary rule operates to bar the prosecution from introducing evidence obtained by a private illegal theft. *Id.* at 475-76. Private parties completely unrelated to the government illegally entered defendant McDowell's office, searched his desk and safes, and seized many of his personal papers. *Id.* at 471-72. These private parties turned the seized papers over to the federal prosecutor, and the prosecutor charged McDowell with mail fraud. *Id.* at 470. McDowell petitioned the trial court to order the federal prosecutor to return the stolen items. *Id.* at 471. The court impounded and sealed the papers for 10 days, after which time the court clerk was to deliver the papers to McDowell's attorney. *Id.* The prosecution appealed the court's order, and the court impounded the documents through the completion of the appeal. *Id.* On appeal, McDowell argued that the Fourth Amendment prohibited the United States from presenting this illegally seized evidence to the grand jury. *Id.* The Supreme Court held that the Fourth Amendment only protects individuals against unlawful government conduct. *Id.* at 475. Accordingly, the Court ruled that the prosecution could present the stolen property to the grand jury because it had in no way acted unlawfully in obtaining the evidence. *Id.* To the *Burdeau* Court, McDowell's sole remedy lay in pursuing individual remedies against the perpetrators of the theft. *Id.*; *see also* 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.8, at 173 (2d ed. 1987) (providing comprehensive discussion of exclusionary rule and private searches). LaFave explains:

> [T]he exclusionary rule would not likely deter the private searcher, who is often motivated by reasons independent of a desire to secure criminal conviction and who seldom engages in searches upon a sufficiently regular basis to be affected by the exclusionary sanction. As for another explanation sometimes given for the exclusionary rule, namely, that the government should not profit from its own wrongdoing, it quite obviously has no application where the wrongdoing was private in nature. Finally, there is the "imperative of judicial integrity" . . . whereby courts are not to become "accomplices" in violation of the [C]onstitution by admitting evidence and thus legitimizing the conduct which produced it. It arguably is of some relevance in the private search context, although it would seem that where the conduct in question is by private individuals rather than the police "the courts do not, by using this evidence, condone the actions of the individual."

Id. at 176-77 (quoting Elkins v. United States, 364 U.S. 206 (1960) and citing State v. Rice, 516 P.2d 1222 (1973)).

191. *Burdeau*, 256 U.S. at 470.

192. *Id.* at 473.

193. *Id.* at 470-71.

rights, could offer McDowell's property to the grand jury.[194] Virtually all courts continue to follow the *Burdeau* rule.[195]

When applying the *Burdeau* rule, courts have often dealt with litigants challenging the extent to which the government may warrantlessly re-examine items that have already been seized and studied by private individuals. In *Walter v. United States*[196] and *United States v. Jacobsen,*[197] the Supreme Court considered this question. In *Walter*, a private interstate shipper erroneously delivered a dozen cartons of motion pictures to L'Eggs Products, Inc.[198] The labels on the cartons indicated that the films contained obscene homosexual sex acts.[199] One L'Eggs employee opened the cartons.[200] He then attempted without success to view portions of one of the films by holding it up to the

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194. *Id.* at 475. The *Burdeau* Court explained:

> The Fourth Amendment gives protection against unlawful searches and seizures, and as shown in the previous cases, its protection applies to governmental action. Its origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies; as against such authority it was the purpose of the Fourth Amendment to secure the citizen in the right of unmolested occupation of his dwelling and the possession of his property, subject to the right of seizure by process duly issued.
>
> In the present case the record clearly shows that no official of the Federal Government had anything to do with the wrongful seizure of the petitioner's property, or any knowledge thereof until several months after the property had been taken from him . . . . It is manifest that there was no invasion of the security afforded by the Fourth Amendment against unreasonable search and seizure, as whatever wrong was done was the act of individuals in taking the property of another. A portion of the property so taken and held was turned over to the prosecuting officers of the Federal Government. We assume that petitioner has an unquestionable right of redress against those who illegally and wrongfully took his private property under the circumstances herein disclosed, but with such remedies we are not now concerned.

Id.

195. *See, e.g.*, United States v. Mithun, 933 F.2d 631, 634 (8th Cir. 1991) (permitting Government to use evidence seized by hotel employees who searched car parked on hotel ramp); Parette v. State, 786 S.W.2d 817, 819-20 (Ark. 1990) (allowing prosecution to use as evidence husband's marijuana taken by wife from home); Pruitt v. State 373 S.E.2d 192, 196-97 (Ga. 1988) (permitting into evidence bloody shirt of defendant taken from defendant's home by private searchers of missing child); Williams v. State, 364 S.E.2d 569, 570 (Ga. 1988) (allowing into evidence bullet removed from defendant by hospital employees).

196. 447 U.S. 649 (1980).

197. 466 U.S. 109 (1984).

198. Walter v. United States, 447 U.S. 649, 651 (1980).

199. *Id.*

200. *Id.* at 652.

light.[201] Shortly thereafter, the L'Eggs company contacted the FBI, and the agency picked up the cartons.[202] Without making any effort to obtain consent from the sender of the packages and without a warrant, the FBI agents viewed the films.[203] Based on the contents of the films, the defendants were indicted on obscenity charges and subsequently convicted.[204] Although there was no majority opinion, a plurality of the Court agreed that the appropriate analysis of a government search which follows on the heels of a private one was whether the subsequent government search significantly expanded the scope of the private search.[205] Following a private search, the fruits of a warrantless government search that extends beyond the original private search will be suppressed.[206] In *Walter*, the Court ultimately determined that the trial judge should have suppressed the contents of the films because the FBI agents exceeded the scope of the prior private search without first obtaining a warrant.[207]

In *Jacobsen*, the Supreme Court answered the question that *Walter* implicitly answered in the affirmative, that is, whether government agents free to do later all of what was done earlier by the private party. In *Jacobsen*, a Federal Express employee opened a damaged package and found several plastic bags of white powder inside a closed ten-inch tube wrapped in several layers of crumpled newspaper.[208] After observing the plastic bags, the employee informed his manager and together they contacted the Drug En-

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201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.* at 657. The *Walter* plurality reasoned:

> If a properly authorized official search is limited by the particular terms of its authorization, at least the same kind of strict limitation must be applied to any official use of a private party's invasion of another person's privacy. Even though some circumstances — for example, if the results of the private search are in plain view when the materials are turned over to the Government — may justify the Government's reexamination of the materials, surely the Government may not exceed the scope of the private search unless it has the right to make an independent search. In these cases, the private party had not actually viewed the films. Prior to the Government screening, one could only draw inferences about what was on the films. The projection of the films was a significant expansion of the search that had been conducted previously by a private party and therefore must be characterized as a separate search.

Id.

206. *Id.*

207. *Id.*

208. United States v. Jacobsen, 466 U.S. 109, 111 (1984).

forcement Agency (DEA).[209] However, before the DEA agents arrived, the Federal Express representatives replaced the plastic bags and restored the package to its original unopened condition.[210] When the DEA agents arrived, they reopened the package and performed a drug field test without a warrant.[211] The trial court denied the defendants' motion to suppress the evidence derived from the DEA agents' search, and the defendants were convicted on drug-related offenses.[212] Applying the *Walter* standard for evaluating the relationship between a private search and a subsequent government search,[213] the *Jacobsen* Court concluded that the DEA agents' search did not violate the Fourth Amendment because the agents' reopening of the tube did not provide any further information than that already made available by the Federal Express employees.[214] For the *Jacobsen* Court, the Fourth Amendment is implicated only if the authorities infringe on an individual's reasonable expectation of privacy that has not been frustrated already by a private party.[215] As for the field drug test, the Court found no Fourth Amendment violation.[216] According to the Court, the defendants held no legitimate privacy interest in their possession of an illegal narcotic.[217] Because the field test could only reveal the presence of specific contraband material — extremely limited information — the drug test was deemed reasonable.[218]

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209. *Id.*

210. *Id.*

211. *Id.* at 112.

212. *Id.*

213. *See supra* note 205 (explaining *Walter* Court's method for analyzing relationship between private search and subsequent governmental search).

214. *Jacobsen*, 466 U.S. at 119. The Supreme Court concluded:

> Even if the white powder was not itself in "plain view" because it was still enclosed in so many containers and covered with papers, there was a virtual certainty that nothing else of significance was in the package and that a manual inspection of the tube and its contents would not tell him anything more than he already had been told. Respondents do not dispute that the Government could utilize the Federal Express employees' testimony concerning the contents of the package. If that is the case, it hardly infringed respondents' privacy for the agents to reexamine the contents of the open package by brushing aside a crumpled newspaper and picking up the tube. The advantage the Government gained thereby was merely avoiding the risk of a flaw in the employees' recollection, rather than in further infringing respondents' privacy.

Id. at 118-19.

215. *Id.* at 117.

216. *Id.* at 123.

217. *Id.*

218. *Id.* at 124.

2. *A Critique of* Murdock*'s Analogy to "Private Search" Jurisprudence*

Other than statutory silence and reliance on *Scott v. United States*,[219] the Sixth Circuit provided no justification for importing Fourth Amendment jurisprudence to create a clean hands exception.[220] Nevertheless, the *Murdock* court, relying on *Jacobsen*'s articulation of the private search exception, concluded that the state could use the tapes illegally recorded by Mrs. Murdock in its prosecution of Mr. Murdock.[221] The Sixth Circuit summarily reasoned that the government played no part in Mrs. Murdock's private unlawful interception, and as a result, the court allowed the tapes in evidence.[222]

However, the Sixth Circuit did not precisely compare and apply the facts, rationale, and holding of *Jacobsen* to the facts of *Murdock* and, therefore, overlooked the fact that the analogy between *Jacobsen* and *Murdock* is far from perfect. As referenced above, the Sixth Circuit disposed of Mr. Murdock's appeal because of the simple fact that the communications at issue in *Murdock* were intercepted by a private party unrelated to government agents.[223] By imagining *Murdock* in the absence of Title III, and then comparing that conceptualization to *Murdock* in the context of Title III, the flaw in the Sixth Circuit's analogy to private search jurisprudence becomes clear.

If the government had intercepted and recorded Mr. Murdock's conversations with the dairy company in the absence of Title III, this action would have constituted a Fourth Amendment search.[224] Consequently, the government would have had to obtain a warrant before commencing the wiretap.[225] However, if Mrs. Murdock had recorded Mr. Murdock's communications independently, her invasion would not have equaled a Fourth Amendment search.[226] Therefore, under *Jacobsen*, because Mr. Murdock's privacy

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219. 436 U.S. 128 (1978); *see supra* notes 173-85 and accompanying text (discussing *Murdock*'s reliance on *Scott*).

220. United States v. Murdock, 63 F.3d 1391, 1400-04 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 1672 (1996).

221. *Id.* at 1403.

222. *Id.* at 1404.

223. *Id.*

224. *See* Katz v. United States, 389 U.S. 347, 359 (1967) (holding that use of listening and recording device attached to outside of public telephone booth constitutes Fourth Amendment search and requires warrant prior to commencement); *see also supra* notes 19-23 and accompanying text (describing evolution of Supreme Court treatment of wiretaps).

225. *See Katz*, 389 U.S. at 359 (holding that use of listening and recording device attached to outside of public telephone booth constitutes Fourth Amendment search and requires warrant prior to commencement).

226. *See* Burdeau v. McDowell, 256 U.S. 465, 476 (1921) (concluding that private

interest in the contents of his conversation with the dairy company had been frustrated already by a private party unrelated to the government, subsequent listening to the tapes by the government could not constitute a Fourth Amendment search.[227] Consequently, the prosecution could play the tapes absent a warrant without fear of an evidentiary sanction at trial.[228]

In contrast to *Jacobsen*, under Title III the issue no longer revolves around what constitutes a Fourth Amendment search. Rather, the central issue becomes whether the oral or wire communication was illegally intercepted.[229] To be sure, evidence illegally obtained by a private party can fit within the Fourth Amendment private search exception.[230] However, the reason courts do not exclude even illegal private searches is because the Fourth Amendment only regulates governmental conduct.[231] In contrast, the scope of Title III regulation expressly covers private conduct.[232] In essence, Title III dramatically increased the level of protection an individual retains in the privacy of wire and oral communications. Prior to Title III, under *Katz* and *Berger*, the law only protected the individual against governmental invasions of wire and oral communications.[233] However, Title III's exclusionary rule, which expressly suppresses both private and governmental illegal interceptions, goes beyond the ordinary Fourth Amendment protection

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searches cannot violate Fourth Amendment); *see also supra* notes 187-215 and accompanying text (explaining relationship between private searches and Fourth Amendment).

227. *See* United States v. Jacobsen, 466 U.S. 109, 117 (1984) (concluding that Fourth Amendment is only implicated if authorities use information with respect to which individual's expectation of privacy has not been frustrated already); *see also supra* notes 208-18 and accompanying text (discussing rationale of *Jacobsen* decision).

228. *Jacobsen*, 466 U.S. at 117.

229. 18 U.S.C. § 2515 (1994). Section 2515 excludes from evidence all interceptions obtained in violation of Title III. *Id.*; *see supra* note 4 (providing full text of § 2515).

230. *See Burdeau*, 256 U.S. at 475-76 (holding that prosecution could offer in evidence incriminating items obtained by private illegal theft because government was in no way connected with private conduct); United States v. Knoll, 16 F.3d 1313, 1319 (2d Cir. 1994) (concluding that government agent's mere reading of papers stolen by private parties from defendant attorney's office without government participation was not itself government search violative of attorney's Fourth Amendment rights).

231. *See Jacobsen*, 466 U.S. at 113 (stating that "[t]his Court has also consistently construed [Fourth Amendment] protection as proscribing only governmental action").

232. 18 U.S.C. § 2511(1). Section 2511(1) criminalizes *all* interceptions of wire and oral communications unless expressly excepted within the statute. *Id.*; *see supra* note 3 (providing full text of § 2511(1)).

233. *See supra* notes 19-23 and accompanying text (showing that *Katz* and *Berger* only restrict government conduct); *supra* note 14 and accompanying text (explaining that § 605 of FCA did not protect individual against private interceptions because private parties could ignore FCA restriction without fear of prosecution).

referenced in *Katz*, *Berger*, and *Jacobsen*.[234] Thus, contrary to *Murdock*'s analysis, the fact that the government was using a privately intercepted recording is by no means dispositive of the suppression issue.[235]

V. A Critique of the Deterrence Argument

Despite the flaws in much of *Murdock*'s reasoning, there remains a persuasive deterrence-based[236] argument for adopting a clean hands exception.[237] Congress enacted Title III not only to protect the privacy of an individual's wire and oral communications, but also to equip law enforcement officers with an essential tool to fight organized crime.[238] To accomplish this

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234. *See* United States v. Vest, 813 F.2d 477, 481 (1st Cir. 1987) (concluding that analogy to Fourth Amendment private search doctrine is improper because legislative intent of Title III was to protect individual privacy against both private invasions and governmental intrusions). The *Vest* court explained:

> The government argues that we should read into section 2515 the exception to the fourth amendment exclusionary rule for evidence falling into the government's hands after a private search and seizure. But the fourth amendment exclusionary rule is a judicially-fashioned rule serving different purposes than the congressionally-created rule of section 2515 — a rule that we are here limited to interpreting rather than modifying. We agree with the district court that to hold that section 2515 allows the government's use of unlawfully intercepted communications where the government was not the procurer "would eviscerate the statutory protection of privacy from intrusion by illegal private interception." The protection of privacy from invasion by illegal private interception as well as unauthorized governmental interception plainly "play[s] a central role in the statutory scheme."

Id. (citation omitted) (quoting United States v. Giordano, 416 U.S. 505, 528 (1974)).

235. *Id.*

236. *See* LAFAVE, *supra* note 190, § 1.8, at 173 (explaining that primary purpose of Fourth Amendment exclusionary rule is to deter future unconstitutional conduct); *see also* Terry v. Ohio, 392 U.S. 1, 12 (1968) (stressing that major thrust of exclusionary rule is deterrence); Linkletter v. Walker, 381 U.S. 618, 636-37 (1965) (stating that exclusion of illegally seized evidence is "based on the necessity for an effective deterrent to illegal police action"); Mapp v. Ohio, 367 U.S. 643, 656 (1961) (emphasizing deterrent effect of exclusionary rule); Elkins v. United States, 364 U.S. 206, 217 (1960) (concluding that purpose of exclusionary rule is to "prevent, not to repair"). Under Title III, the government would argue that the purpose of the § 2515 exclusion is to deter the Title III violator from making future unlawful interceptions by denying the violator the ability to benefit from the fruits of illegal interceptions. Consequently, the government would contend that exclusion serves no deterrent effect when the party moving for the admission of illegally intercepted communications has not actually violated Title III. *See Vest*, 813 F.2d at 480-81 (explaining government's argument that suppression when government is innocent recipient of illegal interception does not deter future illegal government surveillance).

237. *See* United States v. Murdock, 63 F.3d 1391, 1402 (6th Cir. 1995) (alluding to deterrence-based argument), *cert. denied*, 116 S. Ct. 1672 (1996).

238. *See supra* note 26 (explaining law enforcement purpose of Title III).

policy goal, Title III enumerates the crimes for which law enforcement agents may employ electronic surveillance as a means of investigation.[239] In addition, agents must follow the specific procedural requirement of providing a detailed written statement to a federal judge of competent jurisdiction to obtain a Title III authorization order to intercept.[240] Provided that the alleged illegal conduct fits within the exclusive list of crimes susceptible to Title III surveillance and provided that the agents have obtained a legitimate authorization order, government-intercepted communications will withstand a § 2515 suppression motion.[241] In other words, similar to the administration of the Fourth Amendment exclusionary rule,[242] a court will generally only punish the government with the suppression sanction when the government has violated a particular provision of Title III and the court wishes to deter the government from similar future misconduct.[243] The legislative history of § 2515 suggests that this deterrence-based interpretation of the Title III exclusionary rule is plausible.[244] Relying upon this understanding of Title III's exclu-

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239. 18 U.S.C. § 2516 (1994).

240. *Id.* §§ 2516, 2518; *see* United States v. Giordano, 416 U.S. 505, 508 (1974) (concluding that failure to follow application guidelines for obtaining authorization under § 2516 and § 2518 results in suppression under § 2515).

241. 18 U.S.C. § 2515. Absent a Title III violation, § 2515 will not exclude an oral or wire interception. *Id.*; *see supra* note 4 (providing full text of § 2515).

242. *See supra* note 236 and accompanying text (explaining that primary purpose of Fourth Amendment exclusionary rule is to deter future unconstitutional conduct).

243. *See Giordano*, 416 U.S. at 508 (excluding intercepted communications in order to deter government from not following Title III's authorization requirements during future surveillance).

244. *See* S. REP. NO. 90-1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2185 (stating that § 2515 exclusion is not intended "generally to press the scope of the suppression role beyond present search and seizure law"). This statement of legislative intent makes plausible the conclusion that § 2515 exclusion was intended to have the same deterrent effect as suppression under the Fourth Amendment. *See also* 1 CARR, *supra* note 13, § 6.3. Carr explains:

> The utility of deterrence in the context of electronic surveillance should not be overlooked when suppression is being considered for a violation of Title III. Eavesdropping involves "calculated institutional policy [and] . . . official decision." Unlike the random, unexpected, and unpredictable street encounter or the search warrant obtained and executed in haste, court-ordered electronic surveillance usually involves planning and preparation by trained or experienced agents in a context of ongoing agency and judicial supervision. The uncontrollable factors which cause the exclusionary rule to have dubious restraining impact on the street are normally not found with the acquisition and execution of eavesdropping orders. *On the contrary, from the initial decision to proceed through completed surveillance, eavesdropping appears uniquely and highly susceptible to the controlling influence of deterrence.*

Id. (emphasis added) (quoting Alderman v. United States, 394 U.S. 165, 203 (1969) (Fortas, J., concurring and dissenting)).

sionary rule, the United States can persuasively argue that a court should not suppress the contents of an illegal private interception offered by an innocent recipient because suppression will only deter a disclosing party if the disclosing party has perpetrated an original Title III violation.[245]

In both *Vest*[246] and *Murdock*,[247] the United States employed this Fourth Amendment deterrence-based approach to § 2515 enforcement and contended that courts should not punish the government for the illegal interceptions of an unrelated nongovernmental party.[248] In *Murdock*, the Sixth Circuit embraced the Government's position and concluded that Title III only protects the individual against the *perpetrator*'s, not the innocent recipient's, subsequent disclosure of the illegally obtained information.[249] According to the *Murdock* court, the individual has no remedy against the government when the government seeks to introduce illegal private interceptions.[250] Instead, the Sixth Circuit concluded that the victim may only obtain redress from the actual perpetrator of the illegal interception.[251]

However, the plain language of § 2515 and § 2511(1) indicates that the drafters of Title III intended that § 2515 suppression deter not only the perpetrator's disclosure of illegal interceptions, but also any innocent recipient's disclosure of illegal interceptions. Section 2515 suppresses the contents of any wire or oral communication when the disclosure of that communication

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245. *See* United States v. Vest, 813 F.2d 477, 480 (1st Cir. 1987) (explaining Government's argument that courts should invoke suppression sanction only against perpetrator of Title III violation). The *Vest* court stated: "Specifically, the government argues, the purpose of section 2515 is to deter violations of Title III's other provisions, and it would be pointless to apply section 2515 against the government where, as here, the government is the innocent recipient, rather than the guilty interceptor, of an illegally intercepted communication." *Id.*

246. *See id.* (explaining Government's argument that courts should invoke suppression sanction only against perpetrator of Title III violation).

247. *See* United States v. Murdock, 63 F.3d 1391, 1402 (6th Cir. 1995) (discussing Government's deterrence-based argument), *cert. denied*, 116 S. Ct. 1672 (1996).

248. *See* S. REP. NO. 90-1097, at 2156, 2185 (stating that "[t]he perpetrator must be denied the fruits of his unlawful actions in civil and criminal proceedings" and that § 2515 exclusion is not intended "generally to press the scope of the suppression role beyond present search and seizure law"). Read together, these two statements of legislative intent make it plausible (1) that § 2515 exclusion was intended to have the same deterrent effect as suppression under the Fourth Amendment and (2) that courts should invoke § 2515 deterrence only against the "perpetrator" of the Title III violation.

249. *Murdock*, 63 F.3d at 1403; *see supra* note 248 (demonstrating plausibility of Sixth Circuit's assertion).

250. *Murdock*, 63 F.3d at 1404.

251. *See id.* (stating that victim's only remedy is against perpetrator and lies in bringing civil action under 18 U.S.C. § 2520, which permits aggrieved persons to bring civil suits against Title III violators); *see also supra* note 31 (discussing operation of § 2520).

would be in violation of Title III.[252] Section 2511(1)(c) states that the disclosure of an intercepted wire or oral communication violates Title III when the disclosing party knows or has reason to know that the communication was obtained in violation of Title III.[253] Thus, even if the government is an innocent recipient of illegally recorded communications, if the government is aware or should be aware of the recording's illegal status, then disclosure violates Title III.[254] Consequently, the plain language of § 2515 does not protect the prosecution with clean hands against suppression.[255]

Therefore, to avoid suppression, the government as innocent recipient of illegally recorded communications must go beyond the plain meaning of Title III. As referenced above, the Fourth Amendment exclusionary rule[256] supports the government's argument that only the Title III violator should suffer the § 2515 evidentiary sanction.[257] However, for the government to successfully supplant the plain meaning of § 2515 with the more limited Fourth Amendment deterrence theory, the government must independently justify importing Fourth Amendment jurisprudence into this particular question of Title III interpretation.[258]

Although the Sixth Circuit in *United States v. Underhill*[259] did not address whether reference to the Fourth Amendment exclusionary doctrine was appropriate in Title III cases, the *Underhill* decision was the only Title III ruling to present a workable standard for determining when a court should abandon the literal meaning of the statute.[260] In *Underhill*, the Sixth Circuit

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252. 18 U.S.C. § 2515 (1994); *see supra* note 4 (providing full text of § 2515); *see also supra* note 33 (explaining that § 2515 essentially operates to suppress all illegal interceptions).

253. 18 U.S.C. § 2511(1); *see supra* note 3 (providing full text of § 2511(1).

254. 18 U.S.C. § 2511(1).

255. *Id.*

256. *See supra* note 236 and accompanying text (explaining that primary purpose of Fourth Amendment exclusionary rule is to deter perpetrator's future unconstitutional conduct).

257. *See supra* notes 236-45 and accompanying text (explaining that Fourth Amendment deterrence doctrine supports Government's position that only perpetrator should suffer Title III evidentiary sanction).

258. *See* United States v. Giordano, 416 U.S. 505, 524 (1974) (stating in dicta that when considering role of § 2515 suppression, courts should if possible defer to provisions of Title III rather than to judicially fashioned exclusionary rules aimed at deterring violations of Fourth Amendment); United States v. Underhill, 813 F.2d 105, 111 (6th Cir. 1987) (legitimizing departure from plain language of Title III).

259. 813 F.2d 105 (6th Cir. 1987); *see supra* notes 112-33 and accompanying text (discussing facts and holding of *Underhill*).

260. *See Underhill*, 813 F.2d at 111 (explaining that plain meaning of statute should be conclusive unless "the literal application of a statute will produce a result demonstrably at odds

concluded that a court should discard the plain meaning of a Title III provision only when its literal application "produce[s] a result demonstrably at odds with the intentions of its drafters."[261] For the *Underhill* court, allowing the perpetrator of an illegal interception to invoke § 2515 suppression in order to shield himself from his own recorded criminally incriminating statements produced a result demonstrably at odds with the intentions of Title III's drafters.[262]

Applying *Underhill*'s test, the question becomes whether permitting a victim of an illegal interception to bar an innocent recipient's introduction of that illegal recording into evidence produces a result demonstrably at odds with the intentions of the Title III drafters. Because granting the victim's motion to suppress in such circumstances does not thwart Title III's dual purposes of privacy protection and law enforcement,[263] courts should adopt a literal interpretation of § 2515. The goal of privacy protection guided policymakers when enacting Title III.[264] By prohibiting the disclosure of illegally intercepted communications,[265] Title III recognized that an invasion of privacy does not cease with the interception, but continues with subsequent disclosures.[266] Before *Murdock*, the only exception to this general rule occurred when the individual waived her privacy interest by recording herself.[267] Barring the innocent recipient's disclosure of illegally intercepted information further protects the privacy of the victim and, therefore, produces a result clearly consistent with Title III's goal of safeguarding privacy.[268] In essence, Title III's policy objective of privacy protection

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with the intentions of its drafters"). *But cf. Giordano*, 416 U.S. at 524 (reasoning that interpretations of § 2515 should "not turn on the judicially fashioned exclusionary rule aimed at deterring violations of the Fourth Amendment rights, but upon the provisions of Title III").

261. *Underhill*, 813 F.2d at 111 (citing Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982)).

262. *Id.* at 112.

263. *See supra* notes 24-26 (explaining legislative intent behind Title III).

264. *See supra* notes 24-25 (describing Title III's goal of protecting privacy).

265. 18 U.S.C. § 2511(1)(c) (1994); *see supra* note 3 (providing full text of § 2511(1)(c)).

266. *See* United States v. Vest, 813 F.2d 477, 481 (1st Cir. 1987) (reasoning that "an invasion of privacy is not over when an interception occurs, but is compounded by disclosure in court or elsewhere"); *see also In re* Motion to Unseal Elec. Surveillance Evidence, 990 F.2d 1015, 1019-20 (8th Cir. 1993) (denying civil RICO litigants' motion to unseal undisclosed government electronic surveillance due to overriding privacy concern of Title III).

267. *See* United States v. Underhill, 813 F.2d 105, 112 (6th Cir. 1987) (concluding that defendant waived privacy right to telephone conversations by recording himself and therefore forfeited right to invoke § 2515 suppression).

268. *See supra* notes 24-25 (discussing Title III's goal of protecting privacy).

requires courts to interpret § 2515 as a deterrent both to the perpetrator's disclosure of illegal interceptions and to the innocent recipient's disclosure of illegal interceptions.

Although Congress intended that Title III equip law enforcement agents with a weapon essential to the war against organized crime,[269] Congress carefully outlined the situations in which officers could use Title III's form of electronic surveillance to enforce the law. First, agents may employ Title III surveillance only for certain crimes.[270] Second, agents must always obtain judicial authorization.[271] Neither Title III's express language nor its legislative history suggests that Congress intended for Title III law enforcement to occur through illegal private interceptions.[272] To the contrary, Congress banned all private interceptions unless the interceptor is a party to the conversation.[273] Because Title III did not intend to combat organized crime through private illegal wire interceptions, granting the victim's motion to suppress a private illegal interception, even though offered by an innocent recipient, does not thwart Title III's law enforcement purpose. Therefore, the plain meaning of Title III, which requires the suppression of private illegal interceptions even when offered by an innocent recipient, does not produce a result demonstrably at odds with the intentions of the drafters of Title III.[274] As a result, according to *Underhill*, there is no justification to depart from the plain language of § 2515.[275]

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269. *See supra* note 26 (explaining that Congress intended to equip law enforcement agents with weapon to fight organized crime).

270. *See* 18 U.S.C. § 2516 (enumerating exclusive list of crimes that agents may investigate with Title III surveillance).

271. *See id.* § 2518 (detailing procedure for obtaining judicial authorization to engage in Title III electronic surveillance).

272. *Id.* §§ 2516-2518. Sections 2516-2518 detail the method by which Title III requires law enforcement officers to obtain intercepted communications. *Id.* Sections 2516-2518 do not apply to illegal private interceptions. *Id.*

273. *See id.* § 2511(1) (stating general ban on interception of all wire and oral interceptions); *supra* note 3 (providing full text of § 2511(1)); *see also* 18 U.S.C. § 2511(2)(d) (1994) (excepting situation in which interceptor is party to conversation); *supra* note 29 (providing full text of § 2511(2)(d)).

274. *See* United States v. Vest, 813 F.2d 477, 480-81 (1st Cir. 1987) (deciding not to read clean hands exception into Title III and therefore deciding that suppression of private illegal interception offered by Government did not produce result demonstrably at odds with intentions of Title III's drafters).

275. *See* United States v. Underhill, 813 F.2d 105, 111 (6th Cir. 1987) (stating that reasonably plain terms of Title III are conclusive unless they will "produce a result demonstrably at odds with the intentions of its drafters" (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982))).

In addition, courts that adopt a clean hands exception to avoid § 2515 suppression may actually produce results demonstrably at odds with the intentions of Title III's drafters. Congress enacted Title III's suppression provision as well as its civil[276] and criminal penalties[277] in an effort to deter all violations of the statute.[278] However, when a court operates under a clean hands interpretation of § 2515, the court provides great incentive for private parties to intercept the communications of their enemies illegally.[279] Although § 2515 excludes the recording if offered by the intercepting private party,[280] under a clean hands exception the private party can illegally intercept and know that if she captures illicit activities of her enemy on tape, the government may still introduce her illegal recordings in a criminal prosecution.[281] To the extent that one doubts the potential for significant increases in illegal private interceptions, one need only look to the facts of *State v. Faford*.[282] In *Faford*, Wayne C. Fields learned from his neighbor that Robert and Lisa Faford had made disparaging remarks about him.[283] Angered by the

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276. 18 U.S.C. § 2520.

277. *Id.* § 2511(1).

278. *See* S. REP. NO. 90-1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2156 (explaining that Title III's prohibition must be enforced with all appropriate sanctions including criminal and civil penalties).

279. *See Vest*, 813 F.2d at 481. The *Vest* court stated: "We agree with the district court that to hold that section 2515 allows the government's use of unlawfully intercepted communications where the government was not the procurer 'would eviscerate the statutory protection of privacy from intrusion by illegal private interception.'" *Id.* (quoting United States v. Vest, 639 F. Supp. 899, 914-15 (D. Mass. 1986)).

280. 18 U.S.C. §§ 2511(1)(a)-(c), 2515 (1994). Section 2511(1)(a) makes it unlawful for a private party to intercept any wire or oral communication unless the private party is a participant in the intercepted communication. *Id.* § 2511(1)(a). Section 2511(1)(c) makes it unlawful for the private party to disclose any interception that he knows or should know has been illegally intercepted. *Id.* § 2511(1)(c). Section 2515 suppresses any interception if the disclosure of the interception would violate Title III. *Id.* § 2515. Therefore, when the private party illegally intercepts a communication and subsequently attempts to enter that interception in court against the victim of the interception, § 2515 operates to suppress the illegal interception. *Id.*

281. United States v. Murdock, 63 F.3d 1391, 1404 (6th Cir. 1995) (permitting Government to introduce criminally incriminating communications that had been illegally intercepted by private party), *cert. denied*, 116 S. Ct. 1672 (1996).

282. 901 P.2d 447 (Wash. 1996).

283. *See* State v. Faford, 910 P.2d 447, 448 (Wash. 1996) (providing example of private conduct that clean hands exception will encourage). In *Faford*, the Supreme Court of Washington considered whether the state's wiretap statute permitted state law enforcement agents to introduce evidence that they obtained as a result of an illegal private wire interception. *Id.* at 453. In 1993, the owner of a police scanner eavesdropped on several of his neighbors and overheard cordless telephone conversations during which Robert and Lisa

Fafords' remarks, Fields purchased a police scanner and monitored the Fafords' cordless telephone conversations "twenty-four hours a day, seven days a week" for several months in search of any illicit activity.[284] Through his monitoring, Fields discovered that the Fafords were growing marijuana, and he contacted the police.[285] The Supreme Court of Washington applied the state's wiretap and privacy statute and suppressed all government evidence derived from Fields's illegal private interception.[286] Although the Supreme Court of Washington provides at least persuasive authority for rejecting a clean hands exception to Title III's suppression sanction, the *Faford* court's rationale is not as noteworthy as the particular private conduct under review. The *Faford* facts precisely demonstrate the kind of private behavior that the drafters of Title III sought to eliminate[287] and exemplify the highly intrusive private conduct that the clean hands exception will encourage.

The quid pro quo of the plea bargaining process makes Title III's criminal sanction a minimal deterrent because the violator may exchange her illegal recordings for immunity from Title III prosecution. Similarly, a jury is unlikely to award significant damages against the private citizen who performs her civic duty by making public the crimes of another. Thus, once courts limit Title III's suppression sanction with the clean hands exception, courts undermine Title III's overriding purpose of privacy protection by creating an incentive for private parties to invade their enemies' privacy through illegal interceptions in hopes of finding incriminating information.

VI. Conclusion

In *United States v. Murdock*, the Sixth Circuit should have suppressed the recordings illegally intercepted by Mrs. Murdock when the Government

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Faford made disparaging remarks about Wayne C. Fields, another neighbor. *Id.* at 448. This eavesdropper informed Mr. Fields of the Fafords' remarks. *Id.* Angered by these comments, Mr. Fields purchased his own police scanner and monitored the Fafords' cordless telephone conversations "twenty-four hours a day, seven days a week" for several months, listening for any hint of illicit activity. *Id.* Through his monitoring, Mr. Fields discovered that the Fafords had a marijuana-growing operation in their home, and he phoned the police. *Id.* Washington drug agents went to the Fafords' home, explained their basis for investigation, and obtained consent from the Fafords to search their home. *Id.* at 449. The Supreme Court of Washington determined that Fields's scanning of the Fafords' cordless telephone conversations violated the Washington wiretap statute. *Id.* at 452. The court held that the Fafords' consent was the result of an illegal wiretap and suppressed the fruits of the consensual residential search. *Id.* at 453.

284. *Id.* at 448.

285. *Id.*

286. *Id.* at 452-53.

287. *See supra* notes 24-25 (explaining Title III's goal of individual privacy protection against both private and governmental intrusions).

attempted to introduce them during Mr. Murdock's prosecution. The prosecution knew that Mrs. Murdock had illegally intercepted her husband's conversations.[288] As a result, the prosecution's disclosure of Mrs. Murdock's illegal interception violated Title III.[289] Section 2515 requires a court to suppress any interception if its disclosure violates Title III.[290] Thus, the plain language of § 2515 required suppression of the recordings in *Murdock*.[291]

The fact that the government played no part in Mrs. Murdock's illegal interception is irrelevant. First, a literal interpretation of § 2515 neither produces a result demonstrably at odds with the privacy protection objective[292] nor with the law enforcement objective of Title III.[293] Second, even if the Sixth Circuit could justify abandoning the plain meaning of the statute and importing Fourth Amendment jurisprudence, the two principal analogies to the Fourth Amendment — private search doctrine and limited deterrence of the guilty interceptor — fail to support a clean hands exception.[294] Moreover, *Murdock*'s analogies to previous § 2515 exceptions do not withstand close scrutiny[295] Therefore, until Congress expressly states otherwise, when the government attempts to introduce an illegal private interception, courts should reject the clean hands argument, follow the plain meaning of § 2515, and suppress the illegal private interception.

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288. United States v Murdock, 63 F.3d 1391, 1393 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 1672 (1996).

289 *See* 18 U.S.C. § 2511(1)(c) (1994) (making it unlawful for any party to disclose wire or oral interception if party knows or should know that interception was obtained in violation of Title III).

290. *Id.* § 2515; *see supra* note 4 (providing full text of § 2515).

291. 18 U.S.C. § 2515.

292. *See supra* notes 24-25 and accompanying text (discussing Title III's goal of privacy protection); *supra* note 274 and accompanying text (stating that suppression of illegal private interception offered by Government would not produce results demonstrably at odds with intentions of Title III's framers).

293. *See supra* notes 263-75 and accompanying text (reasoning that suppression of illegal private interception offered by Government will not produce result demonstrably at odds with law enforcement purposes of Title III).

294. *See supra* notes 219-35 and accompanying text (demonstrating flaw in *Murdock*'s analogy to Fourth Amendment private search doctrine); *supra* notes 236-87 and accompanying text (explaining that, unlike Fourth Amendment exclusionary rule, § 2515 must not only deter perpetrator from disclosing illegal interception, but also deter innocent recipient from disclosing illegal interception).

295. *See supra* notes 112-33 and accompanying text (explaining why *Underhill* does not support *Murdock*'s clean hands exception); *supra* notes 140-70 and accompanying text (reasoning that *Baranek* does not support *Murdock*'s clean hands exception).