Catholic University Law Review

Volume 28 | Issue 1 Article 4

1978

Criminal Law

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CASENOTE

CRIMINAL LAW—Under the Minimization Requirement of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Recorded Wiretaps Will Not Be Suppressed Unless an Objective Showing of Unreasonable Procurement Is Made Without Consideration of Surveilling Officers' Intent—*Scott v. United States*, 436 U.S. 128 (1978).

Title III of the Omnibus Crime Control and Safe Streets Act of 1968[1] enables the government[2] to intercept wire and oral communications[3] in order to obtain evidence when investigating particular crimes.[4] The Act requires that every order to intercept "shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter. . . ."[5] Known as the minimization requirement, this clause imposes upon officers conducting the surveillance a duty to cease intercepting calls which are extraneous to the investigation.[6]

1. 18 U.S.C. §§ 2510 to 2520 (1976) [hereinafter referred to as Title III].

2. Under Title III the Attorney General may authorize an application to a federal judge for an order approving the interception of wire or oral communications by the F.B.I. or a federal agency investigating certain enumerated offenses. 18 U.S.C. § 2516(1) (1976). State officials are provided similar authority in the presence of a state statute. *Id.* at § 2516(2).

3. Intercept is defined by the Act as "aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device." *Id.* at § 2510(4). Wire communication includes telephone wiretaps. *Id.* at § 2510(1). Oral communication encompasses those statements uttered by a person exhibiting a reasonable expectation that such communication is not subject to interception. *Id.* at § 2510(2). Courts have questioned whether the mere recording of a conversation without listening to it comes within the meaning of the term "aural acquisition." At least one court has held that such conduct is not covered by the statute. *See* United States v. Bynum, 360 F. Supp. 400, 408 (S.D.N.Y.), *aff'd*, 485 F.2d 490 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 903 (1974). For purposes of this casenote, recording alone will be considered an aural acquisition.

4. *See* 18 U.S.C. § 2516(1)(a) through (g) (1976) for an enumeration of crimes covered under the Act.

5. *Id.* at § 2518(5). The Act also provides that the judge may order reports on the progress of the wiretaps to determine whether all safeguards, including the minimization requirement, are being met. *Id.* at § 2518(6).

6. One commentator has defined minimization as "the process by which law enforcement officials, under court supervision, attempt to limit interception and monitoring of calls unrelated to the surveillance." Cranwell, *Judicial Fine-Tuning of Electronic Surveillance*, 6

In incorporating the minimization requirement into Title III, Congress strictly adhered to Supreme Court decisions interpreting the fourth amendment right to be free from unreasonable searches and seizures.[7] Although grounded in fourth amendment principles, the statutory requirement of minimization differs from fourth amendment protections in that it mandates only the minimization, not the elimination, of impermissible intrusions.[8] For a decade, lower courts construed Title III consistently with Congress' intent to provide a constitutional basis for its wiretap statute.[9] Those interpretations must now be reconsidered in light of the Supreme Court's decision in *Scott v. United States*.[10]

On January 24, 1970, the United States District Court for the District of Columbia authorized a wiretap on defendants' telephone pursuant to Title

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SETON HALL L. REV. 225, 251 (1975). *See also* United States v. Clerkley, 556 F.2d 709, 716 (4th Cir. 1977) ("the wiretap statute [18 U.S.C. §§ 2510 to 2520 (1976)] merely provides that unnecessary intrusions be minimized, or reduced to the smallest degree possible"); United States v. Turner, 528 F.2d 143, 156 (9th Cir. 1975), *cert. denied sub nom.* Hacket v. United States, 429 U.S. 837 (1976) (minimization is the effort to reduce interceptions of innocent conversations "to a practical minimum while allowing the legitimate aims of the government to be pursued").

7. *See* Katz v. United States, 389 U.S. 347 (1967); Berger v. New York, 388 U.S. 41 (1967). *See also* notes 36-42 and accompanying text *infra*. The fourth amendment provides that:

> 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.

U.S. CONST. amend. IV. As applied to wiretapping, the fourth amendment requires a judicially authorized warrant, based upon probable cause, describing with particularity the conversations to be seized. *See also* 18 U.S.C. § 2518(3), (4) (1976).

8. Differences between traditional fourth amendment analysis and minimization analysis are examined in Comment, *Post-Authorization Problems in the Use of Wiretaps: Minimization, Amendment, Sealing, and Inventories*, 61 CORNELL L.Q. 92, 102 (1975). Violation of fourth amendment protections typically requires exclusion of evidence illegally obtained. *See* Wong Sun v. United States, 371 U.S. 471 (1963); Weeks v. United States, 232 U.S. 383 (1914), *overruled on other grounds*, Elkins v. United States, 364 U.S. 206 (1960).

9. "[T]he Court delineated the constitutional criteria that electronic surveillance legislation should contain. Title III was drafted to meet these standards. . . ." S. REP. NO. 1097, 90th Cong., 2d Sess. 66, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2112, 2153 [hereinafter cited as 1968 SENATE REPORT]. *See generally* United States v. Kirk, 534 F.2d 1262, 1273 (8th Cir. 1976), *cert. denied*, 433 U.S. 907 (1977) ("Title III fully meets the constitutional requirements of the Fourth Amendment."); United States v. Fino, 478 F.2d 35, 36 (2d Cir. 1973), *cert. denied*, 417 U.S. 918 (1974) (no constitutional defects in Title III as applied in this circuit); United States v. Giordano, 469 F.2d 522, 530 (4th Cir. 1972), *aff'd*, 416 U.S. 505 (1974) (recognized congressional intent that constitutional standards govern Title III wiretaps); United States v. Escandar, 319 F. Supp. 295, 304 (S.D. Fla. 1970), *rev'd on other grounds sub nom.* United States v. Robinson, 468 F.2d 189 (5th Cir. 1972) (court notes legislative history of Title III in finding the wiretap statute constitutional on its face and as applied).

10. 436 U.S. 128 (1978).

III.[11] The order required that the wiretap be conducted in accordance with the minimization requirement and that reports be made to the issuing judge every five days.[12] Information obtained through the wiretap resulted in the indictment of several persons for conspiracy to sell narcotics.[13] The agents conducting the surveillance intercepted every call in its entirety, made or received over the tapped telephone line.[14] Defendants moved to suppress all the evidence acquired through the wiretap, alleging the government's failure to minimize according to the order. The district court granted defendants' motion and ordered all the recorded evidence suppressed. Central to its decision were the facts that all conversations were recorded and that sixty percent of them were neither related to narcotics nor otherwise subject to interception.[15] Examining the agents' reports to the issuing judge, the court concluded that the judge was not informed of the failure to minimize, but only provided with the number of calls recorded each day and the number which related to narcotics.[16]

The United States Court of Appeals for the District of Columbia Circuit vacated the suppression order and remanded the case.[17] Applying the standards set down in an intervening case, *United States v. James*,[18] it or-

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11. United States v. Scott, 331 F. Supp. 233, 237 (D.D.C. 1971), *vacated and remanded*, 504 F.2d 194 (D.C. Cir. 1974).

12. The order required the wiretap to be conducted in "such a way as to minimize the interception of communications that are otherwise subject to interception." Scott v. United States, 436 U.S. at 132. Noting that the order should have read "*not* otherwise subject", the Court was nonetheless satisfied that the agents conducting the surveillance understood its intent. *Id.* at 132 n.3.

13. United States v. Scott, 331 F. Supp. at 241. The government originally believed that the scope of the conspiracy, ultimately found to be local to the Washington, D.C. area, involved efforts to smuggle narcotics into the United States.

14. In all, 384 conversations were intercepted. United States v. Scott, 516 F.2d 751, 754 (D.C. Cir. 1975), *rehearing en banc denied*, 522 F.2d 1333 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 917 (1976). Language in the Supreme Court's decision states that "virtually all the conversations were intercepted." 436 U.S. at 132. The only time the agents disconnected their equipment was when they had mistakenly been connected to a wrong number. Responding to the district court's question as to whether that was the only time minimization was considered, the agent in charge of the investigation replied, "[t]hat is correct. . . ." 436 U.S. at 133 n.7.

15. United States v. Scott, 331 F. Supp. at 247-48. The court rejected a government argument that the possibility of defendants' use of codes justified the total interception, saying "[difficulty in determining possible codes] cannot authorize indiscriminate listening or permit such agents to totally disregard an order [for minimization]."

16. *Id.* at 248.

17. United States v. Scott, 504 F.2d 194 (D.C. Cir. 1974).

18. 494 F.2d 1007 (D.C. Cir.), *cert. denied sub nom.* Tantillo v. United States, 419 U.S. 1020 (1974). In addition to identifying four factors by which to judge the degree of minimization required (*see* notes 43-45 and accompanying text *infra*), the *James* court adopted a more subjective test. The minimization requirement, the court stated, is satisfied "if 'on the whole the agents have shown a high regard for the right of privacy and have done all they

dered the district court to assess the reasonableness of the agents' actions in light of the purpose of the wiretap and the information available to the agents at the time of the intercept. On remand, the district court suppressed the recordings a second time, on the ground that the agents' purposeful failure to minimize was unreasonable.[19]

The court of appeals again reversed, this time reviewing the intercepted conversations rather than remanding the case.[20] Applying the *James* criteria, the court weighed the government's expectations, the use of the phone, and the degree of judicial supervision and found no violation of the minimization requirement.[21] Dissenting from denial of rehearing *en banc*, Judge Robinson declared that the court's decision was at odds with *James*. Foreseeing a "temptation to wiretap first and then use the fruits of the interception in an effort to demonstrate that the intrusion was justified,"[22] Judge Robinson feared that the majority's decision would fatally damage the minimization requirement.

The Supreme Court granted *certiorari* on an appeal of the defendants' subsequent conviction and upheld the earlier decision of the court of appeals.[23] In an opinion by Justice Rehnquist, the majority rejected petitioners' argument that a "good faith effort" to comply with the minimization requirement was mandated by general fourth amendment principles.[24] Instead, the Court adopted an objective standard whereby agents' actions,

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reasonably could to avoid unnecessary intrusion.' " 494 F.2d at 1018 (quoting United States v. Tortorello, 480 F.2d 764, 784 (2d Cir.), *cert. denied*, 414 U.S. 866 (1973)).

19. *See* United States v. Scott, No. 1088-70 (D.D.C. Nov. 12, 1974), *reversed and remanded*, 516 F.2d 751 (D.C. Cir.), *rehearing en banc denied*, 522 F.2d 1333 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 917 (1976) (cited in 425 U.S. at 920 (Brennan, J., dissenting)). The district court maintained that because the order for minimization was not met, the evidence must be suppressed even if every intercepted call was related to narcotics.

20. United States v. Scott, 516 F.2d 751 (D.C. Cir.), *rehearing en banc denied*, 522 F.2d 1333 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 917 (1976).

21. The circuit court in *Scott* held that the intense surveillance was justified when: 1) there were no predeterminations of the scope of the criminal activity; 2) forty percent of the calls received on a private phone, normally requiring greater privacy, were "business" related; 3) the government expected a larger conspiracy than found; and 4) the judge was aware of the high percentage of unrelated calls. 516 F.2d at 758-59. The court then postulated that even if agents should openly declare their intention to violate the minimization requirement, subsequent interceptions would not necessarily be suppressed. Instead, the court ruled that such evidence would be evaluated for a determination of the reasonableness of its procurement. *Id.* at 756.

22. United States v. Scott, 522 F.2d 1333, 1334 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 917 (1976).

23. After initially denying *certiorari*, Scott v. United States, 425 U.S. 917 (1976), the Court agreed to hear the case after the defendants were convicted and the decision was affirmed by the court of appeals. *See* Scott v. United States, 551 F.2d 467 (D.C. Cir. 1977), *aff'd*, 436 U.S. 128 (1978).

24. 436 U.S. at 135-37.

instead of their intentions, became the relevant criteria for judging compliance with the minimization requirement.[25] Similarly, the Court rejected petitioners' argument that the statute required a good faith effort at minimization. The statutory language, reasoned the Court, applies only to actual physical conduct, not subjective intent.[26] Finally, the Court evaluated the physical conduct of the agents by examining the calls, and found that they were reasonably intercepted.[27] Dissenting, Justice Brennan accused the Court of dangerously undermining congressional and constitutional protections against abuses in surveillance.[28]

In considering *Scott v. United States*, the Supreme Court handed down its first interpretation of the Title III minimization requirement. The Court's decision, however, substantially departs from approaches to minimization taken in the majority of lower court jurisdictions.

I. The Minimization Requirement: Constitutional Restraints on Government Surveillance

The eavesdropping provisions incorporated by Congress into Title III evolved from three major Supreme Court decisions. In *Osborn v. United States*,[29] the Court approved the use of a recording device concealed on a government informer on the ground that prior federal judicial authorization had been obtained "for the narrow and particularized purpose of ascertaining the truth of the . . . [informer's] allegations."[30] *Osborn* established the requirements for obtaining the issuance of a wiretap: a warrant, issued by a magistrate, evidencing antecedent justification for the eavesdropping, and particularity of purpose.[31] The *Osborn* warrant and particularity requirements were further detailed in *Berger v. New York*.[32] In *Berger*, the Court struck down a New York eavesdropping statute for its failure to meet the *Osborn* standards, and enumerated the specific safeguards which the law should have required. As articulated in *Berger*, the eavesdropping order must describe the conversations sought with particu-

25. The Court conceded in a footnote that subjective motivation may be pertinent *after* a statutory or constitutional violation has been established. *Id.* at 139 n.13.

26. This emphasis on objectivity supports the court of appeals statement that agents could publicly declare their intent to disobey the minimization order, yet still conduct lawful interceptions. *See* United States v. Scott, 516 F.2d at 756.

27. Scott v. United States, 436 U.S. at 141-43.

28. Justice Brennan referred to the Court's decision as a "myopic, incremental denigration of Title III's safeguards . . ." and suggested that the statute may now be vulnerable to constitutional challenge on fourth amendment grounds. *Id.* at 148.

29. 385 U.S. 323 (1966).

30. *Id.* at 330.

31. The Court also suggested a third requirement by approving eavesdropping only under "precise and discriminate circumstances." *Id.* at 329-30.

32. 388 U.S. 41 (1967).

larity, state the government's objectives in "entering a constitutionally protected area," and set limits upon the conduct of the executing officers.[33] In this manner, *Berger* outlined the acceptable procedures for government eavesdropping.

The following term, in *Katz v. United States*,[34] the Court declared an F.B.I. eavesdrop unconstitutional for lack of a judicially authorized warrant, even though the surveillance was so carefully conducted that it could have been constitutionally approved in advance by a magistrate.[35] The Court, citing *Osborn*, found prior judicial authorization to be an essential requirement under the fourth amendment.[36] In *Katz*, the government complied with the spirit of the other *Osborn* and *Berger* safeguards by limiting its surveillance to the defendant's use of a public telephone, by restricting its investigation to the contents of defendant's unlawful conversations, and by ceasing its surveillance of another user's accidentally intercepted conversations. Nevertheless, these efforts could not remedy the failure to obtain a warrant. Under the *Katz* and *Berger* decisions, both of which applied the earlier *Osborn* standards, the Court required compliance with specifically enumerated safeguards and the issuance of a warrant before the eavesdropping would be constitutionally permissible. These holdings comprised the nucleus around which Congress constructed the wiretapping provisions of Title III.

As enacted, Title III reflects congressional intent that the *Berger* and *Katz* standards prevail in the area of government eavesdropping.[37] Accordingly, it represents a congressional balancing, within Supreme Court guidelines, of stringent crime control measures and the need for protections from unlimited governmental surveillance power.[38] Its legislative

33. *Id.* at 57. The Court also invalidated provisions permitting a two-month surveillance on a single showing of probable cause or extensions beyond two months without additional showings of probable cause, and required a judicially imposed termination once the sought conversation was seized. *Id.* at 59.

34. 389 U.S. 347 (1967).

35. The Court notes approvingly that the agents did not begin electronic surveillance until there was a "strong possibility" that federal law was being violated, limited the surveillance to establishing the illegal contents of defendant's telephone calls, intercepted only when defendant was using the public phone booth, and "took great care" to record only defendant's calls. *Id.* at 354.

36. *Id.* at 359 n.24.

37. 1968 SENATE REPORT, *supra* note 9, at 75.

38. As stated by Justice Brennan:

> Congress has explicitly informed us that the "minimization" and companion safeguards were designed to assure that "the order will link up specific person, specific offense, and specific place. Together [the provisions of Title III] are intended to meet the test of the Constitution that electronic surveillance techniques be used only under the most precise and discriminate circumstances which fully comply with the requirement of particularity."

history, however, fails to address the question of what constitutes minimization,[39] thereby forcing lower courts to interpret the requirement without substantial guidance. As a result, various lines of analysis have developed.

One line of minimization analysis, formulated by the Court of Appeals for the District of Columbia in *United States v. James*,[40] has been widely followed. In *James*, the defendants were convicted on evidence obtained from telephone wiretaps, during which government agents intercepted every call made on the lines. The court evaluated the scope of the criminal enterprise, the location of the tapped phones, the government's reasonable expectations, and the presence of appropriate judicial supervision during the interceptions.[41] Resolving these four factors in the government's favor, the court affirmed the defendants' convictions.[42]

The *James* criteria have been applied by numerous courts ruling on challenges to the minimization procedure.[43] For example, in the recent case of *United States v. Clerkley*,[44] defendants were convicted of gambling violations on evidence obtained from a wiretap and a monitoring device planted in a room. Applying *James*, the court found that a suspected widespread conspiracy, coupled with insufficient knowledge preventing the government from shaping a minimization effort, justified the intensive government eavesdropping activities under Title III.[45]

A second approach[46] used by courts to determine compliance with the

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Bynum v. United States, 423 U.S. 952, 952 (1975) (Brennan, J., dissenting from denial of *certiorari*, quoting 1968 SENATE REPORT, *supra* note 9, at 102).

39. *See generally* 1968 SENATE REPORT, *supra* note 9, at 103. In its only reference to minimization, the report merely paraphrases the wording of the Act.

40. 494 F.2d 1007 (D.C. Cir.), *cert. denied*, 419 U.S. 1020 (1974).

41. *Id.* at 1019-21. *Compare* note 21 *supra*.

42. 494 F.2d at 1021-22. Noting that the defendants were "involved in a narcotics conspiracy of great size and sophistication," that the government was aware of this conspiracy when surveillance was begun, that defendants' telephones were found to be used "almost exclusively to conduct illegal business," that their apartment deserved a lesser standard of privacy than an ordinary home because it served no residential purpose, and that the supervising judge was informed of and approved the government's conduct, the court determined that the wiretap was valid. *Id.*

43. *See, e.g.*, United States v. Kirk, 534 F.2d 1262, 1275-76 (8th Cir. 1976), *cert. denied*, 433 U.S. 907 (1977); United States v. Armocida, 515 F.2d 29, 42-46 (3rd Cir.), *cert. denied*, 423 U.S. 858 (1975); United States v. Quintana, 508 F.2d 867, 873-75 (7th Cir. 1975).

44. 556 F.2d 709 (4th Cir. 1977).

45. In addition, reports were made every five days to the magistrate. *Id.* at 718.

46. A potential third method of analysis, presented in State v. Dye, 60 N.J. 518, 291 A.2d 825, *cert. denied*, 409 U.S. 1090 (1972), has been generally disfavored. The warrant in *Dye* had authorized interception of all calls made during specified hours without regard to their content. 291 A.2d at 828. Known as extrinsic minimization, the method is rarely used, since time of day is unlikely to be a precise method of segregating innocent from criminal communications. Justice Douglas, dissenting from the denial of *certiorari*, called

minimization requirement comprises an analysis of the facts on an *ad hoc* basis. Under this approach, an agent's good faith effort to minimize appears to be a crucial factor in determining reasonableness. For example, in *United States v. Tortorello*,[47] the court noted that agents had considered the caller's identity, the timbre of the speaker's voice, the "guarded nature" of the conversations, and whether children were on the line in determining when to intercept. Once the agents decided that a call was not pertinent to the criminal investigation, interception ceased. Reasoning that "the agents [had] shown a high regard for the right of privacy and [had] done all they reasonably could to avoid unnecessary intrusions," the *Tortorello* court declared the minimization effort acceptable.[48] A similar approach was taken in *United States v. Falcone*,[49] in which the government wiretaps were initiated to obtain evidence of narcotics distribution. The court noted that because one-half of all defendant's innocent calls,[50] some highly personal, had not been monitored, the agents' conduct amounted to a "good faith, reasonable effort to minimize. . . ."[51]

While not involving judicial scrutiny or compliance with the minimization requirement, the Supreme Court in *United States v. Kahn* reinforced the need for minimization in wiretapping.[52] *Kahn* specifically addressed the use of wiretapped evidence against persons for whom probable cause did not exist and who were not named in the warrant. A warrant had

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total surveillance during limited periods of time "the equivalent of a general warrant." 409 U.S. at 1093. The federal courts use an intrinsic minimization standard, which permits around the clock surveillance, but requires a determination of whether each separate call should be intercepted. *See generally* Comment, *supra* note 8, at 119-21.

47. 480 F.2d 764, 783 (2d Cir.), *cert. denied*, 414 U.S. 866 (1973).

48. 480 F.2d at 783-84. The *Tortorello* court relied on three cases to support its standard of high regard for privacy and its mandate that all reasonable action be taken to avoid unnecessary interceptions. *See* United States v. Scott, 331 F. Supp. 233, 247-48 (D.D.C. 1971), *vacated*, 504 F.2d 194 (D.C. Cir. 1974) (violation of minimization found where all calls intercepted and no minimization effort made); United States v. King, 335 F. Supp. 523, 540-43 (S.D. Cal. 1971), *modified*, 473 F.2d 494 (9th Cir.), *cert. denied*, 417 U.S. 920 (1973) (violation of the minimization requirement where approximately 85% of calls intercepted were irrelevant); United States v. Sklaroff, 323 F. Supp. 296, 316-17 (S.D. Fla. 1971) (no violation of minimization when over 10% of personal calls and numerous privileged crime-related calls were either not recorded or only partially recorded).

49. 364 F. Supp. 877 (D.N.J. 1973), *aff'd*, 500 F.2d 1401 (3d Cir. 1974).

50. Every court considering minimization agrees that some interception of innocent calls is permissible. *See, e.g.*, United States v. Schwartz, 535 F.2d 160, 164 (2d Cir. 1976), *cert. denied*, 430 U.S. 906 (1977); United States v. Fino, 478 F.2d 35, 38 (2d Cir. 1973), *cert. denied*, 417 U.S. 918 (1974).

51. United States v. Falcone, 364 F. Supp. at 886-88. For other decisions which have relied on the agents' good faith to test minimization efforts, see United States v. Manfredi, 488 F.2d 588 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974); United States v. Fino, 478 F.2d 35 (2d Cir. 1973), *cert. denied*, 417 U.S. 918 (1974).

52. 415 U.S. 143 (1974).

been issued authorizing the wiretapping of the suspect's phone to obtain evidence of gambling against him "and others as yet unknown."[53] The suspect's wife was convicted on evidence obtained in part from calls in which the suspect was not a participant. The majority upheld that conviction, construing the warrant to include anyone conversing on the tapped line.[54] Although the Court recognized that its decision might encourage agents to intercept without regard to parties named in the warrant, it considered the minimization requirement, as well as the specificity of the warrant and the time limits on the interception, to be adequate safeguards.[55]

Thus, *Kahn* allows the government a significant measure of discretion in the use of wiretap evidence but relies upon the minimization requirement to safeguard individuals against unreasonable searches and seizures. In light of the potential for abuse in such a broad warrant,[56] protection of a party's fourth amendment rights depends upon rigorous enforcement of the minimization requirement. In this sense the *Kahn* Court reaffirmed the need, as reflected in lower court interpretations of the minimization requirement, to balance protection of both the defendants' and innocent parties' constitutional rights against the need for reasonable, good faith efforts by the government to investigate crime and enforce the laws.

II. *SCOTT V. UNITED STATES:* JUDICIAL RESCISSION OF MINIMIZATION PROTECTIONS

The Supreme Court's decision in *Scott v. United States* may substantially affect this balance between the government's law enforcement effort and the protection of citizens' constitutional rights provided under Title III. In focusing upon the agent's actions during surveillance as a key factor in determining compliance with the minimization requirement, the Court relied on traditional fourth amendment search and seizure analysis, which begins with an objective assessment of an officer's actions.[57] To

53. *Id.* at 146-47. The defendant's wife had argued that she did not fall within the scope of "others as yet unknown" because the agents conducting the surveillance had reason to believe that she was involved in the gambling operation. She contended that since she was under suspicion, the government should have named her in the warrant. The Court did not accept her argument, on the grounds that there had been no probable cause that she was committing any offense. *Id.* at 151-55.

54. The dissent argued that the phrase referred solely to any persons who were conversing with Kahn. *Id.* at 160 (Douglas, J., dissenting).

55. *Id.* at 154.

56. Justice Douglas deplored the result in *Kahn*, saying "a wiretap warrant apparently need specify but one name and a national dragnet becomes operative." *Id.* at 163 (Douglas, J., dissenting).

57. Scott v. United States, 436 U.S. at 137. To support its conclusion that fourth amendment analysis begins with objective assessments, the Court relied on United States v. Robinson, 414 U.S. 218, 236 (1973) (police officer need not indicate subjective fear that suspect is

illustrate, the majority cited *Terry v. Ohio*,[58] in which the Court held that a limited stop and frisk to ensure the security of a police officer did not violate the fourth amendment prohibition against unreasonable searches. In reaching this determination, the *Terry* Court "objectively" viewed the challenged conduct in light of the facts available to the officer.[59] Applying this objective analysis to wiretaps, the Court in *Scott* concluded that the minimization standard merely required a post hoc evaluation of the relative reasonableness of the officers' actions, without consideration of the subjective intent of the officers involved.[60] This was accomplished by an examination of the individual calls, each of which the Court found to have been reasonably intercepted. In focusing on the circumstances surround-

armed to validate search incident to a lawful arrest); Beck v. Ohio, 379 U.S. 89, 96 (1964) (fourth amendment requires suppression of evidence obtained after arrest and search based solely on suspicion which would not have warranted a reasonably prudent person to conclude suspect had committed or was committing a crime); and Henry v. United States, 361 U.S. 98, 102 (1959) (probable cause to arrest exists only if the facts and circumstances known to the officer warrant a prudent person in believing an offense is being or has been committed).

58. 392 U.S. 1, 21-24 (1968). In *Terry*, defendants were stopped and frisked without a warrant, after having been observed passing the same store window two dozen times, staring inside, and conferring on an adjacent corner. The police officer's frisk revealed bulges in the clothing of two defendants, from which the officer removed guns. The Court found this intrusion, although based on reasonable suspicion rather than the probable cause traditionally required under fourth amendment principles, justified by the unreasonable risk of violence facing a police officer on the street.

59. It should be noted here that the objective-subjective distinction in fourth amendment analysis is prone to some confusion. An objective assessment of an officer's actions includes subjective elements. For example, in weighing the reasonableness of the search and seizure in the light of the "particular circumstances," the Court in *Terry* considered as one factor the reactions and suspicions of an officer with thirty years of experience on the beat. *Id.* at 24. The *Scott* court also includes subjective elements in its objective analysis. For example, the Court is unwilling to consider subjective intent in assessing the reasonableness of the minimization effort, yet will consider the experience of an agent when examining the possibility of widespread conspiracy. Thus, as used by the *Scott* Court, "objective" appears to mean in light of the particular circumstances of the case, including consideration of an agent's experience; "subjective" embraces good faith or bad faith motivations, insofar as they are related to the minimization effort.

60. The Court's action substantially departs from the bulk of prior minimization law in that courts may no longer consider the surveilling officers' subjective intent, *i.e.*, bad faith, when weighing the minimization effort. *Cf.* United States v. Tortorello, 480 F.2d 764 (2d Cir.), *cert. denied*, 414 U.S. 866 (1973) (court weighed agents' regard for the right of privacy in evaluating the minimization effort); *and* United States v. Falcone, 364 F. Supp. 877 (D. N.J. 1973), *aff'd*, 500 F.2d 1401 (3d Cir. 1974) (court scrutinized agents' conduct to determine whether a good faith reasonable effort to minimize had been made). The application of the Court's objective standard emphasizes the objective-subjective dichotomy. The Court may accordingly consider arguably subjective factors, such as the experience of the agents, when engaging in purely objective analysis of minimization procedure. Conversely, the Court eliminates as subjective any consideration of the agents' intent, motivation or good faith. *See* note 59 *supra*.

ing the calls, the Court exempted several categories of calls from minimization. Nonpertinent short calls were excused because a "determination of relevancy cannot be made before the call is completed."[61] One-time only calls were similarly excused since they "did not give the agents an opportunity to develop a category of innocent calls . . . ."[62] Additionally, the Court eliminated ambiguous calls or those involving guarded or coded language.[63] Finally, the Court recognized an exemption for investigative situations predicated upon the existence of a widespread conspiracy, thereby upholding the need for extensive surveillance to determine the conspiracy's scope.[64] In this manner, the Court satisfied itself that the interception of every call, and therefore the conduct of the surveilling officers, was reasonable.

This analysis can be criticized for a number of reasons. First, in finding all interceptions reasonable, the Court may have weakened the minimization requirement by permitting the interception of calls that could not logically be justified by the circumstances at issue. For example, the Court excused numerous interceptions of calls made to a ninety-second recorded telephone company weather message, because "even a seasoned listener would have been hard pressed to determine with any precision the relevancy of many of the calls before they were completed."[65] Furthermore, the Court included as reasonable six calls which the government itself had characterized as "unrelated to the narcotics enterprise and . . . intercepted with no reasonable expectation of related material."[66] This reluctance to find a violation of the minimization requirement in *Scott* diminishes the possibility that violations will be found in subsequent cases. By further creating overbroad categories of immune calls, the majority opinion provides the government with sufficient leeway to meet the requirement. On the basis of the number and scope of the exceptions to minimization item-

61. United States v. Scott, 436 U.S. at 141.

62. *Id.* at 142. Despite the ambiguity of the classification "one-time only," no definition was provided.

63. These categories, in addition to being broad and undefined, may permit the government to claim the possiblity of codes as justification for nearly any interception. It has been suggested that an officer should be able to tell a coded conversation from an innocent one, yet the Court does not take this fact into consideration. *See* Note, *Minimization of Wire Interception: Presearch Guidelines and Postsearch Remedies*, 26 STAN. L. REV. 1411, 1419 n.42 (1974).

64. Scott v. United States, 436 U.S. at 142-43.

65. *Id.* at 141-42. While it may seem that no privacy interest is violated by such interceptions, it should be noted that the statute requires minimization of all communications extraneous to the investigation, not merely those in which a privacy interest can be found. *See* note 6 *supra*. Twenty-seven calls consisting totally of this type of recorded message were intercepted in their entirety. United States v. Scott, 516 F.2d at 754 n.3.

66. *Id.*

ized in *Scott*, it is difficult to imagine how any violation of the minimization requirement could be committed.[67]

Second, the use of traditional search and seizure analysis is not entirely appropriate in wiretapping situations, since an officer conducting a wiretap is in no physical jeopardy, and is actually not searching *or* seizing, but searching *and* seizing simultaneously.[68] Once the officer has overheard a conversation, that conversation can never be returned. While electronic surveillance may arguably deserve a higher standard of protection,[69] the Court nonetheless ignores this distinction in *Scott*.

Moreover, precluding consideration of the intercepting officers' subjective intent during surveillance will produce some predictable consequences. Such an objective standard, involving substantial amounts of hindsight, may over-emphasize the importance of the government's call analysis and thus tip the outcome in favor of the government. Call analyses, similar to the one prepared in *Scott*, are essentially breakdowns of the intercepted calls, classified according to the subject matter of the conversations. In *Scott*, the call analysis contained categories that were labelled "communications so ambiguous that their purpose cannot be determined," "communications not concerned with the narcotics enterprise but nonetheless of important evidentiary value," and "communications which are unrelated to the narcotics enterprise but which were intercepted with a reasonable expectation of related material."[70] While there may be some need for broad categories, the use of vague classifications such as those in *Scott* enables the government to forego explanations for particular interceptions and concentrate instead on justifying the categories of calls at issue. The strictly objective examination mandated by *Scott* also precludes

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67. The decision provides one example. Where the tapped phone is public, and agents intercept every call regardless of the person placing it, the Court would "substantially doubt" whether minimization was proper. 436 U.S. at 140.

68. *See* Comment, *supra* note 8, at 102:

> Both search and seizure must be minimized—search, because it must be limited to a search for seizable items, and seizure, because it must be limited to the items in the warrant. This result is not easily transferred to the wiretap context; for it is surely not obvious which parts of the surveillance process correspond to a search and which parts to a seizure.

69. A higher standard would arguably be justified in view of the magnitude of rights at stake. In Dye v. New Jersey, 409 U.S. 1090 (1972), Justice Douglas, dissenting from denial of *certiorari* wrote: "Few threats to liberty exist which are greater than those posed by the use of eavesdropping devices." *Id.* at 1091 (quoting Berger v. New York, 388 U.S. 41, 63 (1967)).

70. The call analysis is reproduced at 516 F.2d at 754 n.3. The trial court had referred to it as "an after-the-fact non-validated presentation of counsel for the Government." United States v. Scott, 516 F.2d at 754. In United States v. Bynum, 360 F. Supp. 400, 417 (S.D.N.Y.), *aff'd*, 485 F.2d 490 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 903 (1974), the court described defendants' preparation of a similar table as "result oriented" and based on a "wisdom born of hindsight."

any defense attempt to impeach the call-analysis by scrutinizing the officers' subjective intent. In a difficult, complex or ambiguous case, the intent of the officer could be decisive in determining whether any attempt to minimize had, in fact, been made.[71] Thus some court consideration of the agents' subjective intent seems essential to ensure greater respect for and protection of the important privacy rights at stake.

Although *Scott* rules out subjective intent as a factor in applying the minimization requirement, the decision acknowledges that an official's motives may play some part in determining what remedy is appropriate after a statutory or constitutional violation has been found.[72] Prior to *Scott*, lower courts had postulated several variations of the exclusionary rule as remedies for a failure to minimize.[73] The district court in *Scott* suggested that a violation of the minimization requirement should result in the total suppression of the recorded evidence at trial.[74] An alternate suggestion is the suppression of only those interceptions illegally obtained. Since the illegally obtained conversations, for minimization purposes, are unrelated to criminal activities, partial suppression has been criticized as being no real deterrent to government failure to minimize.[75] Finally, a combination of the two has been suggested that would permit partial suppression only on a finding that agents made a good faith and reasonable, albeit flawed, effort at minimization.[76] By noting that an agent's motives may be a factor in determining whether suppression is appropriate, the Court has failed to settle the diverse lower court interpretations and has put the practical application of the minimization requirement in jeopardy. For example, the remedy of partial suppression enables a court to exclude only "innocent" calls while admitting those calls which incriminate the defendant. In practice, this would be similar to giving the government license to intercept without minimizing, since the innocent calls would be

71. If, for example, surveilling agents prior to intercepting were to declare their intention to monitor every call placed on the line and then claim the possibility of codes as justification, that declaration might be determinative if considered. If many of the allegedly coded calls were ambiguous, a court might well decide to suppress on the basis of the prior statement.

72. Scott v. United States, 436 U.S. 135-36. The Court did not address the question of remedies because, after reviewing the intercepted conversations, it found no violation of the minimization requirement.

73. *See generally* Note, *supra* note 63, at 1435 n.116; Comment, *supra* note 8, at 124-25.

74. 331 F. Supp. at 248. *See also* United States v. Focarile, 340 F. Supp. 1033 (D. Md.), *aff'd sub nom.* United States v. Giordano, 469 F.2d 522 (4th Cir. 1972), *aff'd*, 416 U.S. 505 (1974).

75. *See* United States v. Sisca, 361 F. Supp. 735, 746-47 (S.D.N.Y. 1973), *aff'd*, 503 F.2d 1337 (2d Cir.), *cert. denied*, 419 U.S. 1008 (1974).

76. *See* United States v. Lanza, 349 F. Supp. 929, 932-33 (M.D. Fla. 1972).

weeded out at a pretrial hearing.[77] In the absence of an appropriate remedy for a violation of Title III, the government may now decide to forego efforts to minimize in hopes of a court decision favoring partial suppression.

Scott also casts doubt on the practicality of other Title III provisions. The Act provides for a cause of action against any person who illegally acquires wire or oral communications.[78] The Court's reluctance to find a minimization violation in the light of the actions related in *Scott* suggests that only patently indefensible surveillance procedures will be barred. Assuming the government can avoid such procedures, the provision for civil remedies may be rendered useless.[79] The *Scott* decision may have also damaged the requirement for judicial supervision. Title III provides an issuing magistrate with broad discretionary powers, including the authority to order that periodic reports be made to him at regular intervals concerning the progress of the wiretap.[80] In *Scott*, the reports to the issuing judge indicated the number of calls recorded each day and the number of those which related to narcotics.[81] The judge could not, from the reports, determine the presence or lack of efforts at minimization.[82] Despite this lack of complete and accurate reporting to the issuing judge, the Court did not mention the issue of judicial supervision in its opinion. In this way, *Scott* undercuts the importance of judicial supervision by sanctioning inadequate reports by the government and incomplete scrutiny of those reports by the issuing magistrate.

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77. In United States v. Focarile, the court stated:

> [T]he minization requirement of § 2518(5) would be illusory if it were enforced on an item-by-item basis by means of suppressing unauthorized seizures at trial *after* the interception is a *fait accompli*. Minimization as required by the statute must be employed by the law enforcement officers *during* the wiretap, not by the court *after* the wiretap.

340 F. Supp. 1033, 1046-47 (D. Md. 1972) (emphasis in original).

78. 18 U.S.C. § 2520 (1976).

79. Had the Court found a violation of the minimization requirement in *Scott*, the defendants might have had a cause of action against the government for damages of $100.00 for each day of the illegal surveillance, or $1,000.00, whichever is greater, plus punitive damages, attorneys' fees and costs. *Id.* at § 2520(2)(a) to (c). Even prior to *Scott*, however, the possibility of recovery was marginal, since the government's good faith reliance on the court order constitutes a complete defense. *Id.* at § 2520. After *Scott*, the provision may be completely ineffective, in view of the Court's reluctance to find a minimization violation in the first place.

81. 331 F. Supp. at 248.

82. In contrast the court of appeals conceded that the judge was not informed of the failure to minimize and ordered that periodic reports in the future refer to minimization efforts. The court held, however, that the degree of judicial supervision was reasonable since the judge was aware of the number of irrelevant calls being intercepted. 516 F.2d at 759-60.

Furthermore, the weakened minimization requirement articulated in *Scott* arguably undermines important Supreme Court precedent. In *United States v. Kahn*,[83] the Court emphasized that effective enforcement of the minimization requirement is essential to prevent the blanket approval of a general wiretapping warrant. Without such enforcement, agents can intercept broadly, hoping the recordings may prove incriminating to a third party and become self-justifying.

III. CONCLUSION

Relying on *Scott v. United States*, a court may now judge compliance with the minimization requirement of Title III by a post hoc objective analysis of agents' actions. No consideration of the agents' intention to comply need be made. In applying traditional but inapposite fourth amendment search and seizure analysis to the area of electronic surveillance, *Scott* significantly weakens the constitutional protections Congress sought to embody in Title III.

As a practical matter, agents conducting electronic surveillance may now legally intercept one-hundred percent of the calls placed on a tapped line, provided they can fit the intercepted calls into one of *Scott*'s overbroad, judicially immune categories. Additionally, although agents may have no intention of honoring the requirements of the statute or a judge's order to minimize, *Scott* indicates that such motivations cannot in any way be a basis for invoking the exclusionary rule. Moreover, the decision indicates that agents may circumvent the maintenance of judicial supervision by its failure to insist upon complete and accurate reports to the issuing judge. Finally, even if a defendant could prove a violation of the minimization requirement after *Scott*, the Court leaves open the question of an appropriate remedy. The result could be widespread abuse of the right to privacy despite exacting congressional efforts to the contrary. Given these implications, a dilution of the *Katz* and *Berger* standards appears likely. As a result, further legislative guidance is essential in order to reestablish safeguards no longer guaranteed by the debilitated minimization process. For these reasons it has become necessary for Congress to reassert the constitutional protections of *Katz* and *Berger* in a clear and explicit rewording of the minimization requirement.

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83. 415 U.S. 143, 154-55 (1974).