Applying Leon: Does the Good Faith Exception Apply to Title III Interceptions

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Applying *Leon*: Does the Good Faith Exception Apply to Title III Interceptions?

Melanie B. Harmon†

**INTRODUCTION**

Wiretapping and other methods of electronic surveillance can be used to combat public corruption. In the trial of former Illinois governor Rod Blagojevich, for example, some of the most shocking evidence came from wiretaps on Blagojevich's personal phone. Wiretap evidence has also been used in anticorruption investigations and prosecutions of such defendants as William Cellini, Antoin Rezko, members of the New York City Police Department, and Richard Lipsky. But just as when wiretapping is used to combat lower-profile crimes, minor and unintentional legal defects can occur in the wiretapping process, which involves obtaining a wiretapping warrant. Must such errors render wiretap and derivative evidence useless to prosecutors?

American constitutional jurisprudence, relying on the Fourth Amendment, typically requires that ill-gotten evidence be excluded from use at trial. As a practical matter, however, as

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1 See Douglas Belkin and Stephanie Banchero, *Blagojevich Convicted on Corruption Charges*, Wall Street J A3 (June 28, 2011). See also Criminal Complaint, *United States v Rod Blagojevich*, No 08-CR-888, *59 (ND Ill filed Dec 7, 2008) (quoting a wiretap recording in which Blagojevich states, “I’ve got this thing and it’s fucking golden, and, uh, uh, I’m not just giving it up for fuckin’ nothing”).


more evidence is available at trial, the accurate resolution of a case becomes more likely. And in the realm of high-profile—and often copycat—public corruption, the public’s desire to convict corrupt individuals might be heightened. Thus, the fight against corruption may be best served by a regime that allows minimally “tainted” wiretap evidence to enter the trial record because, although these minor wiretapping errors are inadvertent, the adverse effects of evidentiary suppression are potentially quite large. Whether the admission of such evidence is legally permissible, however, is currently a point of contention among the federal courts.

Perhaps ironically, the federal legislation that addresses investigatory wiretapping—Title III of the Omnibus Crime Control and Safe Streets Act of 1968—is actually the source of the confusion as to whether the existence of a statutory suppression remedy in Title III vitiates certain elements of the constitutional suppression regime. In light of Title III’s suppression rule, codified at 18 USC § 2515, can the

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8 The Fourth Amendment, under penalty of the exclusionary rule, protects citizens from unreasonable searches carried out by government officials:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

US Const Amend IV. See also *Weeks*, 232 US 383. Over the years, courts have developed some limited exceptions to the exclusionary rule, including the good faith exception. See *United States v Leon*, 468 US 897, 910–13 (1984).

9 "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 at any trial ... if the disclosure of that information would be in violation of this
good faith exception to the Fourth Amendment exclusionary rule\(^{10}\) be applied to wiretaps carried out under a Title III wiretap order? Some federal courts have answered this question in the affirmative, while others have found that the judicial good faith exception cannot be applied.\(^{11}\)

After reviewing the history of constitutional and statutory wiretap law in Section I, this Comment will describe the current ambiguity regarding suppression of wiretap evidence derived under certain invalid warrants in Section II. Finally, in Section III, this Comment will attempt to resolve the ambiguity identified in Section II by making three arguments. First, as set out in Section IIIA, the reasons currently set forth for rejecting the good faith exception are ill-conceived. Second, as discussed in Section IIIB, the good faith exception can be directly applied to Title III wiretaps under the language and history of the statute itself. Lastly, Section IIIC will argue that even if the good faith exception does not apply directly to Title III wiretaps, courts can apply the good faith exception indirectly by importing the principles of good faith into the exercise of judicial discretion or by relying on the constitutional principle of separation of powers.

### I. SETTING THE STAGE

To reach a fuller understanding of the interplay between the Fourth Amendment suppression regime and Title III, this Section will outline the relevant statutory and decisional laws relating to wiretapping. After reviewing the Supreme Court’s early wiretapping decisions, this Section will discuss Title III. This Section will conclude by briefly describing the relevant Fourth Amendment jurisprudence—specifically, the exclusionary rule and the good faith exception.

#### A. The Constitutionality of Wiretaps

Until the mid-1960s, the Supreme Court consistently held that the Constitution did not prohibit electronic surveillance chapter.” 18 USC §2515.

\(^{10}\) See Leon, 468 US 897.

\(^{11}\) For the major decisions on either side of the divide, see and compare United States v Moore, 41 F3d 370 (8th Cir 1994) (applying the good faith exception to a Title III wiretap), with United States v Rice, 478 F3d 704 (6th Cir 2007) (refusing to apply the good faith exception). The circuit split has filtered down to the district court level. See, for example, United States v Solomonyan, 451 F Supp 2d 626, 637–38 (SDNY 2006). For a state court case adopting the Rice approach, see People v Jackson, 129 Cal App 4th 129, 156–57 (2005).
conducted without physical entry onto private property. Without an accompanying trespass, the government did not engage in the type of “unlawful physical invasion of a constitutionally protected area” that was believed to be the hallmark of a Fourth Amendment violation. Starting in the early 1960s, however, the Court changed course and began to indicate that private conversations might fall within the Fourth Amendment’s protection.

First, in Silverman v United States, in which surveillance was conducted by means of a microphone inserted into the defendant’s home and abutting a heating duct, the Court based its decision to suppress not on the “technicality of a trespass upon a party wall” but rather “upon the reality of an actual intrusion into a constitutionally protected area.” Next, in Wong Sun v United States, the Court opined that “the Fourth Amendment may protect against the overhearing of verbal statements as well as against the more traditional seizure of ‘papers and effects.’”

In Berger v New York, the Court’s shifting approach to wiretap evidence moved one step further. Berger considered a New York statute that permitted the issuance of ex parte eavesdropping orders. While determining that the statute authorized searches failing to meet the Fourth Amendment’s particularity and probable cause requirements, the Court held that “conversations” fell within the ambit of Fourth Amendment protection. Thus, the use of devices to detect and overhear private conversa-

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12 See Berger v New York, 388 US 41, 50–53 (1967) (reviewing the Court’s wiretap decisions up to 1963).
13 Id at 52, quoting Lopez v United States, 373 US 427, 438–39 (1963). See also Olmstead v United States, 277 US 438 (1928) (holding that the Constitution did not prohibit wiretapping conducted without actual physical entry onto private premises); Goldman v United States, 316 US 129 (1942) (holding the same for “bugging”); On Lee v United States, 343 US 747 (1952) (finding no liability because “no trespass was committed”).
15 Id at 509, 512. In rejecting the reasoning of the circuit court—which held that the evidence was admissible because of the lack of a physical trespass—the Court refused to reexamine the Goldman and On Lee decisions, but also declined to move beyond them by expanding the viability of the physical trespass requirement. Id at 512.
17 Id at 485 (emphasis added). In the wake of the Olmstead decision, Congress passed the Communications Act of 1934. Pub L No 73-416, 48 Stat 1064, codified at 47 USC § 151 et seq. Section 605 of the 1934 Communications Act outlawed the unauthorized interception and disclosure of the contents of telephone-based communications. 48 Stat at 1103. A line of cases interpreting that statute existed separately from the Constitutional decisions represented by Olmstead and its progeny.
18 388 US 41 (1967).
19 Id at 43–44.
20 Id at 54–58.
tions constituted a search within the Fourth Amendment's meaning of that term.\textsuperscript{21}

The Court finally acknowledged that "the premise that property interests control the right of the Government to search and seize ha[d] been discredited" in \textit{Katz v United States}.\textsuperscript{22} By instead interpreting the Fourth Amendment to prohibit the recording of private oral statements, conducted with or without physical trespass, the \textit{Katz} court produced a paradigm shift in wiretap law.\textsuperscript{23} The search at issue in \textit{Katz} was, according to the Court, both reasonable in scope and supported by probable cause. But as a matter of law, the search violated the Fourth Amendment because it was not approved ex ante by a judicial officer.\textsuperscript{24} Without "the procedure of antecedent justification" by a neutral and deliberate judicial officer, the search was a per se violation of the Fourth Amendment.\textsuperscript{25} Indeed, judicial interposition (typically in the form of a warrant) was a nearly universal "constitutional precondition of ... electronic surveillance" because none of the usual exceptions to that Fourth Amendment requirement—specifically, the hot pursuit, incident to arrest, and pursuant to subject's consent exceptions—were applicable to electronic searches.\textsuperscript{26}

B. Title III, the Federal Wiretap Statute

Following the \textit{Berger} and \textit{Katz} decisions, Congress passed Title III of the Omnibus Crime Control and Safe Streets Act of 1968.\textsuperscript{27} This legislation was designed to "define on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized, [and to] prohibit any unauthorized interception."\textsuperscript{28} Concerned with privacy as well as crime fighting, Congress drafted Title III so as "to conform with" and "meet" the constitutional standards announced in \textit{Berger} and \textit{Katz}, going so far as to use those cases as a "guide" in drafting the text of the statute.\textsuperscript{29} Title III was also

\textsuperscript{21} Id at 51, 55, 58.
\textsuperscript{23} \textit{Katz}, 389 US at 352–53.
\textsuperscript{24} Id at 354–57.
\textsuperscript{25} Id at 359.
\textsuperscript{26} Id at 357–58.
\textsuperscript{27} Title III, 82 Stat at 211.
\textsuperscript{28} Title III, 82 Stat at 211.
\textsuperscript{29} \textit{Omnibus Crime Control and Safe Streets Act of 1968}, S Rep No 90-1097, 90th Cong, 2d Sess 1–2, 37, 47 (1968), reprinted in 1968 USCCAN 2112. See also id at 40
drafted to pull back from the protection afforded by §605 of the Communications Act of 1934, an earlier wiretap statute that Congress viewed as overly restrictive of the use of wiretap evidence in criminal prosecutions. Title III thus aimed to serve seemingly antagonistic goals—the protection of privacy and the enhancement of law enforcement's investigative power.

To navigate these conflicting objectives, Congress implemented a general prohibition on the interception and disclosure of the contents of wire, oral, or electronic communications. This prohibition is codified at 18 USC §2511. To narrow the scope of this ban, Congress also created a system whereby law enforcement officers can obtain judicial approval for investigative wiretaps and thereby avoid the statute's prohibitions on interception and disclosure. To obtain judicial approval for a Title III wiretap, a high-ranking Department of Justice (DOJ) official (or an analogous state official) must first authorize an application for a wiretap order. Next, the application is submitted to a judge of competent jurisdiction, in writing and under oath. If, based on the information and allegations contained in the application, the reviewing judge finds probable cause and necessity, then the judge can issue an ex parte order authorizing a wiretap or other electronic interception. A wiretap order issued pursuant to the above procedure must identify the intercept target, the location where the wiretap is authorized to occur, the type of communications sought, the particular offense suspected, the length of the authorization period, the agency that will conduct the interception, and the DOJ official who provided internal authorization for the application. Many elements of the Title III authorization system were designed to conform to requirements of the Fourth

("[The Berger decision ... has laid out guidelines for the Congress and State legislatures to follow in enacting wiretapping and electronic eavesdropping statutes which would meet constitutional requirements."). Other than the stated desire for uniformity, id at 38, Congress did not clarify why a codification of these constitutional standards was necessary.

32 18 USC §§2516–18.
33 18 USC §2516.
34 18 USC §2518(1).
35 18 USC §2518(3).
36 18 USC §2518(4).
Amendment, including ex ante judicial interposition and the necessity and probable cause requirements.37

To encourage compliance with Title III's limits on wiretapping and electronic surveillance, Congress created a series of remedies for unlawful interceptions. The general prohibition on wiretapping and disclosure entails criminal sanctions and allows for civil suits against wrongful interceptors.38 Additionally, 18 USC § 2515 prohibits the use of unlawfully intercepted wire or oral communications at trial, when disclosure of such information would violate the Title III disclosure ban represented by the criminal provisions in § 2511.39 To give effect to the § 2515 suppression rule, 18 USC § 2518(10)(a) permits a person whose communications have been intercepted to move to suppress such interceptions and any derivative evidence. Three grounds for a § 2518(10)(a) suppression motion are listed in the statute: that the interception was unlawful, that the order was facially insufficient, or that the interception did not conform to the order.40 If the court grants a § 2518(10)(a) suppression motion, the challenged interception is deemed to have been conducted in violation of Title III and the § 2515 suppression rule is activated.41

Although § 2518(10)(a) lists three grounds under which the § 2515 suppression rule may be triggered, the Supreme Court has held that § 2515 does not mandate suppression for every vio-

38 18 USC § 2511. Title III's criminal and civil sanctions require intentionality on the part of the interceptor. See 18 USC § 2511(1) ("[A]ny person who—(a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication; ... shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).").
39 See note 9 for the text of § 2515.
40 18 USC § 2518(10)(a).
41 The text of § 2518(10)(a) reads as follows:

Any aggrieved person [as defined in § 2510(11)] in any trial ... may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that—(i) the communication was unlawfully intercepted; (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or (iii) the interception was not made in conformity with the order of authorization or approval. ... If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter.

18 USC § 2518(10)(a). See S Rep No 90-1097 at 78 (cited in note 29) (stating that "Paragraph (10)(a) ... must be read in connection with section[ ] 2515. It provides the remedy for the right created by section 2515."). By deeming an interception "in violation of" Title III, § 2518(10)(a) removes the interception from the scope of § 2517, which permits disclosure of authorized interceptions by law enforcement. Thus, § 2517 is the link between the remedy in § 2518(10)(a) and the "right" in §§ 2515 and 2511.
lation of the Title III wiretapping scheme. In *United States v Giordano*[^42] and *United States v Chavez*,[^43] the Court determined that compliance with all of the elements of the statutory system that were intended specifically to prevent abuse of wiretapping was enough to defeat a § 2518(10)(a) suppression motion, even if other requirements of Title III were contravened.[^44] For example, in *Chavez*, the Court found that the defect in the authorization order—an incorrect identification of the DOJ official who internally authorized the application—was not constitutional in nature and did not warrant suppression under Congress's statutory scheme.[^45] Indeed, the Court "[could] not say that misidentifica-
tion was in any sense the omission of a requirement that must be satisfied if wiretapping or electronic surveillance is to be lawful under Title III."[^46] Rather, the Court found that even given the statute's suppression rule, "suppression [wa]s not mandated for every violation of Title III."[^47]

A 1986 amendment to the statute extended Title III's protection against unlawful interception to "electronic communications."[^48] Finding that the initial statute's references to "wire or oral communications" did not encompass electronic mail or other inter-computer communications, Congress believed that this gap created legal uncertainty that "endanger[ed] the admissibility of evidence."[^49] Generally, then, the 1986 amendment led to uniform treatment of wire, oral, and electronic communications. Notably, however, the § 2515 suppression rule was not extended to electronic communications,[^50] and Congress also appended the following language to § 2518(10): "The remedies and sanctions described in this chapter with respect to the interception of electronic communications are the only judicial remedies and sanc-
tions for nonconstitutional violations of this chapter involving

[^44]: *Giordano*, 416 US at 527; *Chavez*, 416 US at 574–75.
[^46]: Id at 573.
[^47]: Id at 575.
[^48]: The statute had previously protected only "wire and oral communications." See Electronic Communications Privacy Act of 1986 §§ 101–111 (ECPA), Pub L No 99-508, 100 Stat 1848, 1848–59, codified in various sections of Title 18.
[^50]: See 18 USC § 2515 (covering only "wire or oral communications"); S Rep No 99-541 at 22 (cited in note 49).
such communications.”\(^{51}\) Thus, the target of an electronic
communication intercept that violates Title III but not the Constitu-
tion has no suppression remedy available.

C. The Good Faith Exception

The exclusionary rule—formulated by the Supreme Court in
the absence of a constitutional penalty for violations of the
Fourth Amendment—prohibits the use, as substantiative evidence
of guilt, of any material obtained during a search conducted in
violation of the Fourth Amendment.\(^{52}\) The exclusionary rule also
bars derivative evidence flowing from an unconstitutional search
under the “fruits of the poisonous tree” doctrine.\(^{53}\) Much like the
suppression rule in Title III—through the defined term “ag-
grieved person” in § 2518(10)(a)—only parties who were constitu-
tionally wronged by the search and against whom the evidence is
being levied have standing to invoke the rule.\(^{54}\)

The good faith exception, first announced in United States v
Leon,\(^{55}\) is one of several principles developed by the Supreme
Court that limit the scope of the exclusionary rule.\(^{56}\) According to
the good faith exception, the exclusionary rule is not triggered
when a law enforcement officer acted in objectively reasonable,
good faith reliance on a search warrant later found to be inva-
lid.\(^{57}\) However, the good faith exception does not apply to war-
rants that were invalid because the issuing judge was misled by
a knowingly false affidavit.\(^{58}\) Similarly, the exception is not acti-
vated when the warrant-issuing judge “wholly abandoned his
judicial role”; when the warrant was issued in response to an
affidavit that was “so lacking in indicia of probable cause” that it
was unreasonable for the officer to believe probable cause exist-

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\(^{51}\) 18 USC §2518(10)(c). See also S Rep No 99-541 at 23 (cited in note 49) (noting
that, for violations of a "constitutional magnitude, the court involved in a subsequent trial
will apply existing constitutional law with respect to the exclusionary rule").

\(^{52}\) See Weeks v United States, 232 US 383, 391–92 (1914); Mapp v Ohio, 367 US 643
(1961).

\(^{53}\) See Silverthorne Lumber Co v United States, 251 US 385 (1920); Nardone v United


\(^{56}\) For a description of other exceptions to the exclusionary rule, see id at 909–13.

\(^{57}\) Id at 920–21.

\(^{58}\) Id at 923. Nor is an affidavit that is false and made with reckless disregard for the
truth subject to the good faith exception. See id.
ed; or when the warrant was so facially deficient that the officer could not have reasonably believed it to be valid. 59

In formulating the good faith exception, the Supreme Court first considered that the exclusionary rule was a judicial remedy meant to address the Constitution's lack of a remedy for Fourth Amendment violations. The exclusionary rule was not a "necessary corollary of the Fourth Amendment," because the Fourth Amendment had never been interpreted as excluding all illegally seized evidence. 60 Indeed, use of evidence discovered in or derived from an unconstitutional search "work[s] no new Fourth Amendment wrong." 61 Instead, the purpose of the exclusionary rule is to prevent the initial, constitutional wrong—the unlawful search itself. As the Court confirmed in Leon, the exclusionary rule functions to deter law enforcement officers from engaging in unlawful searches by denying them the expected benefits of those searches—that is, evidence with which to convict the defendant. 62

By thus separating the constitutional right to be free from unlawful searches from the judicial remedy of suppression of ill-gotten evidence, the Court cleared a path for the good faith exception. 63 The exclusionary rule entails both social benefits (deterrence of constitutionally prohibited searches) and costs (failed prosecutions of actually-guilty defendants); thus, the Court used a balancing test to evaluate the usefulness of the exclusionary rule. 64 The outcome of this balancing was simply stated by the Court: When "the exclusionary rule does not result in appreciable deterrence, then, clearly, its use ... is unwarranted." 65 From that line of reasoning, the good faith exception came clearly into focus. When an officer has acted in good faith, exclusion of evidence is not supported by this balancing test. Because law enforcement officials already display maximum compliance with the Fourth Amendment in good faith situations, the exclusionary rule can work no additional deterrence on those parties directly

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59 Leon, 468 US at 923.
60 Id at 905–06.
62 Leon, 468 US at 906.
63 Id at 906 ("Language in opinions of this Court and of individual justices has sometimes implied that the exclusionary rule is a necessary corollary of the Fourth Amendment.... [T]he Fourth Amendment has never been interpreted to preclude the introduction of illegally seized evidence in all proceedings or against all persons.") (citations and quotation marks omitted).
64 Id at 908.
65 Id at 909.
responsible for the constitutionality of the search, and the costs of exclusion are not supported by countervailing benefits.66

II. A SPLIT ARISES

Federal courts have disagreed as to whether the Leon good faith exception applies to Title III evidence. This Section will describe the major cases on each side of this split.

A. Applying Leon

The earliest appellate-level case to address the question held that Leon's good faith exception applied to Title III wiretaps. In United States v Malekzadeh,67 the defendant-appellants were charged and convicted of various narcotics offenses, with evidence obtained from Title III wiretaps playing a role in the convictions.68 One defendant moved to suppress the wiretap evidence, asserting that the wiretap order was obtained using information derived from an unconstitutional physical search of his home carried out several years earlier.69 The district court denied this "fruits of the poisonous tree" claim and the defendant appealed.70

On appeal, the Malekzadeh court did not apply the "fruits of the poisonous tree" doctrine to the prior unconstitutional search. Instead, it approached the suppression question from the perspective of the Title III wiretap order.71 First, the court found that the wiretap application was actually based on public records of the conviction that resulted from the prior search—not on evidence derived from the prior search—and that the officer applying for the wiretap order had used that public information in good faith.72 Next, since "the [wiretap] application was devoid of deliberately false or reckless information that would provide a sufficient basis to apply the [exclusionary] rule," the court reasoned that "excluding the fruits of the wiretap would in no way work to deter the conduct of the officer who relied on public in-

66 Leon, 468 US at 919–20. And because the rule is not designed to deter or punish errors by judges, the existence of judicial error in a good faith situation does not compel application of the rule. See id at 916–17.
67 855 F2d 1492 (11th Cir 1988).
68 Id at 1494.
69 Id at 1495–96.
70 Id at 1496.
71 Malekzadeh, 855 F2d at 1497.
72 Id.
formation as a basis for the wiretap application." As in Leon, excluding the evidence—in this case procured by a Title III wiretap—served no beneficial purpose. By relying on the Leon decision and its rationale in considering a challenge to Title III evidence, Malekzadeh implicitly held that the good faith exception was applicable to Title III.

The second major case to apply the good faith exception to a Title III wiretap was United States v Moore. In that case, the government appealed the district court’s grant of the defendant's § 2518(10)(a) motion to suppress the wiretap evidence. The wiretap application and order in Moore met the constitutional requirements of probable cause and the other conditions of Title III, but the issuing judge had failed to sign the order. Agreeing with the district court that the order was "insufficient on its face" as that phrase is used in § 2518(10)(a)(ii), the Eighth Circuit nonetheless refused to suppress the wiretap evidence. According to the court, the missing judicial signature represented only a "technical defect" in the wiretap order, which, under the Giordano and Chavez rules, did not require suppression.

In Moore, the government also argued that suppression of the wiretap evidence should be denied under the Leon exception. In response, the court recognized that the exclusionary rule and the good faith exception were judicial creations, while the issue on appeal was the statutory exclusionary rule. However, because it perceived in the legislative history of Title III an intent to adopt future Fourth Amendment suppression principles, the Moore court found that Leon's good faith exception was applicable to the § 2518(10)(a) motion to suppress. The court

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73 Id at 1497.
74 There is no reference in the Malekzadeh opinion to the § 2515 suppression rule. Although it is not entirely obvious that the Eleventh Circuit was not actually applying the good faith exception to the prior physical search, other courts have uniformly read the Malekzadeh case as applying Leon to the wiretap. See, for example, United States v Heilman, 377 Fed Appx 157, n 21 (3d Cir 2010).
75 41 F3d 370 (8th Cir 1994).
76 Id at 371–72.
77 Id at 372–74.
78 Id at 375–76.
79 See notes 42–47 and accompanying text.
80 Moore, 41 F3d at 374–75.
81 Id at 376.
82 Id.
83 Id, citing S Rep No 90-1097 (cited in note 29). An opinion concurring in the judgment but rejecting the application of the good faith exception was released by Judge Bright. See Moore, 41 F3d at 377.
found additional support for application of the good faith exception in § 2518(10)(a) itself, by reading the language there—"If the motion is granted . . ."—as providing for judicial discretion in adjudicating Title III suppression motions. 84

Finally, the Third Circuit has suggested another approach by which to apply the good faith exception to Title III wiretap evidence. In United States v Heilman, 85 the Third Circuit refused to decide the question of the applicability of Leon to Title III because the district court order upon which the Heilman appeal was taken was not made on that basis. 86 However, in a footnote recognizing the disagreement between circuits as to the relationship between Title III and Leon, the court noted that:

This modification to the exclusionary rule applies to [the] Supreme Court’s Fourth Amendment jurisprudence. Because the exclusionary rule is a judicial remedy, it is within the judiciary’s province to determine when it applies. 87

Under the approach suggested by Heilman, the good faith exception can be applied to Title III, not because Congress has approved it or called for it, but because the judiciary does. The Fourth Circuit, relying on the authority of Moore and Malekzadeh, has also applied the Leon good faith exception to at least one Title III wiretap. 88

84 Moore, 41 F3d at 376. The Eighth Circuit has since backpedaled to some extent on its pro-Leon position. In United States v Lomeli, 676 F3d 734 (8th Cir 2012), the court held that the good faith exception cannot be applied to a wiretap order, the invalidity of which is due to the applicant’s “fail[ure] to comply with the edicts of the federal wiretap statute in procuring the order.” Id at 742–43. Although the court expressed this pronouncement in sweeping language, the court justified it by performing the Leon balancing test. Id (“To hold otherwise on these facts would prompt bad practices and reward those who routinely include mere boilerplate language in wiretap applications.”). Thus, it is not clear whether the Lomeli holding is a broad rebuttal of Leon or simply an application of Leon to the facts. Alternatively, the Lomeli opinion may represent a redefining of “good faith” based on the Title III requirements. See id (“Without including the name of the authorizing DOJ official on wiretap applications, there can be no ‘good faith’ reliance under the statutory scheme.”).

85 377 Fed Appx 157 (2010) (unreported). Because the Heilman decision was not selected for publication, its precedential value may be limited.

86 Id at 184–85 & n 21.

87 Id at n 21 (emphasis added).

B. Rejecting Leon

The earliest case to deny the applicability of Leon's good faith exception to Title III wiretaps was United States v Orozco.\(^8\)\(^9\) The district judge hearing Orozco was confronted with a series of motions to suppress made by several different defendants and relating to a set of eleven interception orders issued over the course of a year.\(^9\)\(^0\) In response, the government claimed that "the principles of Leon" should guide the court's decision because the officers acted with good faith in applying for the wiretap orders.\(^9\)\(^1\) The court found that Congress did not intend to incorporate later-arising Fourth Amendment principles into Title III and thus rejected the government's Leon-based response to the motions to suppress.\(^9\)\(^2\) Moreover, the court stated that the judicial origin of the exclusionary rule meant that its corollaries were inapposite to statutory motions to suppress.\(^9\)\(^3\) In support of this proposition, the Orozco court cited Supreme Court precedent: "The suppression remedy for [...] statutory, as opposed to constitutional, violations [...] turns on the provisions of Title III rather than the ... exclusionary rule."\(^9\)\(^4\) Therefore, Orozco refused to "view the exclusionary rule and 18 USC § 2515 as providing interchangeable remedial sources," and thus did not apply the good faith exception to the motion to suppress.\(^9\)\(^5\)

The principal case rejecting the Leon exception in the context of Title III is United States v Rice.\(^9\)\(^6\) In Rice, the defendant's motion to suppress was based on the misleading nature of the application for the wiretap order. Specifically, the affidavit accompanying the application implied that other investigative methods had been attempted, when in fact they had not.\(^9\)\(^7\) Finding this misrepresentation to be reckless, the district court ruled that the good faith exception, even if applicable, was not triggered and thus granted the motion to suppress.\(^9\)\(^8\) On appeal, the

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\(^8\) 630 F Supp 1418 (SD Cal 1986).
\(^9\) Id at 1430.
\(^0\) Id at 1521.
\(^1\) Id at 1522 & n 9.
\(^2\) Orozco, 630 F Supp at 1522.
\(^3\) Id at 1522, quoting United States v Donovan, 429 US 413, 433 n 22 (1977).
\(^4\) Orozco, 630 F Supp at 1522.
\(^5\) 478 F3d 704 (6th Cir 2007).
\(^6\) Id at 707–08.
\(^7\) Id at 708–09.
Sixth Circuit rejected the government's claim that the *Leon* exception applied to Title III wiretaps. 99

The *Rice* court found that the judicial rule of *Leon* should not apply in a statutory situation because the "lengthy discussion on the social costs and benefits of the exclusionary rule" on which *Leon* was founded was inapplicable to Title III wiretaps. Specifically, the existence of a suppression remedy in Title III signified that "Congress ha[d] already balanced the social costs and benefits" of suppression in the wiretap context. 100 In reaching this conclusion, *Rice* further relied on the language and legislative history of Title III to reject the good faith exception. 101

First, the court approached §2515 as an exclusive remedy that is "clear on its face and does not provide for any exception." 102 To the *Rice* court, this indicated that "[c]ourts must suppress illegally obtained wire communications." 103 As to the legislative history, the *Rice* court found that Congress intended Title III to reject any later-arising constitutional suppression standards. 104 Specifically, *Rice* emphasized the word "present" in Congress's statement that Title III was not designed to "press the scope of the suppression role beyond present search and seizure law." 105 Under the court's reading, this language embodied a congressional desire to "incorporate only the search and seizure law that was in place" when Title III was passed in 1968, sixteen years before the *Leon* decision. 106

Finally, in denying the applicability of *Leon* in the context of Title III, the *Rice* court explicitly rejected the *Moore* and *Malekzadeh* decisions. 107 First, *Moore*’s emphasis on the discretionary element of §2518(10)(a) was misguided, according to *Rice*. 108 While the decision to grant or deny such a motion must necessarily be made by the court, the statute's closed system of remedies strictly confined the discretionary element of that decision. The *Rice* court found that "[w]hen [the statute is] read as a whole, it is clear that the suppression decision must be made

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99 Id at 706.
100 *Rice*, 478 F3d at 712, 713.
101 Id at 712–13.
102 Id at 712.
103 Id at 712 (emphasis added).
104 *Rice*, 478 F3d at 713.
105 Id at 713, quoting S Rep No 90-1097 (cited in note 29).
106 *Rice*, 478 F3d at 713.
107 Id at 714.
108 Id.
within the strict confines of Title III itself, and is far from 'discretionary.' The Rice panel also asserted that its reading of the legislative history of Title III—the direct opposite of that advanced in Moore—was correct. Lastly, as for Malekzadeh—which "made no attempt to explain why reasoning from a Fourth Amendment exclusionary rule case was appropriately imported into a Title III case"—the Rice court was simply unconvinced.

III. RESOLUTION: LEON CAN PROPERLY BE APPLIED TO TITLE III

This Section will argue that the Leon good faith exception can be applied to Title III motions to suppress. Section IIIA will first discuss why the logic of the cases refusing to apply Leon is subject to criticism. Next, Section IIIB will explain why the good faith exception can be directly applied to Title III wiretaps. This Section will conclude by arguing in Section IIIC that even if none of the reasons supporting direct application of the Leon exception are persuasive, there is leeway within the scheme of Title III for courts to employ the rationale and principles of the good faith exception.

A. Criticizing Orozco and Rice

The Orozco decision contains inadequacies and mischaracterizations that bring into question the validity of its holding. First, the Orozco court failed to address why, even if the suppression decision turned on the language of Title III, that decision could not at least be informed by broader Fourth Amendment principles. The government actually advanced this approach, not the direct application of Leon that the Orozco opinion rejected. The government's proposed indirect approach to Leon

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109 Id.

110 Rice, 478 F3d at 714 ("If anything, the meaning of the Senate Report is that it intends Title III to incorporate only what the Fourth Amendment jurisprudence existed at the time of the Act's passage (which was before Leon) and nothing more.").

111 Id.

112 Thus, this Comment argues that a valid solution to this circuit split already exists and can simply be applied by the courts. For a commentary that advances a legislative solution to the Title III-Leon problem, see Derik T. Fettig, When "Good Faith" Makes Good Sense: Applying Leon's Exception to the Exclusionary Rule to the Government's Reasonable Reliance on Title III Wiretap Evidence, 49 Harv J Leg 373, 384 (2012) ("[R]esolution of this circuit split under the current version of the statute is far from certain, which leads to the proposal . . . that Congress should amend Title III to clarify that the good faith exception applies in wiretap cases.").

113 See United States v Orozco, 630 F Supp 1418, 1521 (SD Cal 1986) (recognizing that "[t]he government argues that the procedures followed by agents to obtain intercept or-
may have been closer to Congress's stated goals for Title III than complete and unequivocal suppression. Indeed, the balancing of effective law enforcement against the protection of Fourth Amendment privacy rights—epitomized precisely by the good faith exception—is clearly in line with the purpose of Title III as stated by Congress.

The Orozco court also misstated the Title III suppression rule. It is not the case that, as the court claimed, "18 U.S.C. § 2515 expressly states that evidence derived from wire or oral communications intercepted in violation of 18 U.S.C. § 2510 et seq. may not be used in any proceeding before any court." In actuality, § 2515 states that evidence may not be used when disclosure of that evidence would violate the statute and § 2511(1)(c) makes disclosure of material obtained through an interception conducted in violation of § 2511(1) a statutory violation. In the context of a § 2518(10)(a) suppression motion—where the interception is deemed to have been conducted in violation of Title III—the statute's prohibition on the use of the wrongfully intercepted evidence necessarily flows through the judicial branch.

That is to say, suppression is not provided for "expressly" in § 2515, as the Orozco court wrongly posited. Rather, Title III can be seen as bestowing on court-authorized wiretaps a cloak of admissibility that can be lifted only indirectly, through a court order granting a § 2518(10)(a) motion. If suppression were express and an automatic legal result, § 2518(10)(a) would be, at best, an unnecessary restatement of a rule of evidence or criminal procedure, or at worst, mere surplusage. Because Congress included the language of § 2518(10)(a) in the statute, courts should adopt an interpretation of Title III that gives meaning to that passage. Orozco's indifference to the existence of

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114 For a discussion of Congress's goals in passing Title III, see notes 27-31.
115 See S Rep No 90-1097 at 38 (cited in note 29); 82 Stat at 211-12.
116 Orozco, 630 F Supp at 1522 (emphasis added).
117 The language of § 2518(10)(a) seems to be legally inconsistent: "Any aggrieved person ... may move to suppress ... communication intercepted pursuant to this chapter ... on the grounds that the communication was unlawfully intercepted; ... If the motion is granted, the [interception] ... shall be treated as having been obtained in violation of this chapter." (emphasis added). A presumption that court-authorized wiretaps are valid and admissible may explain how communications that are intercepted in accordance with Title III can be challenged as unlawful and regarded as violating the statute.
§ 2518(10)(a) fails to do this, leaving § 2518(10)(a) without practical effect.

Finally, in a related line of reasoning, the Orozco court asserted that, if Congress had meant to incorporate the Leon rule into Title III, it would have amended the statutory text.\(^{118}\) However, Congress's inaction in the wake of Leon is wholly ambiguous. It could be that Congress wanted the Leon exception to apply to Title III and believed that, under the current statute, it did. Alternatively, Congress might not have wanted Leon to apply and thought that, under Title III as written, it did not apply.\(^{119}\)

A closer look at Rice reveals that it too suffers from several weaknesses. First, the portion of the Rice opinion discussing the relationship between Leon and suppression under Title III is effectively dictum. The district court had determined that even if the good faith exception applied to Title III, it was inappropriate in the Rice situation because the officer had not acted with good faith.\(^{120}\) Although the Rice court stated that the standard of review was clear error\(^{121}\)—indicating that it recognized that the question presented was factual in nature—it also decided an unnecessary question of law: whether Leon applies to Title III motions to suppress.\(^{122}\)

The lower court had not decided that question, opting instead to make a factual finding. Under Leon itself, and as it had been interpreted in the Sixth Circuit, "the good-faith exception is inapposite . . . where the issuing magistrate was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard for the truth."\(^{123}\) The Rice defendant alleged precisely this, so the government's appeal must have sought first to deny the validity of that allegation. When the Rice court affirmed that finding,\(^{124}\) it needed go no further.

The Rice court's decision to move one step beyond the necessary issue on appeal might have been excusable in the name of

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\(^{118}\) Orozco, 630 F Supp at 1522 ("Congress has not in the wake of the Leon decision attempted to modify this remedy [of § 2515].").

\(^{119}\) See Johnson v Transportation Agency, 480 US 616, 672 (1987) (Scalia dissenting) ("[W]e should admit that vindication by congressional inaction is a canard.").

\(^{120}\) Rice, 478 F3d at 709.

\(^{121}\) Id.

\(^{122}\) Id at 711–14.

\(^{123}\) Id at 712, quoting United States v Hython, 443 F3d 480, 484 (6th Cir 2006).

\(^{124}\) Rice, 478 F3d at 710–11.
APPLYING LEON clarity—as the court itself opined had it not entailed disregarding valid in-circuit precedent. In United States v Baranek, the Sixth Circuit held that the Fourth Amendment “plain view” exception applied to Title III wiretaps. Besides the apparent analogy—that if the judicial plain view exception applies to Title III suppression, then so should the good faith exception—the Baranek court also cited approvingly the government’s argument that suppression should not obtain because the officer acted with good faith. The Baranek court noted that the law enforcement officers were not charged with wrongdoing and also recognized that its holding would have no deterrent effect on future misconduct.

Moreover, Baranek explicitly rejected the “contention that Fourth Amendment law is not involved in the resolution of Title III suppression issues” because “[t]he Supreme Court has indicated to the contrary.” Rather, with “a factual situation clearly not contemplated by the statute, [the Baranek court found] it helpful on the suppression issue—as opposed to the question of whether there was a violation of the authorization order—to look to Fourth Amendment law.” In light of this, Rice’s attempt to distinguish Baranek on its facts seems inadequate. The Baranek court did not express a desire to limit its reasoning to the facts, only its holding. Given that, Rice would have been well served to address the relevant portions of Baranek, or even directly overrule it.

B. Directly Applying the Good Faith Exception to Title III

There are at least three reasons why the Leon good faith exception can apply directly to Title III wiretaps. First, the linkage between a § 2518(10)(a) motion to suppress and the mens rea

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125 Id at 711 (“[W]e have not previously made clear whether the good-faith exception applies to warrants improperly issued under Title III.”).
126 903 F2d 1068 (6th Cir 1990).
127 Id at 1070.
128 Id.
129 Id at 1072.
131 Baranek, 903 F2d at 1072.
132 Rice also appears to misconstrue the words of the Baranek court. Rice quotes Baranek in an attempt to explain why Baranek is not binding or even persuasive precedent. Rice, 478 F3d at 713. But in saying that its holding would “not impact or shape future conduct,” the Baranek court likely meant that the future conduct of future law enforcement officers would be unaffected, not that the opinion was not meant to be precedential, as Rice asserts. Baranek, 903 F2d at 1070.
requirement of §2511 allows—even requires—considerations of good faith when deciding such a motion. Second, Title III does not explicitly disclaim judicially crafted remedies for interceptions of wire and oral communications, but does do so for interceptions of electronic communications. Wire and oral communications, then, are subject to judicially crafted remedies such as the good faith exception, even for statutory violations. And for wiretapping violations of a constitutional magnitude, the Court’s constitutional jurisprudence—including the good faith exception—controls, regardless of whether such wiretaps also violate Title III, because of separation of powers considerations. Third, the legislative history of Title III evinces a congressional intent to incorporate later-arising limitations on suppression.

1. Connection between §2518(10)(a) and §2511.

Title III grants courts bounded discretion in deciding §2518(10)(a) motions to suppress. That section does not allow a suppression motion to be made on the “basis of justice,” “when the principles of equity dictate,” or upon another similar basis. At the same time, the enumeration in §2518(10)(a) of grounds for a suppression motion does not mean that the suppression decision cannot account for good faith reliance by law enforcement. In fact, because the §2518(10)(a) suppression motion is meant to be decided with reference to §2515, the mens rea requirement implicit in §2515 is relevant to the suppression decision.

Specifically, §2515 prohibits disclosure of intercepted communications at trial when such disclosure would violate some part of Title III. But only intentional disclosure coupled with knowledge of the unlawful interception is prohibited by Title III. The connection between a §2518(10)(a) motion to suppress and the intentionality requirement in §2511 indicates that Congress wanted courts to consider something akin to the state of mind of law enforcement when deciding whether to suppress challenged Title III evidence. The good faith exception—which addresses both the subjective and objective behavior of law en-

133 For the definitions of wire, oral, or electronic communications, see 18 USC §2510(1), (2), and (12) respectively.
134 See note 41 for the text of 18 USC §2518(10)(a).
135 See S Rep No 90-1097 at 78 (cited in note 29) (stating that §2518(10)(a) “must be read in connection with” §2515 because it provides the “remedy for the right created by” that section).
136 See 18 USC §2511.
APPLYING LEON enforcement—is a proxy for just that. Thus, by the very structure and language of Title III, Congress presaged the good faith exception and created an opening for the direct applicability of Leon to Title III.

2. Inference arising from the 1986 amendment to § 2518(10)(c) and integrity of separation of powers.

A second textual/structural feature of Title III counsels in favor of employing the Leon good faith exception in at least a certain subset of Title III motions to suppress. When describing the procedural mechanics of the Title III suppression regime in § 2518(10), Congress explicitly disclaimed extra-statutory remedies for statutorily improper interceptions (so-called “nonconstitutional violations”) of electronic communications. Because Congress added this disclaimer—found at § 2518(10)(c)—two years after the Leon decision, it was at least aware that the good faith exception had entered the Fourth Amendment jurisprudence that it was expressly disclaiming. A similar provision addressing wire and oral communications, however, is absent from the statute.

This lack of an analogous provision suggests that Congress did not intend to exclude judicially crafted remedies when the challenged interception contained wire or oral communications and the purported violation was statutory in nature. Indeed, to give meaning to every word in the statute, judicially created remedies like the exclusionary rule and the good faith exception must be applied to statutorily-improper wiretaps of wire and oral

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137 Under the good faith exception, the germane questions are as follows: First, did the officer actually, subjectively rely on the warrant? And second, was that reliance objectively reasonable? See Leon, 468 US at 919–22.

138 See 18 USC §2518(10)(c) (“The remedies and sanctions described in this chapter with respect to the interception of electronic communications are the only judicial remedies and sanctions for nonconstitutional violations of this chapter involving such communications.”). The statute’s suppression rule does not apply to electronic communications, leaving only the civil and criminal penalties. See 18 USC §§2515 and 2518(10)(a) (applying only to “wire or oral communication”). But see 18 USC §§2511(1)(a), (c)-(e), 2520(a) (applying to “wire, oral, or electronic communication”). Thus, for interceptions of electronic communications that represent statutory, but not constitutional violations, the good faith exception cannot be directly applied when deciding the motion to suppress.

139 See ECPA, 100 Stat 1848–59.

140 See, for example, Norman Singer and J.D. Shambie Singer, Statutes and Statutory Construction §47:23 (West 7th ed 2007).

141 “[A] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.” Corley v United States, 556 US 303, 314 (2009), quoting Hibbs v Winn, 542 US 88, 101 (2004).
communications. Otherwise, the language contained in §2518(10)(c) would be surplusage.142

As for constitutional violations, the Berger and Katz decisions143 made it clear that the Fourth Amendment applies to wiretaps, and the existence of Title III cannot alter constitutional protections. Thus, the exclusionary rule and the good faith exception should apply to wiretaps and other interceptions that violate constitutional search and seizure rules, even if such interceptions also happen to violate Title III. Moreover, Congress likely did not mean for Title III to negate the judicially crafted system of remedies for Fourth Amendment violations. During the passage of the original Title III legislation in 1968, for example, Congress stated that Title III was intended to mimic the Supreme Court's Fourth Amendment wiretap jurisprudence, which at that time included the exclusionary rule.144 And during the process of amending Title III in 1986, Congress again disclosed an intention to preserve the constitutional suppression regime for constitutional violations, stating: “In the event that there is a violation of law of a constitutional magnitude, the court involved in a subsequent trial will apply the existing constitutional law with respect to the exclusionary rule.”145 For a wiretap that represents any constitutional violation—even if it also entails a statutory violation—the relevant suppression regime is the one developed in the Fourth Amendment jurisprudence, meaning that direct application of the good faith exception is germane.

Even if Congress intended Title III to prevent the constitutional suppression regime from applying to wiretaps that represent Fourth Amendment violations,146 the courts should not al-

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142 It might be argued that this interpretation of §2518(10)(c) makes the subsection itself surplusage—because there is no statutory suppression remedy for electronic communications, there is no need to disclaim the good faith exception. However, the language of §2518(10)(c) disclaims the exclusionary rule, and by implication the Leon exception, as well as underscores the lack of a statutory remedy. Congress's statement, in the Senate Report accompanying the relevant legislation, that §2518(10)(c) meant to underscore the lack of a statutory suppression rule for electronic communications, does not mean that §2518(10)(c) does not also disclaim non-statutory (that is, judicially crafted) remedies. See S Rep No 99-541 at 23 (cited in note 49). Purported congressional intent should not be used to limit the obvious meaning of a statutory text.

143 See notes 18–26 and accompanying text.

144 See S Rep No 90-1097 at 2, 37, 47 (cited in note 29).

145 See S Rep No 99-541 at 23 (cited in note 49) (explaining the §2518(10)(c) disclaimer of remedies for electronic communications). Although this statement was addressed to electronic interceptions, the principle applies with equal vigor to all interceptions.

146 It might be argued that the statutory remedies of Title III preempt the constitutional remedy of the exclusionary rule because courts should defer to that weighing of social costs and benefits conducted by Congress. See, for example, Rice, 478 F3d at 712–
low this result. Specifically, the judiciary should not concede to Congress the power to change constitutional principles simply by codifying them.\(^1\) It is not the role of Congress in a system of divided powers to determine the scope and viability of Constitutional rights, remedies, or rules.\(^2\) Indeed, it is "the province and duty of the judicial department to say what the law is" because that "is of the very essence of judicial duty," especially when that law is the Constitution.\(^3\)

Although Congress can enact laws that are more protective of rights than the Constitution, it should not have the power to impose harsher remedies than the Constitution for basic constitutional violations.\(^4\) Given the exceedingly close relationship between Fourth Amendment principles such as probable cause, judicial interposition, and minimization and the Title III requirements, the Title III suppression rule, if read exclusively, produces just such an outcome. To the extent that Title III has the same requirements for a valid wiretap as the Fourth Amendment—that is, where Title III tracks the Constitution exactly—the full constitutional remedial regime, including the exclusionary rule and the good faith exception, should be applied to violations of those requirements.

3. Incorporation of later-arising principles.

Finally, much has been said about Congress's statement that Title III was not meant "to press the scope of the suppression role beyond present search and seizure law."\(^5\) The courts that oppose applying \textit{Leon} to Title III maintain that this congression-

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\(^1\) See \textit{Dickerson v United States}, 530 US 428, 436 (2000) ("Congress may not legislatively supersede our decisions interpreting and applying the Constitution.").

\(^2\) Compare \textit{US Const Art I, §§ 1, 8} with \textit{US Const Art III}.

\(^3\) \textit{Marbury v Madison}, 5 US 137, 177–78 (1803). See also Linda Jellum, "Which is to be Master," the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers, 56 UCLA L Rev 837, 862, 875 (2009) (reviewing the formalistic and functionalistic approaches to separation of powers).

\(^4\) This notion at first seems nonsensical, as the Fourth Amendment suppression regime might be interpreted as the baseline set of remedies. But the case law and literature on Congress's "enforcement powers" under the Fourteenth Amendment are instructive. See, for example, \textit{City of Boerne v Flores}, 521 US 507, 532 (1997) (discussing the Religious Freedom Restoration Act as an impermissible utilization of Congress's Fourteenth Amendment enforcement powers and finding that it "appears [] to attempt a substantive change in constitutional protections"). Outside the context of the Fourteenth Amendment, where Congress does not even have enforcement powers, the limit on Congress's ability to meddle with constitutional remedies is perhaps even clearer. See also \textit{Dickerson}, 530 US 428.

\(^5\) \textit{S Rep No 90-1097} at 69 (cited in note 29).
This interpretation of the legislative history is inaccurate. Rather, this statement suggests that Congress did not wish to expand the scope of suppression beyond that required by the Constitution in 1968. Thus, the incorporation of later-arising constitutional developments that hem in that suppression regime is not inapposite to Congressional intent. Indeed, Congress's identification of the §2515 suppression remedy as an "evidentiary sanction to compel compliance" with Title III portended the Court's understanding of the exclusionary rule expressed in Leon. Accordingly, Congress's statement as to the intended scope of the suppression remedy in Title III indicates only that it did not wish for statutory suppression to exceed 1968 levels, not that it wanted to eliminate from Title III later-arising constitutional suppression principles.

C. Indirectly Applying the Good Faith Exception to Title III

In an alternative approach to directly applying Leon, courts can indirectly employ the reasoning and principles underlying the good faith exception when deciding Title III motions to suppress. Because the statute, by its plain language, allows for discretion in granting §2518(10)(a) motions, courts are well within the bounds of the statute to consider the good faith of law enforcement as a part of that discretion. Although such an approach is different than applying the Leon exception directly, it achieves a highly similar result and thus serves the same ends as Leon.

152 See, for example, Rice, 478 US at 713 ("[T]he language from the Senate Report indicates a desire to incorporate only the search and seizure law that was in place at the time of the passage of Title III."). See also Orozco, 630 F Supp at 1522, n 9 (recognizing that Leon was unknown to Congress in 1968, but concluding, contradictorily, that "Congress did not intend to bind the §2515 remedy to whatever the state of search and seizure law is at the time of the interception").

153 By its own admission, Congress was concerned with the prevention of crime and restricting the amount of evidence available with which to convict does little to combat crime. See notes 27–30 and accompanying text.

154 S Rep No 90-1097 at 68 (cited in note 29).

155 And in the case of later-arising and stricter constitutional principles, Congress would have been powerless to effect that result anyway. If the Constitution were later found to be more protective of privacy than previously understood, this narrower regime would trump Title III by its very nature as a constitutional principle.

156 See 18 USC §2518(10)(a) ("If the motion [to suppress] is granted ....") (emphasis added).
Courts could consider good faith as an element of the Giordano and Chavez rule that suppression obtains only when the violation is of a requirement meant to compel compliance with the statute. If a statutory requirement is intended to compel compliance by law enforcement and has actually done so, then suppression serves no further purpose. This approach to Giordano and Chavez mirrors Leon’s focus on deterrence. Furthermore, since a list of requirements that trigger Giordano and Chavez has never been espoused by the Supreme Court, such an approach—one that considers the good faith of law enforcement as an element of the Giordano and Chavez rubric—is not ruled out by current case law.

Alternatively, courts deciding Title III motions to suppress could attempt to shoehorn considerations of good faith into one of the more ambiguous phrases of Title III. For example, good faith on the part of law enforcement could play directly into the court’s consideration of whether, under § 2518(10)(a)(i), the communication was “unlawfully intercepted.” Because Title III requires a mens rea of intentionality before an interception is unlawful,157 whether an officer acted with good faith seems to be a relevant factor in the unlawfulness of an interception. In fact, an officer’s subjective and objective approach to a Title III wiretap might be the only way to resolve the conflicting language in § 2518(10)(a)(i): “Any aggrieved person … may move to suppress … any wire or oral communication intercepted pursuant to this chapter … on the grounds that (i) the communication was unlawfully intercepted.”158 In a similar approach to § 2518(10)(a), courts could interpret “unlawfully intercepted” to mean that the wiretap authorization order was validly obtained, even if the authorization order was not itself valid.159 Under that approach, whether law enforcement acted with good faith in obtaining the war-

157 See 18 USC § 2511(a).
158 18 USC § 2518(10)(a) (emphasis added). That an interception may be conducted pursuant to Title III but also unlawfully suggests that something factors into the lawfulness of the interception that is not enumerated in the statute. This could be a reference to constitutional principles—which, after Leon, include good faith—or it could be an indication that judicial officers should use discretion in granting motions to suppress, which discretion could include considerations of good faith.
159 This approach might be unavailable as to the other two § 2518(10)(a) grounds to suppress (authorization order was insufficient on its face or interception was not made in conformity with the authorization order). But the “validly obtained order” versus “valid order” distinction is viable on an independent basis, as it was actually suggested by Congress. See United States v Donovan, 429 US 413, 432, n 22 (1977), citing S 917, 90th Cong, 2d Sess (Feb 8, 1967), in 114 Cong Rec 14718 (May 23, 1968) (“So long as a court order is validly obtained, evidence obtained under the order should be admissible.”).
rant could be a factor in deciding whether the warrant was validly obtained. Thus, as either an element of judicial discretion or as way to give meaning to some of the indefinite phrases in Title III, courts could indirectly consider good faith when deciding motions to suppress.

IV. CONCLUSION

In the investigation and prosecution of public corruption, wiretapping and other electronic surveillance can be a significant source of evidence. Gathered pursuant to a Title III authorization order, such evidence is admissible in later court proceedings. But, perhaps to the chagrin of those concerned with combating corruption, some courts have decided to exclude wiretap evidence when law enforcement officers or authorizing judges make minor and inconsequential errors during the authorization process. Other courts, however, have readily admitted such evidence under the good faith exception espoused in United States v Leon. Which of these approaches is proper?

Because the types of errors that qualify for the good faith exception are hard to engineer artificially, there is little risk that law enforcement officers or judges might themselves become corrupt through the operation of the good faith exception. Because of this lack of moral hazard, the fight against corruption might be best served by universal adoption of the good faith exception. This Comment has argued that, as a legal matter, the Leon good faith exception can be applied to Title III wiretaps without any further legislative action. That the pro-Leon result can obtain in the current state of the world is an important fact in the fight against corruption, as it means that courts and prosecutors do not have to be impeded by congressional inaction.

The two main cases rejecting Leon, Orozco and Rice, are subject to criticism. But there are also affirmative reasons why the good faith exception should apply directly to all wiretaps that violate the Constitution—to preserve the separation of powers inherent in, and particularly important to, issues of a constitutional magnitude; and to wiretaps of wire and oral communications that violate Title III but not the Constitution—to give meaning to § 2518(10)(c) and because Title III itself calls for a consideration of the state of mind of an unlawful interceptor. This leaves only wiretaps of electronic communications intercepted in violation of Title III, but not in violation of the Constitution, unprotected by the good faith exception. Since evidence obtained through such wiretaps is not suppressed by Title III or
the Constitution, the good faith exception is unnecessary. Finally, for all wiretaps subject to statutory suppression, the good faith of a law enforcement officer can indirectly factor into a court's decision to suppress, either through the exercise of judicial discretion that is granted in §2518(10)(a) or through importation of good faith into ambiguous statutory phrases like "unlawfully intercepted" in §2518(10)(a)(i).