

DETECTING TITLE III MINIMIZATION VIOLATIONS: WHY SUPPRESSION ISN'T ENOUGH

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INTRODUCTION

Imagine that you are an FBI agent investigating a large-scale narcotics operation. You have reason to believe that John Smith has narcotics in his home. You could search his home for the drugs, but you do not yet have enough evidence to show probable cause and obtain a warrant; as a result, such a search would violate the Constitution, and the drugs would not be admissible in evidence at trial if you did so.¹ You therefore continue your investigation until you can obtain a warrant, conduct a search with the warrant once you obtain it, and in doing so, comply with the Fourth Amendment’s prohibition on unreasonable searches and seizures. The narcotics you

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1. Evidence obtained in violation of the Fourth Amendment is inadmissible in the government’s case-in-chief. *Weeks v. United States*, 232 U.S. 383, 391–92 (1914) (creating the exclusionary rule in federal courts); *Mapp v. Ohio*, 367 U.S. 643, 654–55 (1961) (applying the exclusionary rule to the states).

find during the legal search are therefore admissible at trial, and Smith gets convicted. By excluding unconstitutionally obtained information from trial, the exclusionary rule disincentivizes illegal searches by depriving law enforcement of evidence they need at trial.

Now imagine you are an FBI agent monitoring a wiretap² on John Smith's home phone for evidence of narcotics trafficking. You are aware of your obligation, under Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III"), to minimize the recording of any conversations not relating to the crime for which the warrant was issued,³ and you are further aware that any such recordings will be suppressed at trial.⁴ However, you hear Mr. Smith talking to his friend and describing a physical altercation he had with his wife. You realize that this is not related to narcotics trafficking and will probably not be admissible, but unlike the search of the home, it will not be possible to investigate further and come back later with a warrant to listen for evidence of this crime.⁵ Therefore, if this conversation gets suppressed at trial, you would find yourself in exactly the same position as if you had turned off

2. A wiretap is a device that can monitor and record any phone conversation over the tapped line. Wiretaps are legal only if a warrant is issued in accordance with Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510–22 (2006).

3. 18 U.S.C. § 2518(5).

4. The victims of minimization violations can file a motion to suppress any evidence obtained in violation of Title III at trial. 18 U.S.C. § 2518(10)(a). This provides a remedy for the right created by 18 U.S.C. § 2515 (requiring that no evidence obtained in violation of Title III be used in any proceeding). *In re Evans*, 452 F.2d 1239, 1242 (D.C. Cir. 1971). Most courts to decide the issue have held that minimization violations only require the suppression of conversations that were improperly minimized. *See, e.g.*, *United States v. Scott*, 516 F.2d 751, 760 n.19 (D.C. Cir. 1975); *United States v. Cox*, 462 F.2d 1293, 1301–02 (8th Cir. 1972); *United States v. LaGorga*, 336 F. Supp. 190, 196–97 (W.D. Pa. 1971); *United States v. King*, 335 F. Supp. 523, 543–45 (S.D. Cal. 1971).

5. It is possible for officers to obtain retroactive amendments to the warrant to use these conversations in court in situations such as this if the original communication was intercepted lawfully, i.e., before it was clear that the communication did not relate to narcotics trafficking. 18 U.S.C. § 2517(5). However, in this scenario, the contents were not "intercepted in accordance with the provisions of this chapter" because the officers continued recording this conversation after it was clear it did not relate to narcotics, in violation of 18 U.S.C. § 2518, and therefore a retroactive amendment would not be available. JAMES G. CARR & PATRICIA L. BEL-LIA, *THE LAW OF ELECTRONIC SURVEILLANCE* § 5:23 (2004). The fact that assault is not one of the crimes designated for electronic surveillance by Title III should be immaterial based on the legislative history. S. REP. NO. 90-1097, at 98 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2186 [hereinafter *Legislative History*].

the recorder.⁶ On the other hand, there is a possibility this evidence could be admissible to impeach the testimony of a witness who has perjured himself,⁷ or against another party,⁸ or that a court may find the circumstances sufficiently ambiguous to justify the interception. So you ask yourself: “Why not?”

In order to obtain a warrant to tap a suspect’s phone, the government must clear a series of hurdles put in place by Congress to prevent unnecessary intrusions into personal privacy. These hurdles include the exhaustion of less intrusive investigative remedies,⁹ probable cause to believe the suspect is using that particular phone in the commission of a crime,¹⁰ and a specificity requirement.¹¹ To meet the specificity requirement, the warrant authorizing the electronic surveillance must specify the identity, if known, of the person whose communications are to be intercepted,¹² as well as the nature and location of the place where the interception is to occur.¹³

This specificity requirement has been interpreted to provide leniency to the government—only a low degree of specificity is required.¹⁴ Additionally, the order must specify the type of communication to be intercepted, the period during which interception is authorized,¹⁵ and the particular crime to which the interception

6. Michael Goldsmith, *The Supreme Court and Title III: Rewriting the Law of Electronic Surveillance*, 74 J. CRIM. L. & CRIMINOLOGY 1, 124–25 (1983) (“Law enforcement thereby loses only that to which it had never been entitled.”).

7. *See infra* Part II.A.1.

8. *See infra* Part II.A.2.

9. 18 U.S.C. § 2518(3)(c).

10. *Id.* § 2518(3)(d).

11. *Id.* § 2518(4).

12. *Id.* § 2518(4)(a).

13. *Id.* § 2518(4)(b).

14. *See, e.g.*, 38 GEO. L.J. ANN. R. CRIM. PROC. 152 n.415 (2009) (citing “United States v. Escobar-de Jesus, 187 F.3d 148, 170 (1st Cir. 1999) (specificity requirement met because order identified main location of phone line in one building; order need not specify location of various extensions of telephone line, even if extensions located in separate building than described in order); United States v. Feldman, 606 F.2d 673, 680 (6th Cir. 1979) (specificity requirement met when order authorized taps on all telephones at location because neither Fourth Amendment nor Title III required surveillance order to list numbers of telephone lines tapped); Shell v. United States, 448 F.3d 951, 956 (7th Cir. 2006) (specificity requirement met by warrant authorizing transmitter on badge to intercept conversations in ‘Visitor Area’ of prison); United States v. Fairchild, 189 F.3d 769, 774–75 (8th Cir. 1999) (specificity requirement met because order described location of monitored phone line used to facilitate drug trafficking, agency authorized to intercept communications, and type of offenses government agents believed wire-tap would uncover); United States v. Carneiro, 861 F.2d 1171, 1179 (9th Cir. 1988) (specificity requirement met because telephone line and offenses identified).”).

15. 18 U.S.C. § 2518(4)(e).

relates.¹⁶ This last element is meant to require interception to be limited to the underlying predicate for probable cause.¹⁷ This means that if probable cause has been established that parties *A* and *B* will be discussing illegal transaction *X* on a phone, the description of the conversations to be intercepted should exclude any conversation not between *A* and *B* involving *that specific* illegal transaction.¹⁸ Conversations relating to other crimes may also be intercepted, but only if they are in “plain view” in the sense that the subject matter of the conversation was not yet clear when the recording took place.¹⁹

Recall the quandary faced by our FBI agent in the opening hypothetical. Even if a defendant could prove that officers intentionally disregarded the minimization order at a suppression hearing²⁰ on the entire wiretap, the court would still not necessarily be justified in suppressing it. This is because the proper approach for evaluating compliance with the minimization order is to make an objective assessment of actions of the officer or agent conducting surveillance “in light of facts and circumstances confronting him at the time, without regard to his underlying intent or motivation.”²¹ This creates a situation where there is an incentive for law enforcement officers to intentionally violate the law, which poses a serious threat to privacy.²² Furthermore, there are negligible disincentives facing officers to dissuade them from committing minimization violations, including an ineffective civil remedy and a rarely applied wholesale suppression remedy. This Note seeks to address this problem.²³ Part I will discuss the prevalence of minimization violations,

16. *Id.* § 2518(4)(c).

17. Goldsmith, *supra* note 6, at 139.

18. *Id.*

19. *Id.* at 140; *see also* 18 U.S.C. § 2517(5).

20. A suppression hearing is a pretrial hearing in which the defendant can argue that evidence should be suppressed at trial because it was illegally obtained. BLACK'S LAW DICTIONARY 739 (8th ed. 2004).

21. *Scott v. United States*, 436 U.S. 128, 136–37 (1978).

22. Goldsmith, *supra* note 6, at 119–20 (“*Scott's* willingness to tolerate intentional misconduct in the context of minimization violations poses a serious threat to privacy.”).

23. Nothing in this note should be seen as a criticism of the exclusionary rule generally. Excluding evidence obtained in violation of the Fourth, Fifth, and Sixth Amendments can often prevent relevant evidence from being used in court, when that evidence could have been used had police complied with the Constitution. This does provide a disincentive to police for violating the law. When it comes to minimization, however, the evidence will most likely only be excluded if it is irrelevant, in which case it would probably never have been introduced anyway. Furthermore, not recording a conversation places the prosecution in an even worse

the relevant legal standards for considering them, and the harms created by a legal system that encourages them. Encouraging officers to violate the law is problematic from a formalistic perspective, and the knowledge that officers are indiscriminately recording conversations on tapped phones could have a chilling effect on protected speech. Part II will delve into the incentive structure facing officers listening to the wiretap, evaluating when improperly recorded conversations are nonetheless admissible and discussing the standards for wholesale suppression of the wiretap and for holding officers personally liable for civil damages. Improperly minimized conversations can be used against parties who lack standing to challenge the minimization and to impeach testimony offered on direct examination, whereas wholesale suppression of the wiretap and civil remedies will rarely impact officers. Part III will discuss several proposals for reforming this system, such as altering the standing requirements and eliminating the impeachment exception, or increasing the sanctions on officers who disregard the minimization order.

I. MINIMIZATION VIOLATIONS AND THE REASONS TO AVOID THEM

Despite the prohibition on recording non-pertinent conversations, minimization violations have become a routine part of Title III wiretaps. Reviewing courts have held that law enforcement officers engaged in sufficient minimization even when a surprisingly low percentage of calls were appropriately minimized. For example, the Tenth Circuit found that the government made out a prima facie case of reasonable minimization even though only 25.6% of the calls that should have been minimized were actually minimized.²⁴ Another court denied a motion to suppress even though it found that, of the 111 conversations the government intercepted, only two were pertinent.²⁵ The percentage of appropriately mini-

position than recording it and having it suppressed, due to its availability as impeachment evidence and against anyone who was not a party to the recorded conversation. Both of those factors are unique to Title III evidence, so to argue for a supplement to the deterrent effect of the exclusionary rule in this setting is not to argue that one is needed for violations of the Fourth, Fifth, and Sixth Amendments.

24. *United States v. Yarbrough*, 527 F.3d 1092, 1098 (10th Cir. 2008).

25. *United States v. Rastelli*, 653 F. Supp. 1034 (E.D.N.Y. 1986) (failing to even examine the minimization issue because minimization violations would have only resulted in suppression of improperly minimized conversations).

mized calls is not and should not be dispositive;²⁶ however, the fact that the government can fail to minimize 75% of the calls that should be minimized without having the entire wiretap suppressed or any sanction on the officers shows how commonplace minimization violations have become.

Many of these violations are not of the sort described in the introduction. It is entirely possible for minimization violations to occur even if the officers are acting with good faith, because calls may be ambiguous, and the nature and scope of the criminal enterprise under investigation may be uncertain, particularly in the early stages of investigation.²⁷ While it would not be impossible to deter these violations, for example by suppressing the entire wiretap for any minimization violation, the cost of doing so would be to render the surveillance ineffective by preventing the officer from recording any ambiguous conversation.

This Note is concerned with deterring the bad faith, intentional interception of conversations that should be minimized. To use an example, in *Scott v. United States*,²⁸ the officers placed a wiretap on the home phone of the defendant and failed to consider minimization at all, turning off the recording device only once when they discovered it had inadvertently been connected to the wrong line.²⁹ This complete failure to minimize is a clear example of bad faith. The Supreme Court held that there was no need to suppress any of the recorded conversations, because none of the individual conversations was intercepted unreasonably.³⁰ The court analyzed the individual conversations to see if minimization was reasonable even though the officers did not, because the subjective intent of the officers was considered irrelevant.³¹

In other areas of search and seizure law, the specific intent of officers is not and should not be relevant because the Fourth Amendment rights of citizens would lack meaning if the constitutionality of an officer's action depended on his own subjective understanding of Fourth Amendment rights, as opposed to the understanding of a detached, neutral judge.³² There is good rea-

26. *Scott*, 436 U.S. at 140 (“[T]here are surely cases . . . where the percentage of nonpertinent calls is relatively high and yet their interception was still reasonable . . . [because] [m]any of the nonpertinent calls may have been very short. Others may have been one-time only calls . . . [or] been ambiguous in nature.”).

27. *Id.* at 140–41.

28. 436 U.S. 128.

29. *Id.* at 133 n.6.

30. *Id.* at 141–43.

31. *Id.* at 138.

32. *Id.* at 136–37; *Terry v. Ohio*, 392 U.S. 1, 21–22 (1968).

son, however, to distinguish wiretap recordings. The application of the exclusionary rule to the Fourth Amendment imposes a very real evidentiary cost because the illegality of the search is not a but-for cause of the later introduction of an item found in the search.³³ For example, suppression of a knife discovered in a warrantless search deprives the prosecution of the knife as evidence; however, the knife could have been legally obtained and therefore introduced.³⁴ Conversely, there is no evidentiary cost imposed on the State for committing a minimization violation—suppression of an improperly minimized conversation places the officers in the same position as proper minimization. Furthermore, in most cases the only conversations that will be suppressed will be “nonpertinent *innocent* conversations which the prosecution had never intended to use,”³⁵ because relevant conversations that are useful to the prosecution would have been within the scope of the warrant and therefore would not have needed to be minimized. This creates a barely significant incentive to adhere to the minimization order, and because suppressed conversations may be admissible for impeachment purposes,³⁶ or against non-parties to the conversation,³⁷ the prosecution is in a better position if it has suppressed recordings than if it has none. Since the incentive to act in bad faith exists, whether the officer has acted in bad faith should be relevant if we are to deter intentional minimization violations.

The preceding discussion assumes, of course, that it is worthwhile to attempt to deter minimization violations. Some courts have applied a “no harm, no foul” analysis to minimization violations, holding that motions to suppress wiretaps should be denied since the inappropriately monitored conversations were not going to be introduced at trial anyway.³⁸ Considering that the prosecution will usually be in the same position whether or not the officers minimize, what harms are being caused by these violations? As one court has put it, “the ‘evil’ to be limited by this requirement is the listening to innocent calls,”³⁹ but there is little discussion of what harms are inflicted upon the speakers by such listening.

33. See Akhil Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 793–94 (1994).

34. *Id.*

35. Goldsmith, *supra* note 6, at 125.

36. See *infra* Part II.A.1.

37. See *infra* Part II.A.2.

38. See, e.g., *United States v. Mares-Martinez*, 240 F. Supp. 2d 803, 816 (N.D. Ill. 2002).

39. *United States v. Bynum*, 360 F. Supp. 400, 409 (S.D.N.Y. 1973).

Some scholars have expounded on the harms inherent in the intrusion of privacy. Professor Daniel Solove, for example, argues that the notion that there is no reason to fear an intrusion of privacy if one has nothing to hide fails to take into account the fact that privacy encompasses more than simply the right to hide embarrassing or incriminating information.⁴⁰ Solove also points out that confidentiality is key to protecting a relationship of trust between people and businesses,⁴¹ which may also be applied to the relationship of trust between the people and the State. It is easy to see how intentional disregard for the laws protecting our private phone conversations can lead to a distrust of government. Even if one focuses only on the more tangible consequences of minimization violations, there are both formal and functional reasons why we should endeavor to avoid them.

Formally speaking, an intentional failure to minimize is an intrusion by the executive branch into personal privacy that is explicitly prohibited by Congress and the Constitution. In *Berger v. New York*,⁴² the Court struck down a New York statute that authorized wiretapping partly because it lacked any requirement of particularity or procedures to minimize the intrusion to conversations relating to a specific crime.⁴³ While Title III purports to solve these constitutional deficiencies, if the incentives for police are structured such that there is an incentive to intentionally fail to minimize the intrusion into conversations, then Title III suffers from the same constitutional deficiencies as did the New York statute at issue in *Berger*. Incentivizing police officers to violate the Constitution and congressional statutes would be problematic even if there were no discrete harm arising from the minimization violations simply because it erodes the rule of law.

Functionally, there is a potential First Amendment chilling issue. The limitations placed on wiretaps by Title III were intended to protect the privacy of communication and encourage “the uninhibited exchange of ideas and information among private parties.”⁴⁴ Fear that the police are monitoring even innocent telephone con-

40. Daniel J. Solove, *“I’ve Got Nothing to Hide” and Other Misunderstandings of Privacy*, 44 SAN DIEGO L. REV. 745, 769 (2007) (“At the end of the day, privacy is not a horror movie, and demanding more palpable harms will be difficult in many cases. Yet there is still a harm worth addressing, even if it is not sensationalistic.”).

41. *Id.* at 770.

42. 388 U.S. 41 (1967).

43. *Id.* at 58.

44. *Bartnicki v. Vopper*, 532 U.S. 514, 532 (2001) (quoting Brief for United States at 27, *Bartnicki v. Vopper*, 532 U.S. 514 (2001) (Nos. 88-1687, 99-1728), 2000 WL 1344079, at *27).

versations “can have a seriously inhibiting effect upon the willingness to voice critical and constructive ideas.”⁴⁵ Plaintiffs do not have standing to raise a constitutional challenge on the basis of such a subjective chilling effect;⁴⁶ however, that does not mean it does not occur or that we should not take steps to avoid it. There is a difference between conversations that are evidence of a crime, and conversations that the parties would not want the police to be recording. This difference is what gives rise to the minimization requirement in Title III, and this difference is the reason that the law needs to incentivize law enforcement officers to respect it. The next Section examines whether or not the law does in fact incentivize law enforcement officers to adhere to the minimization requirement.

II. THE DILEMMA FACING LAW ENFORCEMENT OFFICERS

The law enforcement officer in our introductory hypothetical is faced with the decision to record the conversation. Congress did not intend this officer to perform a cost-benefit analysis here by weighing the risks of civil liability and suppression of the wiretap against the benefit to the prosecution of having the recording; according to Title III, the conversation should not be recorded if it does not pertain to the offense mentioned in the warrant.⁴⁷ However, officers will inevitably record the conversation if doing so can help them secure a conviction and there is no realistic possibility of a penalty. The Supreme Court has shown concern that making it too easy to introduce illegally obtained evidence cuts back against the rationale of the exclusionary rule: to remove the incentive for police to violate civil rights.⁴⁸ “[P]olice officers and their superiors would recognize that obtaining evidence through illegal means stacks the deck heavily in the prosecution’s favor,”⁴⁹ greatly increas-

45. *Id.* at 533 (quoting PRESIDENT’S COMM’N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 202 (1967)); see also *Sinclair v. Schriber*, 916 F.2d 1109, 1115 (6th Cir. 1990) (“Sinclair’s affidavit states . . . [t]he chilling effect of FBI wiretaps and other illegal surveillance and interference in my political activities as Chairman of the Rainbow People’s [sic] Party was of principal importance in bringing my political activism to an end in 1974.”).

46. *Sinclair*, 916 F.2d at 1115 (citing *Laird v. Tatum*, 408 U.S. 1, 13–14 (1971) (“Allegations of a subjective ‘chill’ are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm.”)).

47. 18 U.S.C. § 2518(4)(c) (2006).

48. *James v. Illinois*, 493 U.S. 307, 317–18 (1990).

49. *Id.* at 318.

ing the chance of police misconduct.⁵⁰ This Section explores the potential costs and benefits from the officer's perspective of intentionally failing to minimize.

*A. Incentives to Fail to Minimize: When Evidence
Obtained in Violation of Title III Is Admissible*

The principle that evidence obtained in violation of the Fourth Amendment cannot be used in court dates back to 1914, when the Supreme Court created the exclusionary rule for federal prosecutions.⁵¹ The Court stated that, “[i]f letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment . . . is of no value, and . . . might as well be stricken from the Constitution.”⁵² The Court continued, “To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action.”⁵³ The exclusionary rule became broadly enforced at the state level in the landmark case of *Mapp v. Ohio*.⁵⁴

The deterrent power of the exclusionary rule has been eroded by four exceptions:⁵⁵ inevitable discovery,⁵⁶ exigency,⁵⁷ the good faith exception,⁵⁸ and the impeachment exception.⁵⁹ Furthermore, evidence that would be excluded at trial can be used in grand jury

50. *Id.*

51. *Weeks v. United States*, 232 U.S. 383 (1914).

52. *Id.* at 393.

53. *Id.* at 394.

54. 367 U.S. 643, 655 (1961).

55. See, e.g., Christopher A. Harkins, Note, *The Pinocchio Defense Witness Impeachment Exception to the Exclusionary Rule: Combating a Defendant's Right to Use with Impunity the Perjurious Testimony of Defense Witnesses*, 1990 U. ILL. L. REV. 375, 396–409 (1990).

56. *Nix v. Williams*, 467 U.S. 431, 449–50 (1984) (holding that illegally obtained evidence is admissible if other legal police tactics would have inevitably led to the discovery of the evidence).

57. Evidence obtained by warrantless searches is admissible if there was an imminent need to search, seize, or interrogate in order to avoid impending danger to law enforcement officers or destruction of evidence. See *United States v. Davis*, 461 F.2d 1026, 1030 (3d Cir. 1972).

58. Evidence is admissible if law enforcement officers acted in an objectively reasonable manner and in good faith in discovering it. *United States v. Leon*, 468 U.S. 897, 919–20 (1984); *Massachusetts v. Sheppard*, 468 U.S. 981, 988 (1984).

59. Otherwise inadmissible evidence becomes admissible to impeach a defendant's perjurious testimony. *Walder v. United States*, 347 U.S. 62 (1954).

proceedings,⁶⁰ civil tax proceedings,⁶¹ civil deportation proceedings,⁶² habeas corpus hearings,⁶³ and parole revocation hearings.⁶⁴

Evidence obtained in violation of Title III may be excluded even if there is no constitutional violation, however, because Title III has its own statutory exclusionary provision and does not rely on the constitutional exclusionary rule.⁶⁵ In order to determine the effect of these exceptions to the constitutional exclusionary rule on officers listening to wiretaps, we must examine whether these exceptions have been incorporated into the statutory exclusionary provision of Title III. Inevitable discovery does not apply because there is no way a conversation could be obtained at all absent the wiretap, much less inevitably obtained. Exigency is inapplicable as well because the statute itself allows for exigent circumstances. There is an exigency exception to the warrant requirement of Title III written into the statute,⁶⁶ and officers have the ability to listen for evidence of other crimes and obtain a retrospective amendment.⁶⁷ Therefore, if a conversation is so irrelevant that officers were not permitted to record it or apply for a retrospective amendment, it is highly unlikely that exigent circumstances would demand that such a conversation be recorded. For example, if officers listening to a wiretap for evidence of narcotics trafficking overheard a conversation about an imminent terrorist attack, there would be an immediate need to record that conversation, much like the immediate need for police to enter a home in search of a fleeing suspect. However, as long as the officers applied for a retroactive amendment under § 2517(5), it would not be a violation of Title III to record that conversation, it would not be suppressed, and no exception to the exclusionary rule would be necessary. The extent to which good faith excuses a minimization violation will be discussed in the section on wholesale suppression. The impeachment exception is the only one of the traditional exceptions to the exclusionary rule that has been incorporated into the statutory exclu-

60. *United States v. Calandra*, 414 U.S. 338 (1974).

61. *United States v. Janis*, 428 U.S. 433 (1976).

62. *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984).

63. *Stone v. Powell*, 428 U.S. 465 (1976).

64. *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357 (1998).

65. 18 U.S.C. § 2515 (2006).

66. *Id.* § 2518(7) (providing that the attorney general can authorize a wiretap without applying for a warrant if circumstances require the wiretap to be placed before a warrant can be obtained, as long as a warrant is applied for within forty-eight hours).

67. *Id.* § 2517(5); *see also supra* note 5 and accompanying text.

sonary provision of Title III. The reasons for this incorporation are discussed in the following Section on impeachment.

Apart from the exceptions to the exclusionary rule, there is another way the government can use evidence obtained in violation of Title III in court. The question of who has standing to suppress illegally intercepted conversations is extremely complicated. Parties that lack standing to challenge the original recording would not be able to suppress illegally recorded conversations, simply because their rights were not violated. The Title III standing issue and its implications are discussed in the section on standing.

1. Impeachment

The impeachment exception dates back to 1954, when the Court permitted physical evidence that was inadmissible in the case-in-chief to be used to impeach the defendant.⁶⁸ In *Walder*, the Court stated that,

It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths.⁶⁹

In *Harris v. New York*,⁷⁰ the Supreme Court "held that otherwise impermissible evidence could be used by the prosecution on rebuttal, stating that no exclusionary rule may permit affirmative perjury . . ." ⁷¹ The *Harris* Court also noted that exclusion from the government's case-in-chief was a sufficient disincentive to officers who would violate the Constitution, and that any marginal deterrent effect from excluding evidence for impeachment purposes was negligible.⁷² The exception has been broadened by subsequent cases, so that impeachment with inadmissible evidence "has not been limited to direct contradictions of a defendant's direct examination testimony, but is more generally allowed whenever the sub-

68. *Walder v. United States*, 347 U.S. 62, 65 (1954).

69. *Id.*

70. 401 U.S. 222 (1971).

71. *Jacks v. Duckworth*, 651 F.2d 480, 484 (7th Cir. 1981) (citing *Harris*, 401 U.S. at 225); see also *United States v. Havens*, 446 U.S. 620, 626 (1980) ("We rejected the notion that the defendant's constitutional shield against having illegally seized evidence used against him could be 'perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances.'" (quoting *Harris*, 401 U.S. at 226)).

72. *Harris*, 401 U.S. at 225.

ject matter that encompasses the impeachment was ‘reasonably suggested by the defendant’s direct examination.’”⁷³

The impeachment exception seems to have been explicitly incorporated into Title III by Congress in the legislative history of the statute, though counterarguments could be made. It is worth noting that the impeachment exception as articulated in *Walder* predates the Act by fourteen years, yet Congress chose to make no mention of an impeachment exception in the text of § 2515.⁷⁴ Therefore, a court could presume that Congress chose not to include such an exception in the statute, and for judges who interpret statutes based heavily on the text, that would most likely be dispositive.⁷⁵ Furthermore, the summary of the legislative record describes the Title III exclusionary rule in simple language: “The contents of wire and oral communications intercepted in accordance with the standards set forth in this act may be used as evidence in judicial proceedings. The contents of illegally intercepted communications may not be used as evidence in any proceeding.”⁷⁶

A closer look at the legislative history reveals that Congress did support the incorporation of the impeachment exception. In explaining the purpose of the exclusionary provision, the history provides that “[t]here is, however, no intention to change the attenuation rule . . . [n]or generally to press the scope of the suppression role beyond present search and seizure law. See *Walder v. United States*, 74 S.Ct. 354, 347 U.S. 62 (1954).”⁷⁷ The citation to the case creating the impeachment exception, after the statement that the intent of the statute is not to increase the role of suppression

73. Jeffrey A. Bellin, *Improving the Reliability of Criminal Trials Through Legal Rules that Encourage Defendants to Testify*, 76 U. CIN. L. REV. 851, 871 (2008) (quoting *Havens*, 446 U.S. at 627–28).

74. The full text of the provision reads:

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

18 U.S.C. § 2515 (2006).

75. A full discussion of the debate over whether judges should examine legislative history when the text is clear is beyond the scope of this note. For such a discussion, see generally WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994); Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533 (1983).

76. S. REP. NO. 90-114, at 73 (1968).

77. Legislative History, *supra* note 5, at 2185.

beyond the current law, indicates that there was no intent to eliminate the impeachment exception.⁷⁸

Courts have been willing to rely on this legislative history to incorporate the impeachment exception into Title III: “While *Harris* and its progeny involved evidence obtained in violation of the Fourth Amendment, the rationale has been extended, and properly so, to cases involving evidence obtained . . . in violation of Title III of the Omnibus Crime Control and Safe Streets Act of 1968.”⁷⁹ In total, six circuits have either extended or acknowledged the possibility of extending the impeachment exception to evidence obtained in violation of Title III.⁸⁰

This application of the impeachment exception to Title III, while apparently in line with congressional intent, raises several policy concerns. The first is that wiretap evidence is less valuable as impeachment material than physical evidence obtained in a search. If a defendant says on the stand that he has never possessed narcotics, the suppressed narcotics themselves have high value in impeaching him because he is clearly committing perjury. Evidence that he said in a phone conversation that he possessed narcotics has less value as impeachment material, because he may have been lying on the phone. Therefore, the rationale on which the *Walder* and *Harris* courts relied, that the impeachment exception was necessary to prevent perjury, applies less forcefully to evidence obtained in violation of Title III. In fact, it may serve only to muddle the issue if the testimony in court is truthful and the statements made on the phone are not.

Additionally, a defendant may conceivably have made contradictory statements in different telephone conversations. In this scenario, there is no way for the defendant to avoid being impeached

78. *Henson v. State*, 790 N.E.2d 524, 531 n.3 (Ind. Ct. App. 2003).

79. *Jacks v. Duckworth*, 651 F.2d 480, 483–84 (7th Cir. 1981) (citation and footnote omitted) (citing *United States v. Caron*, 474 F.2d 506, 509–10 (5th Cir. 1973)).

80. *See* *United States v. Baftiri*, 263 F.3d 856, 857 (8th Cir. 2001); *United States v. Echavarria-Olarte*, 904 F.2d 1391, 1397 (9th Cir. 1990); *United States v. Vest*, 813 F.2d 477, 480, 484 (1st Cir. 1987); *Anthony v. United States*, 667 F.2d 870, 879 (10th Cir. 1981); *Jacks*, 651 F.2d at 483–84 (7th Cir.); *Caron*, 474 F.2d at 509 (5th Cir.); *see also* *United States v. Wuliger*, 981 F.2d 1497, 1506 (6th Cir. 1992) (refusing to recognize an impeachment exception to § 2515 in civil proceedings but suggesting that such an exception might exist in the criminal context). *But see* *United States v. Gray*, 521 F.3d 514, 529–30 (6th Cir. 2008) (“[T]here is no convincing reason to create, let alone expand to defendant, an impeachment exception where the illegally obtained conversations were self-suppressed by the government and not available for use by either party at trial.”).

with suppressed evidence if he testifies,⁸¹ and since being impeached by a recording is damaging to one's credibility, this may deter defendants from testifying. Currently, approximately half of defendants choose to testify, though that number has been shrinking.⁸² It is fundamental to the trial process for the jury to be able to consider defendant testimony, because "the most important witness for the defense in many criminal cases is the defendant himself. There is no justification today for a rule that denies an accused the opportunity to offer his own testimony."⁸³ It is not only critical to the defense's case, but also to the jury, as academics and the Supreme Court have both acknowledged: "When the defendant, 'who above all others may be in a position to meet the prosecution's case,' is silent, the jury is deprived of critical factual information."⁸⁴ This deprivation is exacerbated when an innocent defendant declines to testify, because "the jury is deprived of testimony of incomparable value—truthful testimony from the witness most knowledgeable about the events in question—that could prevent unjust punishment by the state, and potentially an escape from justice by the guilty party."⁸⁵

81. This assumes that the issue on which the defendant made contradictory statements is "plainly within the scope of the defendant's direct examination." *United States v. Havens*, 446 U.S. 620, 627 (1980). However, any questions "suggested to a reasonably competent cross-examiner" by direct testimony are permissible, subjecting statements made in response to cross-examination "reasonably suggested" by the direct to impeachment. *Id.* at 626–27. Therefore, depending on the scope of the direct examination and the trial court's definition of reasonable, this scenario or one like it is at least plausible.

82. Bellin, *supra* note 73, at 852 (citing Gordon Van Kessel, *Quieting the Guilty and Acquitting the Innocent: A Close Look at a New Twist on the Right to Silence*, 35 *IND. L. REV.* 925, 950–51 (2002) (summarizing studies dating back to the 1920s and concluding that "with increasing frequency defendants are not taking the stand at trial as they once did" and "the extent of refusals to testify varies from one-third to well over one-half [of defendants] in some jurisdictions")); Stephen J. Schulhofer, *Some Kind Words for the Privilege Against Self-Incrimination*, 26 *VAL. U. L. REV.* 311, 329–30 (1991) (describing study of trials in Philadelphia in the 1980s that revealed that 49% of felony defendants and 57% of misdemeanor defendants chose not to testify); Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 *N.Y.U. L. REV.* 1449, 1450, 1459 (2005) (noting that "only half" of the defendants who proceed to trial testify on their own behalf).

83. *Rock v. Arkansas*, 483 U.S. 44, 52 (1987).

84. Bellin, *supra* note 73, at 854 (quoting *Ferguson v. Georgia*, 365 U.S. 570, 582 (1961)).

85. *Id.* at 855 (citing Richard Friedman, *Character Impeachment Evidence: Psycho-Bayesian [!?] Analysis and a Proposed Overhaul*, 38 *UCLA L. REV.* 637, 666 (1991)). There is also the possibility that by deterring the defendant from testifying, suppressed wiretaps weaken the defense case to the extent that they plead guilty instead of going to trial at all. It is impossible to tell if this is a significant problem

This is not to say that perjury is not a real problem to be avoided. Applying the impeachment exception to Title III prevents defendants from having a license to perjure. However, it is worth noting that there are costs to deterring that perjury: incentivizing law enforcement officers to violate the minimization order and deterring defendants from testifying. Additionally, the benefits to the truth-seeking process are reduced in the Title III context because the statement introduced to impeach the witness may itself be a lie, and the testimony may have been true. Even when this is not the case, the mere possibility is enough for the jury to discount the impeachment evidence in part, which reduces its value. These are all factors that should be taken into account when deciding whether to apply the impeachment exception to minimization violations.

2. Standing

The standing requirement further limits the effectiveness of suppression as a deterrent to minimization violations. Conversations that are suppressed against one party may be admissible against another, giving police another incentive to record conversations outside the scope of the warrant. In the landmark Fourth Amendment case of *Rakas v. Illinois*,⁸⁶ the Supreme Court held that to invoke the exclusionary rule for a Fourth Amendment violation, the party seeking to exclude the evidence must have personally had his or her Fourth Amendment rights violated.⁸⁷ This means the defendant cannot suppress his drugs when the police found them in an illegal search of his neighbor's house, where he had no expectation of privacy, even if he was the target of the investigation.⁸⁸ If this same limitation on suppression applies to Title III, a wiretapped public payphone conversation involving a lower-ranking member of an organized crime organization could be introduced against a higher-ranking member of the organization, even if law enforcement officers blatantly and intentionally disregarded the minimization order with respect to the party using the phone.

Courts have struggled with the question of whether this understanding of the standing requirement applies to violations of Title III. While the exclusionary provision of Title III is found in § 2515, that provision does not explicitly provide a remedy nor give any

because there are a multitude of reasons a defendant may decide against going to trial; most notably a three level reduction in the defendant's guidelines range for acceptance of responsibility. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2010).

86. 439 U.S. 128 (1978).

87. *Id.* at 139.

88. *Id.*

guidance as to who may invoke it.⁸⁹ It is § 2518 that provides “aggrieved persons” with a remedy by permitting them to file a motion to suppress the evidence.⁹⁰ Congressional intent seems to be that the unequivocal and sweeping language of § 2515 should be limited to those who can invoke its protections.⁹¹ Since Title III was written before *Rakas*, it is possible that Title III was meant to incorporate “target standing,” a theory rejected by the *Rakas* Court but which states that the target of a search is the victim of an invasion of privacy and has standing to challenge the search, even though it was not his property that was searched or seized.⁹² The text supports the conclusion that the drafters intended target standing to apply. The remedy for “aggrieved persons” described in § 2518(10)(a) defines “aggrieved person” as a “person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.”⁹³

The Supreme Court has rejected this interpretation. In *Alderman v. United States*,⁹⁴ the Court addressed the issue of whether electronic surveillance obtained in violation of one defendant’s rights was admissible against a codefendant.⁹⁵ The Court declined to expand the exclusionary rule to codefendants in the electronic surveillance context,⁹⁶ but this holding was grounded in the Fourth Amendment because Title III was not yet law at the time of the interception. In dicta, however, the *Alderman* Court noted that the legislative history of Title III indicated that only aggrieved persons were eligible to invoke its protections, and went on to define aggrieved persons “in accordance with existent standing rules.”⁹⁷ The standing doctrine as it existed at the time, according to the *Alderman* opinion, held that “suppression of the product of a Fourth Amendment violation can be successfully urged only by those

89. 18 U.S.C. § 2515 (2006); see also *supra* note 4 and accompanying text.

90. 18 U.S.C. § 2518(10)(a).

91. The committee report recognizes that § 2518(10)(a) is a limitation on who can invoke § 2515. Legislative History, *supra* note 5, at 2185 (“[Section 2515] must, of course, be read in light of section 2518(10)(a) . . . which defines the class entitled to make a motion to suppress.”); *id.* at 2195 (“This provision [§ 2518(10)(a)] must be read in connection with sections 2515 and 2517 . . . which it limits.”).

92. *Jones v. United States*, 362 U.S. 257, 261 (1960); see also Goldsmith, *supra* note 6, at 58–59.

93. 18 U.S.C. § 2510(11) (emphasis added); see also *Alderman v. United States*, 394 U.S. 165, 171–76 (1969).

94. *Alderman*, 394 U.S. 165.

95. *Id.*

96. *Id.* at 171.

97. *Id.* at 175 n.9.

whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence.”⁹⁸

The Court’s assumption that the Title III drafters did not intend to alter the standing doctrine would make more sense if the doctrine were perfectly clear at the time. It would not, however, have been clear to the Title III drafters that “existent standing doctrine” did not include target standing, especially considering that *Jones* was cited in the legislative history.⁹⁹ Justice Fortas, dissenting from the Court’s opinion on standing in *Alderman*, argued that the *Jones* decision had liberalized the standing doctrine to include target standing, and therefore target standing should apply to Title III.¹⁰⁰ Commentators have likewise argued that target standing is the only interpretation that “would have made sense to Title III legislators.”¹⁰¹

Despite solid evidence in both the text and legislative history of Title III to the contrary, as well as the fact that the issue was never briefed in *Alderman* because Title III did not apply,¹⁰² the *Alderman* dicta has become dispositive of the Title III standing issue in many jurisdictions.¹⁰³ This presents law enforcement officers with an incentive “to sacrifice the case against a minor criminal—by violating his rights—in the hopes of developing a successful prosecution against a major offender.”¹⁰⁴

In addition to limiting the definition of aggrieved persons to those whose conversations were actually intercepted, there is an additional standing issue that allows for evidence obtained in violation of the minimization order to be used by the prosecution in an investigation. The issue is squarely presented when a witness refuses to testify before a grand jury because he or she was summoned and

98. *Id.* at 171–72.

99. Legislative History, *supra* note 5, at 2179–80.

100. *Alderman*, 394 U.S. at 207, 208 n.10 (Fortas, J., concurring in part and dissenting in part).

101. *See, e.g.*, Goldsmith, *supra* note 6, at 60–61.

102. *Id.* at 57 (citing Brief for Petitioners, *Alderman v. United States*, 394 U.S. 165 (1968) (Nos. 133, 11, 197) and Brief for United States, *Alderman v. United States*, 394 U.S. 165 (1968) (Nos. 133, 11, 197)).

103. *Id.* at 122 (citing *United States v. Dorfman*, 690 F.2d 1217 (7th Cir. 1982); *United States v. Williams*, 580 F.2d 579, 583 (D.C. Cir. 1978); *United States v. Houlton*, 525 F.2d 943, 946 (5th Cir. 1976); *United States v. Bynum*, 513 F.2d 533, 534–35 (2d Cir. 1975)).

104. *Id.* at 61 (citing Welsh S. White & Robert S. Greenspan, *Standing to Object to Search and Seizure*, 118 U. PA. L. REV. 333, 351 (1970)). Goldsmith further notes that “it is questionable whether Title III’s civil and criminal penalties independently serve as effective deterrents.” *Id.* at 61 n.380. It is the contention of this note that they do not.

questioned on the basis of information allegedly obtained from illegal wiretapping.¹⁰⁵ Section 2518(10)(a), which provides the remedy for aggrieved persons, does not include grand jury witnesses as parties who may move to suppress evidence.¹⁰⁶ The Supreme Court, however, held in *Gelbard v. United States* that § 2515 does provide grand jury witnesses with a “just cause” defense to a contempt charge for refusing to answer questions based on evidence obtained in violation of Title III,¹⁰⁷ but it has failed to provide any guidance on how to determine whether the evidence was in fact illegally obtained.¹⁰⁸ This is not an issue when there has been no court order at all, but if the surveillance was conducted pursuant to a warrant and the argument is that the minimization order was violated, then a mechanism for the witness to challenge the interception would be necessary. While the Court did not come up with a workable procedure, it indicated in *Gelbard* that a witness may not be able to assert this defense when the surveillance was conducted pursuant to a court order.¹⁰⁹

The lower courts have attempted to craft procedures for witnesses who make *Gelbard* challenges to grand jury questions. Unless the unlawfulness of the government’s surveillance was established at a prior judicial proceeding,¹¹⁰ in order to challenge the minimization effort the witnesses would need some form of discovery so that the recorded conversations could be evaluated in context. Several circuit courts held that witnesses were not entitled to any such discovery, but in the event of a *Gelbard* challenge judges should review the surveillance documents *in camera* for facial invalidity.¹¹¹ The surveillance documents refer to the documents authorizing the surveillance, such as the warrant application and its supporting affidavits. Transcripts and recordings of the actual conversations are not included, therefore minimization violations cannot be assessed. Other circuits have allowed a limited challenge, requiring disclosure of the application for surveillance, supporting affidavit, court order, and government affidavit indicating the period of eavesdrop-

105. *Id.* at 66–67.

106. 18 U.S.C. § 2518(10)(a) (2006).

107. *Gelbard v. United States*, 408 U.S. 41, 46–47 (1972).

108. Goldsmith, *supra* note 6, at 69.

109. *Gelbard*, 408 U.S. at 61 n.22.

110. Such a determination would provide a grand jury witness with the *Gelbard* defense. *In re Persico*, 491 F.2d 1156, 1161 (2d Cir. 1974).

111. *Id.* at 1161–62; *In re Gordon*, 534 F.2d 197, 198–99 (9th Cir. 1976); *United States v. Worobytz*, 522 F.2d 197, 198 (5th Cir. 1975).

ping so that the witness can mount a facial challenge.¹¹² These circuits do allow for *in camera* inspection or redaction of sensitive information.¹¹³ This disclosure is also insufficient to allow the witness to challenge the officer's minimization because it does not include the transcripts. There is therefore no effective way for a grand jury witness to challenge a question because it is based on information gained by officers disregarding the minimization order on a court-ordered wiretap.

If the target of an investigation lacks standing to suppress any conversation to which he was not a party, it creates another scenario in which illegally obtained wiretap evidence can conceivably be admissible in court, and therefore another incentive for officers to intentionally fail to minimize.¹¹⁴ Furthermore, being able to use recorded conversations to inform prosecutors in their questioning of grand jury witnesses who will not be able to prove that the officers disregarded the minimization order is a valuable investigative tool. Even if officers are aware that any recordings will most likely be inadmissible against the parties involved, there is always the chance they will be useful in another prosecution later, and it is therefore better to have the recordings, even suppressed, than not to have them at all.

As the discussion in Part II has made clear, there are two ways in which the government can make use of evidence obtained in violation of Title III in a criminal prosecution: to impeach testimony offered on direct examination, and against parties who lack standing to challenge the interception. It would clearly be in the best interests of law enforcement officers to record every possible conversation if the only potential downside to doing so was the suppression of conversations that should not have been intercepted. There are some measures, however, that can be taken against officers who do so. These measures include depriving the prosecution

112. Goldsmith, *supra* note 6, at 73 nn.441–42 (citing *In re Grand Jury Proceedings (McElhinney)*, 677 F.2d 738 (9th Cir. 1982); *In re Demonte*, 667 F.2d 590, 599 (7th Cir. 1981); *In re Harkins*, 624 F.2d 1160, 1166 (3d Cir. 1980); *In re Grand Jury Proceedings (Katasourous)*, 613 F.2d 1171, 1175 (D.C. Cir. 1979); *Melickian v. United States*, 547 F.2d 416, 420 (8th Cir. 1977); *In re Lochiatto*, 497 F.2d 803, 807–08 (1st Cir. 1974)).

113. *In re Lochiatto*, 497 F.2d at 807–08.

114. Goldsmith, *supra* note 6, at 124 (“For example, if police obtain a wiretap for Citizen Small Fry’s telephone to intercept conversations of ‘Citizen Small Fry and others as yet unknown,’ knowledge that virtually all who speak with Citizen Small Fry may not raise minimization claims could prompt a decision to sacrifice the case against Citizen Small Fry and gain the benefit of indiscriminate listening to all of his calls involving ‘higher ups.’”).

of any evidence obtained from the wiretap in question, even conversations it would otherwise have been entitled to, criminal charges, and civil suits by the recorded parties against the offending officers. The next section discusses these disincentives.

B. The Disincentives to Failing to Minimize

Officers face three potential disincentives to minimization violations: wholesale suppression, civil suits, and criminal penalties. Wholesale suppression means that the minimization violation was so egregious that the court will not allow any of the recorded conversations in the government's case-in-chief, including those which were properly intercepted. Civil suits are suits by the recorded parties against the officers and the government for damages stemming from a violation of Title III. Criminal penalties for violations of Title III also exist;¹¹⁵ however, these penalties are not relevant for the purposes of this note, because in practice officers are not prosecuted for failing to minimize. No court has ever found an officer guilty of willfully violating this provision due to a failure to minimize.¹¹⁶ While these disincentives should theoretically work to deter minimization violations, they fail to effectively do so.

1. Wholesale Suppression

Carr's treatise on electronic surveillance states that wholesale suppression is rarely applied, as the prevailing view is that "total suppression of electronic surveillance is not appropriate unless the moving party shows that there was a taint upon the investigation as a whole . . ." [and] [t]his circumstance [has] only rarely been found to have occurred."¹¹⁷ Several circuits have held that only the conversations that were improperly intercepted need to be suppressed.¹¹⁸ Even intentional minimization violations do not necessarily result in wholesale suppression, because the Supreme

115. Section 2511(1) provides that a person who violates the provisions of the act "shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5)." 18 U.S.C. § 2511(1) (2006). Section 2511(4) in turn provides that, with exceptions, "whoever violates subsection (1) shall be fined under this title or imprisoned not more than five years, or both." *Id.* § 2511(4). Section 2511(5) reads that courts may issue an injunction for a first offense, and that if the violation is a second offense, "the person shall be subject to a mandatory \$500 civil fine." *Id.* § 2511(5) (a) (ii) (A)–(B).

116. As far as the author is aware, no criminal case has ever even been brought under this section against an officer for a willful failure to minimize.

117. CARR & BELLIA, *supra* note 5, § 6:46.

118. *See, e.g.*, *United States v. Mansoori*, 304 F.3d 635, 648 (7th Cir. 2002); *United States v. Charles*, 213 F.3d 10, 22 (1st Cir. 2000); *United States v. Ozar*, 50

Court has adopted a standard of “objective reasonableness” for assessing minimization violations.¹¹⁹

The Supreme Court declined to address the appropriate scope of the suppression remedy in *Scott*;¹²⁰ however, the First Circuit has developed a test for wholesale suppression: “The critical inquiry is whether the minimization effort was managed reasonably in light of the totality of the circumstances.”¹²¹ This standard is hardly exacting: “The government is held to a standard of honest effort; perfection is usually not attainable, and is certainly not legally required.”¹²² Courts look to three factors as crucial in determining the reasonableness of the government’s conduct: the nature and complexity of the suspected crimes, the thoroughness of the government precautions to bring about minimization, and the degree of judicial supervision over the surveillance practices.¹²³ Wholesale suppression is not required unless the minimization effort over the course of the entire period of interception was not managed reasonably;¹²⁴ therefore, even a few flagrant violations would not be enough for a court to suppress properly intercepted conversations if the officers made reasonable efforts to minimize overall.

Construction of this standard has been extremely lenient toward the government. In one First Circuit case, federal agents monitoring a wiretap in a narcotics investigation intercepted twenty-two calls between a suspect’s wife and her attorney.¹²⁵ The defendants moved to suppress the entire wiretap on the ground that the agents had flagrantly disregarded both federal law¹²⁶ and the district court’s minimization order.¹²⁷ The district court denied the motion, electing instead to suppress only the offending calls.¹²⁸ The First Circuit affirmed on the basis that “[t]he minimization effort, assayed in light of the totality of the circumstances, was managed reasonably.”¹²⁹ In reaching this conclusion, the *Hoffman* court re-

F.3d 1440, 1448 (8th Cir. 1995); *United States v. Hoffman*, 832 F.2d 1299, 1309 (1st Cir. 1987); *see also* *United States v. Baltas*, 236 F.3d 27, 32 (1st Cir. 2001).

119. *Scott v. United States*, 436 U.S. 128, 137–39 (1978).

120. *Id.* at 136 n.10.

121. *Charles*, 213 F.3d at 22.

122. *United States v. Uribe*, 890 F.2d 554, 557 (1st Cir. 1989).

123. *See* *United States v. London*, 66 F.3d 1227, 1236 (1st Cir. 1995); *Uribe*, 890 F.2d at 557; *United States v. Angiulo*, 847 F.2d 956, 979 (1st Cir. 1988).

124. *Charles*, 213 F.3d at 22.

125. *United States v. Hoffman*, 832 F.2d 1299, 1307 (1st Cir. 1987).

126. *See* 18 U.S.C. § 2518(5) (2006).

127. *Hoffman*, 832 F.2d at 1307.

128. *Id.*

129. *Id.* at 1307–08.

jected the “suggestion that total suppression must be ordered to forestall future misconduct,” holding that total suppression may be an appropriate remedy only “in a particularly horrendous case”¹³⁰ and where there is a “taint upon the investigation as a whole.”¹³¹ Courts construing this standard have not defined exactly what they mean by “a particularly horrendous case,” because they have not yet held any activity to meet this test.¹³²

The First Circuit is not alone in its reluctance to apply wholesale suppression. The Seventh Circuit has explicitly adopted the *Hoffman* standard.¹³³ In another recent case, only 25.6% of calls subject to minimization were actually minimized, but the Tenth Circuit found that this percentage was sufficient to support the conclusion that the government made out a prima facie case of reasonable minimization in conformity with Title III.¹³⁴ The Eighth Circuit has upheld the overall minimization effort as reasonable when the government had minimized 80 out of 1,200 phone calls, when only 400 of those calls were drug-related,¹³⁵ and when the government’s logs showed 8,552 minimizations in the course of 15,024 minutes intercepted, with a total of only 2,952 minutes of pertinent conversations.¹³⁶ No circuit has explicitly rejected *Hoffman* in favor of a more stringent standard.

2. Civil Causes of Action

Aside from the unlikely threat of wholesale suppression, the other main reason a law enforcement officer would refrain from intercepting non-pertinent conversations is the possibility of civil liability. Title III does create a federal cause of action for willful violations of the statute;¹³⁷ however, it also provides that a good faith

130. *Id.* at 1309.

131. *Id.* at 1307.

132. *See, e.g.*, *United States v. Charles*, 213 F.3d 10, 22–23 (1st Cir. 2000).

133. *United States v. Mansoori*, 304 F.3d 635, 647–48 (7th Cir. 2002).

134. *United States v. Yarbrough*, 527 F.3d 1092, 1098 (10th Cir. 2008).

135. *United States v. Losing*, 560 F.2d 906, 909 (8th Cir. 1977).

136. *United States v. Ozar*, 50 F.3d 1440, 1448 (8th Cir. 1995).

137. 18 U.S.C. § 2520(a) (2006). The willfulness requirement is read into the civil portion because “no civil cause of action arises under Title III *unless* the criminal provisions of the statute have been violated.” *Citron v. Citron*, 539 F. Supp. 621, 622 n.1 (S.D.N.Y. 1982) (emphasis in original) (quoting *Kratz v. Kratz*, 477 F. Supp. 463, 483 (E.D. Pa. 1979)); *Anonymous v. Anonymous*, 558 F.2d 677, 677 (2d Cir. 1977) (affirming dismissal of a civil action under Title III with the observation that “the facts alleged here do not rise to the level of criminal conduct intended to be covered by the federal wiretap statutes . . .”). The criminal provision makes it a felony for anyone to “*willfully* intercept[], endeavor[] to intercept, or procure[]

reliance on a warrant or court order is a complete defense.¹³⁸ The statute authorizes compensatory and punitive damages, as well as reasonable attorney's fees.¹³⁹ Since compensatory damages for merely intercepting the phone call will be difficult to calculate, the statute sets the floor at \$100 per day or \$10,000 total, whichever is higher.¹⁴⁰

The good faith defense is fairly liberally applied when the defendant is an officer acting pursuant to a warrant. For example, an officer who obtained a valid wiretap warrant under Tennessee state law, which did not require exhaustion of less intrusive alternatives to wiretapping and therefore violated Title III, was found to have acted in good faith even though he admitted he was fully aware of Title III and simply believed it did not apply.¹⁴¹

The deterrent effect of civil suits is also cut back against by qualified immunity. In claims under *Bivens*,¹⁴² law enforcement officials have qualified immunity, which protects officer defendants from civil liability when a reasonable officer "could have believed" his or her conduct to be lawful.¹⁴³ This defense of qualified immunity was judicially created for § 1983 suits because "it is better to risk some error and possible injury from such error than not to decide or act at all."¹⁴⁴ When the Court decided in *Bivens* that a corollary civil action also existed against federal officers,¹⁴⁵ the defense was imported, though the Second Circuit added a subjective element.¹⁴⁶ To defend against a *Bivens* suit, officers would have to prove that they acted "in good faith and with a reasonable belief in

any other person to intercept or endeavor to intercept, any wire or oral communication . . ." 18 U.S.C. § 2511(1)(a) (emphasis added).

138. 18 U.S.C. § 2520(d)(1).

139. *Id.* § 2520(b).

140. *Id.* § 2520(c)(2)(B).

141. *Frierson v. Goetz*, 99 F. App'x, 649, 652–53 (6th Cir. 2004).

142. *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

143. *See, e.g., Hunter v. Bryant*, 502 U.S. 224, 227–28 (1991) (per curiam) (holding that Secret Service agents are immune from damages liability for an unlawful arrest "if a reasonable officer could have believed" in the existence of probable cause); *Anderson v. Creighton*, 483 U.S. 635, 638, 641 (1987) (holding that qualified immunity extends to actions "a reasonable officer could have believed . . . to be lawful").

144. *Scheuer v. Rhodes*, 416 U.S. 232, 242 (1974).

145. *Bivens*, 403 U.S. at 397.

146. The Court in *Bivens* remanded the question of immunity to the Second Circuit. *Id.* at 397–98. On remand, the Second Circuit held that while there was no "immunity," a defense did exist for law enforcement officers. *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 456 F.2d 1339, 1341 (2d Cir. 1972).

the validity of the arrest and search”¹⁴⁷ This subjective test would have rendered the qualified immunity question irrelevant in the Title III context, because the statute itself provides such a defense to any civil claims against officers.¹⁴⁸ Therefore, the immunity would have been coextensive with the statutory defense and would have indemnified only officers who could not be found liable anyway.

Unfortunately, the Supreme Court rejected the Second Circuit test and opted instead for an objective test for qualified immunity, wherein the only requirement for immunity to attach is that the action be objectively legally reasonable, assessed in light of the legal rules that were clearly established at the time the action was taken.¹⁴⁹ This is problematic in that it creates another barrier to civil plaintiffs recovering against officers. Plaintiffs must overcome both the statutory good faith defense of Title III by arguing that the individual officer was subjectively aware that he should not intercept a given conversation, and qualified immunity by arguing that the conversation was not sufficiently ambiguous for a reasonable officer to have believed the interception was within the minimization order. Qualified immunity would prevent the officer from having to pay any damages as long as a reasonable officer could have thought the conversation was within the scope of the order, even if the particular officer had no intention of minimizing, for example, like the officers in *Scott*.¹⁵⁰

Of course, to protect officers from suits under Title III, the defense of qualified immunity must apply to actions under Title III in addition to *Bivens*. There is a circuit split as to whether officers have qualified immunity to civil suits for violations of Title III. Unlike in § 1983, Congress did enact a statutory defense to a suit under § 2520(a)—the aforementioned good faith defense.¹⁵¹ Several courts have used this difference to distinguish the qualified immunity cases and hold them inapplicable to violations of Title III.¹⁵² Others have held that qualified immunity does apply to violations of Title III, reasoning that protecting public officials from personal

147. *Bivens*, 456 F.2d at 1341.

148. 18 U.S.C. § 2520(d) (2006).

149. *Anderson v. Creighton*, 483 U.S. 635, 638–39 (1987) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818–19 (1982)).

150. *Scott v. United States*, 436 U.S. 128 (1978); *see also supra* notes 29–31 and accompanying text.

151. 18 U.S.C. § 2520(d).

152. *See, e.g., Berry v. Funk*, 146 F.3d 1003, 1013 (D.C. Cir. 1998); *see also Davis v. Gracey*, 111 F.3d 1472, 1481–84 (10th Cir. 1997) (implying that the good faith defense under Title III is a separate defense from qualified immunity).

liability for violations of constitutional rights that are not clearly established is no different than protecting them when they violate statutory rights that are not clearly established.¹⁵³ In these circuits, there is even less of a deterrent effect on individual officers because they would not be liable for damages from civil suits.

Even where qualified immunity does not exist in the Title III context, or in the rare case where it can be overcome, there is an additional barrier to deterrence from civil suits. In *Bivens* actions, officers are almost always indemnified by the government for any civil liability,¹⁵⁴ meaning there is no actual deterrent effect on the officers themselves. Practically speaking, “indemnification is a virtual certainty.”¹⁵⁵ Since the officers are not responsible for either litigating the suit or for paying the judgment, they are unlikely to be deterred by the threat of a civil suit. It is unclear whether this indemnification also applies to officers found liable for violations of Title III,¹⁵⁶ but there is no conceivable policy rationale for indemnifying law enforcement officials who are found liable under *Bivens* that would not apply equally to officers found liable for violations of Title III.

Due to these barriers to holding officers personally liable, the threat of civil suits provides a negligible deterrent effect on officers contemplating an intentional minimization violation. For an officer to actually have to pay damages, a court would have to find that he did not act in good faith, which would not happen in every case of actual bad faith. Bad faith is often difficult to prove, and the burden in a civil action is on the plaintiff. Courts would also have to find that qualified immunity did not apply because not only did the officer not act in good faith, but also that no reasonable officer could have intercepted that conversation acting in good faith. Even if that were to happen, the officer may still be indemnified by the govern-

153. See, e.g., *Tapley v. Collins*, 211 F.3d 1210, 1216 (11th Cir. 2000); *Blake v. Wright* 179 F.3d 1003, 1013 (6th Cir. 1999); *Davis v. Zirkelbach*, 149 F.3d 614, 619–20 (7th Cir. 1998); *In re State Police Litig.*, 88 F.3d 111, 124–27 (2d Cir. 1996) (acknowledging that qualified immunity may apply in the Title III context depending on the facts).

154. Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials’ Individual Liability Under Bivens*, 88 GEO. L.J. 65, 76 (1999) (In *Bivens* cases, the federal government “indemnifies its employees against constitutional tort judgments or settlements (in the rare instances in which a *Bivens* claim results in a monetary liability) and takes responsibility for litigating such suits . . .”).

155. *Id.* at 77.

156. Because indemnification happens after a civil judgment is rendered, and since civil judgments against law enforcement officers for violations of Title III are basically nonexistent, there is no precedent for this situation.

ment for any damages he was required to pay.¹⁵⁷ Given how understanding courts generally are when examining minimization violations,¹⁵⁸ these suits are extremely unlikely to get past even the first of these three hurdles. This difficulty is demonstrated by the dearth of plaintiffs attempting to hold law enforcement officers civilly liable for minimization violations (as opposed to holding them liable for placing a wiretap without a warrant). This author was unable to find a single such case.

To briefly summarize the analysis thus far, there are two ways in which improperly minimized recordings, even if suppressed, are useful to the prosecution—to impeach testimony offered on direct examination and against parties who lack standing. On the other side of the coin, there are two disincentives to recording such conversations—wholesale suppression of the wiretap and civil damages. Both of these disincentives are rarely applied in the context of minimization violations and require the aggrieved party to prove that the officer acted in bad faith, which, given the ambiguity of these conversations, is extremely difficult. Therefore, a rational officer would fail to adhere to the minimization order. The next section proposes legal reforms that would fix the incentive structure and encourage a rational officer to follow the law.

III. THE PROPOSED SOLUTION

The suggestions in this section would solve an aspect of the problem discussed above if used individually, but none of them are mutually exclusive with the others. To fix the incentive structure, it is not necessary to remove all the incentives and increase all the disincentives for failing to minimize; it is only necessary to ensure that the costs outweigh the potential benefits. The reluctance of courts and legislatures to impose harsh sanctions on individual officers is understandable. The holding of *Scott*, while problematic due to its lack of deterrent effect on minimization violations, was consistent with other areas of Fourth Amendment law and relieves lower courts of the burden of determining whether an officer acted in good faith. It is therefore more reasonable to remove the incentives for failing to minimize than to increase the costs. By making

157. It is possible that there would be some internal penalties enforced on the officer if the FBI had to pay civil damages. There is no standard policy on this, and no such penalties are listed in the FBI's Domestic Investigations and Operations Guide. See FED. BUREAU OF INVESTIGATION, DOMESTIC INVESTIGATIONS AND OPERATIONS GUIDE 193–200 (2008). This would likely be handled on a case-by-case basis.

158. See *supra* notes 125–36 and accompanying text.

improperly minimized wiretap evidence inadmissible in court, rendering it unusable to prosecutors in grand juries, and expanding the category of people who have standing to challenge the interception, Congress can turn intentional minimization violations from rational to irrational decisions.

The first problem that needs to be solved is the impeachment issue. There are two policy arguments in favor of allowing such evidence to be used for impeachment purposes on which Congress presumably relied when it crafted the legislative history of Title III.¹⁵⁹ The first is that there is a negligible marginal deterrent effect on police officers from suppressing the evidence for impeachment purposes.¹⁶⁰ This is not the case in the Title III context because such conversations cannot be obtained by legal means, so suppressing them in the prosecution's case-in-chief provides no deterrent effect. This also means that suppressing these conversations for impeachment purposes does not create a deterrent effect either; however, such suppression does remove an incentive to violate the minimization order, allowing the true disincentives such as wholesale suppression and civil damages to be more effective.

The more powerful argument against suppression is that the harms inflicted on the fact-finding process by perjury are so severe that courts cannot grant a license to perjure without fear of contradiction.¹⁶¹ What this argument fails to take into account is that, had officers followed the law, the prosecution would also be unable to contradict the perjury. With physical evidence, an illegal search is not necessarily a but-for cause of the discovery,¹⁶² therefore a mistake by officers that leads to suppression can "give" the defendant a license to perjure himself that he would not have had otherwise. Since improperly minimized conversations should never and could never have been recorded legally, preventing their use in contradicting perjury does not give the defendant a windfall; it merely puts the prosecution in the same position to contradict the perjury that it would have been in had it followed the law.

The second change that needs to be made is to incorporate target standing into Title III. This could be done by courts if they chose not to follow the *Alderman* dicta, or by Congress if it amended the statute to more clearly reflect target standing. This would allow the target of an investigation to move to suppress a recorded conversation to which he was not a party. Eliminating the standing re-

159. See *supra* notes 68–72 and accompanying text.

160. See *Harris v. New York*, 401 U.S. 222, 225 (1971).

161. See *United States v. Havens*, 446 U.S. 620, 626–27 (1980).

162. See *Amar, supra* note 33, at 793–94.

quirement entirely is unnecessary, and would “impose a disproportionate penalty upon law enforcement for a single violation and would potentially create insuperable taint problems.”¹⁶³ It would be a rare situation in which an officer listening to a wiretap made the decision to record a conversation in violation of the minimization order because he thought it could be used against someone who was neither a party to the conversation nor a target of the investigation; therefore, such an interception is unlikely to have been made in bad faith. Both of these solutions expand the scope of the suppression remedy to remove the incentive to violate the minimization provision.

In the alternative, Congress could elect to allow improperly minimized evidence to be used by the prosecution in these circumstances, but increase the sanctions on law enforcement officers for deliberate violations. This could be accomplished by lowering the threshold for plaintiffs to overcome the good faith defense and qualified immunity in civil suits and lowering the standards for criminal prosecution of offending officers, or more liberally applying the standard for wholesale suppression. In addition, state police departments and the FBI could impose internal sanctions on officers they find have failed to minimize.

The standard for invoking wholesale suppression also needs to be changed. Prior to *Scott*, there were multiple approaches to minimization violations: “total suppression of the entire product of wire interception, partial or limited suppression of only those conversations that should not have been intercepted, and a double-standard remedy that turns on the nature of the deviations.”¹⁶⁴ The double-standard remedy that turns on whether the interception was an intentional minimization violation is the most narrowly tailored to the problem of intentional failures to minimize. However, it is also the most difficult to enforce because it requires courts to determine the officer’s intent. After *Scott*, the subjective intent of the officers conducting the minimization is considered irrelevant¹⁶⁵ and the double-standard remedy is therefore no longer used. Given the incentives to record conversations that are not within the scope of the minimization order discussed in Part II, the double-standard remedy should be employed to deter intentional minimization violations. This could be accomplished either by a legislative amendment to Title III or by the Supreme Court if it elected to

163. Goldsmith, *supra* note 6, at 61.

164. Ronni L. Mann, Note, *Minimization of Wire Interception: Presearch Guidelines and Postsearch Remedies*, 26 STAN. L. REV. 1411, 1435 n.116 (1974).

165. *Scott v. United States*, 436 U.S. 128, 138 (1978).

overrule *Scott*. While this would require courts to determine whether the interceptions were made in good or bad faith, these distinctions are not impossible to make. The relevant factors would be whether the officers properly minimized in other recordings on the same wiretap, whether they can explain to the court's satisfaction why they thought the recorded conversation was relevant, and the scope and nature of the criminal enterprise under investigation.

The most easily implemented and applied solution is internal discipline by law enforcement agencies. Law enforcement organizations could apply penalties such as fines, suspensions, demotions, and removal from the case to officers who violate the minimization orders. This imposes the fewest transaction costs on the legal system and has the additional benefit of being directly applied to the law enforcement officers who violated the minimization order. Critics of the exclusionary rule are quick to point out that its deterrent effect on police misconduct is negligible because it is unclear whether suppression of evidence is even noticed by the law enforcement officers who violated the Constitution, who have most likely moved on to another case.¹⁶⁶ Direct sanctions on the officers have no such feedback problem.

CONCLUSION

Suppressing illegally obtained wiretap evidence in the government's case-in-chief fails to incentivize officers to take care to avoid minimization violations. Therefore, the law must provide some supplemental measure to disincentivize police officers from intentionally violating Title III's minimization requirements. In many jurisdictions, law enforcement officers can blatantly disregard the minimization requirement and still introduce conversations against people who were not parties to the phone call or to impeach a witness, with little concern that their actions might lead to wholesale suppression or personal liability. This is an unacceptable situation for two reasons. It erodes the rule of law to incentivize those who are sworn to enforce our laws to break them in the process, and it results in a violation of privacy and the chilling of protected speech that Congress wrote Title III specifically to avoid.

166. See, e.g., Harry M. Caldwell & Carol A. Chase, *The Unruly Exclusionary Rule: Heeding Justice Blackmun's Call to Examine the Rule in Light of Changing Judicial Understanding About Its Effects Outside the Courtroom*, 78 MARQ. L. REV. 45, 54-56 (1994); L. Timothy Perrin et al., *If It's Broken, Fix It: Moving Beyond the Exclusionary Rule—A New and Extensive Empirical Study of the Exclusionary Rule and a Call for a Civil Administrative Remedy to Partially Replace the Rule*, 83 IOWA L. REV. 669, 675 (1998).

To fix the incentive structure, several reforms are needed. Since it is difficult to increase the disincentives to minimization violations on law enforcement officers without severely hindering their investigative efforts, Congress and the courts should attempt to eliminate the scenarios in which improperly minimized conversations are helpful to the prosecution. This can be done with two legislative amendments to Title III. The first should supersede the *Alderman* dicta and grant standing to challenge a minimization violation to the targets of the investigation. The second should supersede the language in the legislative history that implies that evidence obtained in violation of Title III should be admissible for impeachment purposes. Finally, police departments and the FBI should impose direct sanctions such as suspensions and negative performance reviews on law enforcement officers who fail to properly minimize. Without these reforms, the incentive structure will continue to encourage officers to violate the minimization provision of Title III, which is critical to the statute's constitutionality and to preserving the First and Fourth Amendment rights of American citizens.

