VOICES THAT GO BUMP IN THE NIGHT: CONFLICTING RIGHTS UNDER THE WIRETAP STATUTES

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"When at last this little instrument appeared, consisting, as it does, of parts every one of which is familiar to us, and capable of being put together by an amateur, the disappointment arising from its humble appearance was only partially relieved on finding that it was really able to talk."**
James Clerk Maxwell (1831-1879)
The Telephone (1878)

I. Introduction

Law is often unable to keep pace with technological developments. This is particularly true in the area of communications. Recently, headlines were made when a secret communication from President Reagan aboard Air Force One was intercepted by a short wave radio operator.[1] Perhaps, more importantly, business and personal conversations are conducted over cellular car phones and cordless phones every day. These conversations may similarly be intercepted.

Recently, a number of issues were raised when conversations between a newly-elected municipal official and the town's municipal attorney-designate were intercepted.[2] The interceptor may have been "scanning" the airwaves on a short wave or "ham"

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** J. MAXWELL, THE TELEPHONE (1878).

1 *E.g.* N.Y. Times, Sept. 21, 1984, at A18, col. 2.

2 Defendant's Brief at 2, Spanos v. Daily Home News. The plaintiffs proceeded on an order to show cause. The suit was withdrawn prior to the obtaining of a docket number. For a discussion of the issues presented in this case, see Sullivan, *Cordless Phones Raise An Eavesdropping Issue*, N.Y. Times, Mar. 11, 1987,§ B, at 3, col.1.

radio,[3] and the conversations may have contained evidence of ethical improprieties or unlawful activities.[4] Tapes of further conversations were subsequently made and acquired by a local elected official in the town. He gave the tapes to local law enforcement authorities who presented them to the county prosecutor. Additionally, one copy of the tapes was given at some point to a major regional daily newspaper.[5]

The immediate concern in such cases is that *civil* privacy rights are being violated. Commentators who have addressed the problem of wireless and cellular telephone interception have done so in the context of the admissibility of evidence obtained through such interception. These commentators have concluded that there is a violation of the privacy rights of the overheard individuals.[6]

However, such an analysis barely scratches the surface. The commentators fail to address: the public's right to know; the liability—criminal or civil—of a person who overhears a conversation containing clear evidence of a crime and who feels compelled to act upon it;[7] and the first amendment rights, legal obligations, and evidentiary privileges of elected officials, newspaper reporters, and others who subsequently obtain such information. These issues are as important as the admissibility of such evidence in criminal proceedings, and just as likely to occur.

In an attempt to address these issues, Representative Robert Kastenmayer (D. Pa.) and Senator Patrick Leahy (D. Vt.) introduced the Electronic Communication Privacy Act of 1986 [here-

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[3] Defendant's Brief at 2. A short wave radio is one operating on radio waves having lengths of about 100 meters or less corresponding to a frequency ranging upwards from about 3,000 kilocycles. A "ham" is an amateur radio operator. FUNK & WAGNALLS NEW COMPREHENSIVE INT'L DICTIONARY OF THE ENGLISH LANGUAGE (ed. 1985).

[4] Defendant's Brief at 3.

[5] Defendant's Brief at 4.

[6] *See, e.g.*, Note, *The Admissibility of Evidence Obtained by Eavesdropping on Cordless Telephone Conversations*, 86 COLUM. L.REV. 323 (1986). *See also* 1985 U. ILL. L. REV. 143.

[7] For example, would these persons be "accessories after the fact" under federal law, 18 U.S.C. § 3 (1982); United States v. Bissonette, 586 F.2d 73 (8th Cir. 1978); or persons hindering apprehensions or prosecutions under New Jersey law, N.J. STAT. ANN. § 2C:29-3(a)(3) (West 1982). To be convicted under 18 U.S.C. § 3 (1982), a federal offense must have been committed. 586 F.2d at 76. Therefore, as discussed below, a strict reading of the proposed legislation may not have the desired effect.

inafter the Act][8] to protect against the unauthorized interception of electronic communications in the telephone industry, the cellular phone industry, the paging industry, the electronic mail industry, the data processing industry, and the providers of any electronic communication services.[9]

Additionally, the New Jersey Assembly introduced Bill No. 2955[10] concerning telephone surveillance. This Bill amends New Jersey's wiretap statute[11] to include those "communications through or between wireless telephones utilizing radio frequency transmissions such as cordless, mobile or cellular telephones, if the services are provided through a communication common carrier" in the definition of wire communication.[12]

This article, unlike current commentary, looks to legislative and judicial attempts to address the broader issues of the obligations of non-law enforcement individuals who intentionally or inadvertently intercept electronic data through the operation of a radio or other non-intrusive equipment. This article will also look at the protections given to such individuals when the information is disclosed to the appropriate authorities. The concern is that, in their zeal to protect an individual's privacy rights, legislators have imposed a moral, if not legal, straitjacket upon the ultimate recipient of the information. Moreover, the legislature, in attempting to solve one problem, has gone beyond what is actually necessary. This may in fact have negative consequences in the future when law enforcement officials or other citizens do not act upon such information. Finally, the legislation raises issues impacting on the freedom of the press and other non-law enforcement officials.

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8 This bill passed the House on June 23, and the Senate on October 1, 1986 and was signed into law on October 21, 1986. Pub. L. No. 99-508, §§ 101-111 (1986). The law went into effect January 1987.

9 *See* S. Rep. No. 541, 99th Cong., 2d Sess. (1986) [hereinafter SENATE REPORT]. This article does not address the other aspects of the Act that concern themselves with non-telephone interception, nor does the article focus on procedures for the obtaining of wiretaps by law enforcement officials.

10 A. 2955, 202 Leg., 2nd Sess. (1986).

11 N.J. STAT. ANN. § 2A:156A-2 (West 1985).

12 A. 2955, 202 Leg., 2nd Sess. (1986). Introduced June 30, 1986. This bill passed the Assembly by a 71-0 voice vote in December 1986 and is pending in the Senate.

II. Nature of the Industry

A cellular telephone transmits conversations by microwaves,[13] and involves a series of overlapping oval cells that represent the radio-wave cover area of individual base stations. "As a caller's car moves out of range of one cell's base station, the call is automatically handed over to the next cell station. Each cell's base station is connected to the local telephone system."[14]

In contrast to the cellular phone, which operates on microwave principles and is linked to the company's base, a cordless telephone operates like a "CB radio".[15]

Generally, cordless telephones can be intercepted by non-specialized equipment such as FM radios,[16] whereas cellular telephones require more specialized equipment.[17]

III. Statutory Framework

A. *Omnibus Crime Control and Safe Streets Act of 1968*

In order to comprehend the changes effected by the Act, it is necessary to understand the relevant provisions of the Omnibus Crime Control and Safe Streets Act of 1968 [hereinafter OCC-

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[13] Microwaves are extremely short, high frequency electromagnetic radio waves, less than ten meters (and usually less than one meter) in length, radiated into space by means of antennae. Their frequency is 1,000 to 300,000 megahertz. CONCISE COLUMBIA ENCYCLOPEDIA 544 (1983). A hertz is a unit of frequency equal to one cycle per second. They are transmitted point-to-point on line-of-sight paths between antennae or between satellite and earth station ("dishes"). H.R. REP. No. 647, 99th Cong., 2d Sess., 17 (1986) [hereinafter HOUSE REPORT].

[14] Philadelphia Inquirer, Oct. 13, 1986, § E, at 1, col. 2.

[15] It consists of a base unit and a mobile unit. The base unit is physically attached to two separate wires, one of which is the land based telephone line and the second of which is an AC power source. The mobile unit is a self-contained unit with its own batteries which are recharged when the mobile unit is physically rested upon the base unit. No cord or line or physical connection of any kind exists between the mobile unit and the base unit. The mobile unit is much like a conventional telephone and one can both hear from and speak into the mobile unit. Communication between the base unit and the mobile unit takes place through the reception and transmission of FM radio signals by both the base and mobile units.

State v. Howard, 235 Kan. 236, 238, 679 P.2d 197, 199 (1984).

[16] Gelspan, *Bill to Restrict Eavesdropping on Phone Calls Due Tomorrow*, Boston Globe, Sept. 17, 1985, at 16, col. 1.

[17] *Id.*

SSA],[18] and two of its definitional predicates. Whether a particular communication came under the protection of OCCSSA and subjected the intercepter to liability depended upon the application of the definitions of wire and oral communications.

Under prior law, a "wire communication" was

> "any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier and providing or operating such facilities for the transmission of interstate or foreign communications."[19]

By contrast, an "oral communication" was defined as

> "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation."[20]

Thus, there was no requirement of an expectation of privacy in connection with wire communications, as there was with oral communications. Only if the speaker had a reasonable expectation of privacy could an oral communication fall under OCCSSA. The differences in the types of communications therefore become important when analyzing the operation of section 2511, which prohibits certain interception and disclosure of wire and oral communications.[21]

The significance of the differences in the definitions is apparent. If a communication classified as a wire communication were intercepted, it could not be lawfully used elsewhere since it would have been "acquired" by "any person" without adherence to the procedures outlined elsewhere in the statute. However, if the communication could be classified as "oral," then the communication would only be covered under the prohibition of section 2511 if the speaker could be said to have a reasonable expectation of privacy. This latter notion was engrafted into the statute in a Congressional adoption of *Katz v. United States*.[22]

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18 18 U.S.C. §§ 2510-2520 (1982).

19 *Id.* § 2510(1).

20 *Id.* § 2510(2).

21 *Id.* § 2511.

22 389 U.S. 347 (1967). Against the background of *Katz*, OCCSSA's purposes became clear. *Katz* was the pre-Title III decision involving the conviction of the

Under section 2511, it was illegal for "any person who willfully intercepts, endeavors to intercept, or procures another person to intercept any wire or oral communication,"[23] or "who uses or procures someone else to use any electronic, mechanical, or other device to intercept an oral communication when such device is affixed to or . . . transmitted through a wire, cable, or other like connection, [or] such device transmits communications by radio or interferes with . . . such communications, [or] such person . . . has reason to know that such device or any component thereof has been sent through . . . interstate commerce, . . . [or] such use . . . [of the device] takes place on the premises of . . . a commercial establishment the operations of which affect interstate commerce, . . . [or] such person acts in the District of Columbia, Puerto Rico, or any U.S. territory or possession of the United States."[24] Furthermore, it was illegal for any person to willfully disclose the contents of any wire or oral communication to any other person "having reason to know that the information was obtained through the interception of a wire or oral communication."[25] It was also unlawful for a person to use, even without disclosure, the contents of a wire or oral communica-

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petitioner by the introduction of telephone conversations overheard by FBI agents who had attached an electronic listening and recording device to the outside of a public telephone booth from which he had placed his calls. In dismissing what it perceived to be hypertechnical arguments over the characterization of the phone booth, the Supreme Court focused on whether or not the person had sought to protect his privacy. As the court indicated, "what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . [b]ut what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." (citations omitted) 389 U.S. at 351-52.

23 18 U.S.C. § 2511(1)(a) (1982).

24 *Id.* § 2511(1)(b).

25 *Id.* § 2511(1)(d). "Intercept" meant the "aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device." *Id.* § 2510(4). "Electronic, mechanical or other devices" were defined to mean "any device or apparatus which can be used to intercept a wire or oral communication;" *Id.* § 2510(5). Exceptions to this last definition are telephones or other equipment "furnished to the user and being used in the ordinary course of business," or "being used by a communications common carrier in the ordinary course of business," *or* hearing aid or similar device. *Id.* § 2510(5)(a)-(b).

For purposes of the prohibitions of section 2511, "any person" is defined in section 2510(6) to include any individual and not simply agents or employees of the United States.

It is evident that a simple transistor radio could be a "device" and a small child an "interceptor" under this definition.

tion obtained in violation of section 2511.[26]

Therefore, depending upon how one defined the communications intercepted on a ham radio which if the statutory language is strictly interpreted, an elected official who was the recipient of information could be in violation of the statute if he "disclosed" or otherwise acted upon the information. A newspaper reporter as well would be in violation if the cellular communications were wire communications and he reported the information. This application of the old law, as well as with the public figure, would have conflicted with the first amendment rights of each.

The intent of section 2511, however, was to counter the extensive wiretapping being carried on in the 1960's without legal sanction or the consent of the parties to the conversation.[27] Obviously, the technology of cellular and cordless telephones was not in existence in 1968. In fact, cellular telephone services were not approved by the FCC until 1981.[28]

Furthermore, under section 2511, it is clear that a private detective, journalist, or public official could not intentionally intercept a wire or oral communication. Nor could they instruct others to intercept intentionally such communications.[29] Moreover, if a private citizen violated section 2511 and voluntarily brought the information to a detective, local official, or journalist, he could still not willfully use or endeavor to use the information knowing that it was obtained through an illegal interception.[30] Moreover, even if the initial interception were inadvertent, it would seem that the interception of subsequent conversations would be deemed intentional.

In addition, under section 2511, if a journalist picked up the information unintentionally, the subsequent printing of the information would still be a willful use of the information, unless he could sustain the argument that the non-violation intercept justifies the subsequent use. Further, the interpretation of the type of com-

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26 *Id.* § 2511(1)(d). "Willfully" has been held to have the same meaning in a civil as well as criminal context, and means "a voluntary, intentional violation of and perhaps also reckless disregard of a known legal duty." Citron v. Citron, 722 F.2d 14, 16 (2d Cir. 1983).

27 S. REP. No. 1097, 90th Cong., 2nd Sess., 4, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 2115, 2153-62.

28 *See* Cellular Communications Systems Decisions, 86 FCC 2d 469 (1981) (No. 79-318).

29 18 U.S.C. § 2511(1)(a) (1982).

30 *Id.*

munication intercepted would impact on the legality of subsequent use. Thus, if the initial interception was intentional, and therefore in violation of section 2511, a journalist or public official would have to choose between the obligation to disclose the information or to violate section 2511.[31] As a result of this confusion and the various judicial interpretations, legislation became necessary.

B. *New Jersey Statute*

The New Jersey Wiretapping and Electronic Surveillance Control Act,[32] was also passed in 1968. The definition of "wire communication" in the New Jersey statute is identical to the prior federal statute with one exception. New Jersey specifies the facilities for the communication as being "furnished or operated by a telephone, telegraph, or radio company."[33] On the other hand, the federal statute, encompasses "any person engaged as a common carrier."[34] The definitions of "oral communication" and "intercept" are identical. The New Jersey statute adds a definition of "intercepting device" to mean "any device or apparatus, including an induction coil, that can be used to intercept a wire or oral communication other than any telephone or telegraph instrument . . . furnished to a subscriber . . . or a hearing aid."[35] The definition of "person" is also broad enough to encompass individuals as well as state agents.[36]

The prohibitive portion of the New Jersey statute differs slightly from the prior federal statute; in New Jersey it is unlawful for any person "who (a) willfully intercepts . . . any wire or oral communication; (b) willfully discloses . . . to any other person the contents or any wire or oral communication; and (c) willfully uses or endeavors to use the contents of such wire or oral communication."[37]

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[31] The purpose for which the recording is made, however, was significant and supported a cause of action even against a journalist if the purpose was to embarrass. In other words, even a non-violative recording by a journalist could become illegal with the wrong motive. *See* Boddie v. American Broadcasting Companies, Inc., 731 F.2d 333 (6th Cir. 1984).

[32] N.J. STAT. ANN. §§ 2A:156A-1 to -26 (West 1985).

[33] *Id.* § 2A:156A-2.

[34] 18 U.S.C. § 2510(1) (1982).

[35] N.J. STAT. ANN. § 2A:156A-2(d) (West 1985).

[36] *Id.* § 2A:156A-2(e).

[37] *Id.* § 2A:156A-3.

An important exemption to both the federal and state statutes is "a person not acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or where one of the parties has given prior consent, . . . may use the information unless such communication is intercepted for the purpose of committing any criminal or tortious act."[38] The New Jersey statute adds the proviso that "[t]he fact that such person is the subscriber to a particular telephone does not constitute consent effective to authorize interception of communication among parties not including such person on that telephone."[39] Similarly the New Jersey statute prohibits the willful *use* of information the user knows was intercepted.[40] In other words, by its terms, the person who inadvertently intercepts the conversation would violate the statute by intentionally giving the information to someone else.

C. *Other Applicable Statutes*

There are several other statutory and regulatory provisions which are relevant to the discussion of this issue.[41] Under Section 605 of the Communications Act of 1934,[42] "no person having received any intercepted radio communication or having become acquainted with the contents, substance, purport, effect,

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38 18 U.S.C. § 2511(2)(d) (1982).

39 N.J. STAT. ANN. § 2A:156A-4(d) (West 1985). *See generally* State v. McCartin, 135 N.J. Super. 81, 86-87, 342 A.2d 591, 594-95 (Law Div. 1975). *McCartin* involved a telephone subscriber who picked up the receiver of a malfunctioning telephone and overheard evidence of a crime. In deciding similar issues regarding the New Jersey statute, the court stated that in a case of inadvertent telephone interruption the evidence will not be suppressed. *Id.* at 87, 342 A.2d at 595. The court noted further that "[t]he recording of the phone conversation is immaterial 'when the overhearing is itself legal' (citations omitted). A tape recorder is a mere accessory to better memorialize the overheard conversation." *Id.* at 88, 342 A.2d at 594. *See also* Roberts v.Alaska, 453 P.2d 898 (Alaska 1969).

McCartin may be read to exclude from the trial evidence of the release of information to police. The issue remains, however, whether journalists and elected officials who get information and "use" it will be liable.

40 It should be noted that the statute expires on July 1, 1988 pending enactment of acts to revise, repeal or compile in Title 2C. *See* N.J. STAT. ANN. § 2C:98-3 (West 1982).

41 *Boddie* involved a creative plaintiff who also relied upon a civil penalty provision for violations of FCC regulations. 731 F.2d at 336; 47 U.S.C. § 502 (1982); 47 C.F.R. §§ 2.701, 15.4, 15.11, 15.154 (1986).

42 47 U.S.C. § 605 (1962 & Supp. I 1986).

or meaning of such communication (or any part thereof) knowing that such communication was intercepted," shall divulge or "use such communication . . . for his own benefit or for the benefit of another not entitled" to the information.[43] Section 605 does not define either "radio communication" or "intercept."[44] Similarly, New Jersey has a statute prohibiting the disclosure of communications by employees of telegraph or telephone companies.[45]

Ham radio operators face further restrictions. Under Section 15.11 of the Rules and Regulations of the Federal Communications Commission, "[n]o person shall use, either directly or indirectly, a device operated pursuant to the provisions of this part for the purpose of overhearing or recording the private conversations of others unless such use is authorized by all of the parties engaging in the conversation."[46] However, several issues remain unanswered. For example, what if a journalist or public official makes use of the information? Should a "good citizen" be punished by losing his ham license because of his turning over information to law enforcement officials?

IV. Case Law

The leading cases dealing with interference of wire or oral communications have been in the criminal arena.[47] In order to understand the impact and inadequacies of the current legislation, it is necessary to review the prior cases which have dealt with this issue.

State v. Howard involved two defendants "charged with possession of cocaine and conspiracy to sell marijuana."[48] The district court suppressed "certain taped conversations and other evidence obtained by the police . . . following the search of the defendants' house," on the grounds "that the interception of the defendants' cordless telephone conversations and tape record-

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[43] *Id.* Courts have divided over whether Section 605 has been held to create a private right of action. *Compare* American Television & Communications Corp. v. Western Techtronics, Inc., 529 F. Supp. 617, 619 (D. Colo. 1982) *with* Smith v. The Cincinnati Post & Times Star, 353 F. Supp. 1126 (S.D. Ohio 1972).

[44] *See generally* United States v. Gregg, 629 F. Supp. 958 (W.D. Mo. 1986).

[45] *See* N.J. STAT. ANN. §§ 48:17,-19,-20 (West 1940).

[46] 47 C.F.R. § 15.11 (1986).

[47] *See* State v. Delaurier, 488 A.2d 688 (R.I. 1985); State v. Howard, 235 Kan. 236, 679 P.2d 197 (1984).

[48] 235 Kan. at 236, 679 P.2d at 198.

ings" violated Kansas' wiretap statute.[49] A neighbor of the defendants, operating his AM/FM radio, heard conversations and determined that they were those of defendants conversing with others through a cordless telephone.[50] Significantly, "the radio receiver was a standard make and model and was not modified in any manner."[51] On his own, he tape recorded the conversations and provided information about them to state police officials.[52] The police gave "the informant with a tape recorder and a number of blank tapes and requesting the informant to record any further conversations."[53] Although the police obtained a court order to install a pen register[54] on defendant's telephone, no such order was obtained "to monitor or record the conversations originating from defendant's residence."[55] Based on these recorded conversations, a search warrant was obtained. A search was performed which disclosed a cordless telephone as well as narcotics.[56] The trial court heard extensive testimony from an expert witness who explained "the nature and operational dynamics of the cordless telephone."[57]

In reversing the district court,[58] the Supreme Court of Kansas held that the intercepted conversations "between the mobile unit and the base unit of the cordless telephone [in this case] were . . . oral communications."[59] In particular, the court stated "[i]t seems logical to us that cordless telephone conversations, which may be heard by anyone listening on an ordinary radio receiver, should not be included within the definition of a 'wire communication' under Title III."[60] The court further held that the defendants, "as owners of the cordless telephones, had been fully advised by the owner's manual as to the nature of the equip-

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49 *Id.* at 237, 679 P.2d at 198.

50 *Id.* at 237, 679 P.2d at 198.

51 *Id.* at 237, 679 P.2d at 198.

52 *Id.* at 237, 679 P.2d at 198.

53 *Id.* at 237, 679 P.2d at 198.

54 *Id.* at 237, 679 P.2d at 198. A pen register is a mechanical device which records only the numbers dialed.

55 *Id.* at 237-38, 679 P.2d at 198.

56 *Id.* at 238, 679 P.2d at 199.

57 *Id.* at 238-39, 679 P.2d at 199.

58 *Id.* at 246-47, 679 P.2d at 204.

59 *Id.* at 247, 679 P.2d at 204.

60 *Id.* at 248, 679 P.2d at 205.

ment and therefore had no reasonable expectation of privacy,"[61] which is the necessary predicate for a finding of a violation of the wiretap statute where an "oral communication" is involved. The court defined the congressional intent behind Title III as two fold; first, the protection of an individual's right of privacy; second, "to provide a uniform and systematic method for the interception of human communication by police officials as a means of protecting the public from criminal activities."[62]

The court indicated that if the intercepted conversations were wire communications, then court authorization would have been necessary before the conversations could be recorded. If, however, the conversations were oral communications, then the court would need to determine whether there was a reasonable expectation of privacy so as to require court authorization.[63] The court distinguished *United States v. Hall*[64] finding that the *Hall* court had misconstrued Congress' intent.[65] The court also emphasized that the case did not involve the rights of the person on the other end of the telephone line who was speaking into the standard phone.[66] Thus, had the person speaking into the standard telephone been the subject of the criminal proceeding, the court would have found that he had an expectation of privacy, and therefore the evidence would have been suppressed.

Shortly thereafter, the Supreme Court of Rhode Island de-

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61 *Id.* at 249, 679 P.2d at 206.

62 *Id.* at 249-50, 679 P.2d at 206. The court referred to other courts dealing with this specific problem of cordless telephones and cited United States v. Hoffa, 436 F.2d 1243 (7th Cir. 1970), *cert. denied*, 400 U.S. 1000 (1971), in which the Seventh Circuit held that the defendant had no expectation of privacy protected by the Fourth Amendment as to calls originating from a mobile telephone in automobiles where the calls were exposed to everyone in the area who possessed FM radio receivers or any other automobile telephone tuned in to the same channel. *See also* United States v. Hall, 488 F.2d 193 (9th Cir. 1973), a contrary holding, finding that communications from radio telephones in automobiles were wire communications and that if a conversation involves a land line telephone it is a wire communication. Only conversations not involving a land line telephone will be oral communications. The *Howard* court also considered Dorsey v. State, 402 So.2d 1178 (Fla. 1981), another criminal action which involved the more extreme situation of the police themselves monitoring by radio scanner messages received by one of the defendants through a "pocket pager".

63 *Howard*, 235 Kan. at 247, 679 P.2d at 204.

64 488 F.2d 193 (9th Cir. 1973).

65 *Howard*, 235 Kan. at 247, 679 P.2d at 204.

66 *Id.* at 248, 679 P.2d at 204.

cided *State v. Delaurier*.[67] *Delaurier* involved a private citizen who telephoned the police with a report that her son heard a discussion for the sale of drugs over his AM radio.[68] The police eventually took an AM radio to a different location where they monitored conversations and recorded them over a period of several weeks.[69] As in *Howard*, the defendant in *Delaurier* "was using a standard Radio Shack wireless telephone which he operated by means of radio waves."[70] The court held that the purpose behind Title III was to counter increasing threats to privacy through the use of sophisticated electronic devices, with the two main goals being: "(1) to protect the privacy of oral and wire communications; and (2) to provide, on a uniform basis, circumstances and conditions under which interception of such communications could be allowed."[71] The question was whether the communications were wire or oral and, if so, whether they were intercepted by the police. As in *Howard*, the court did not rely upon *United States v. Hall*,[72] and found that the conversations were oral communications.[73] In fact, the *Delaurier* court went further than *Howard* or *Hall* in explaining the absurdities of the *Hall* decision. For example, the court noted that defining the communications as wire communications would require "the police to obtain a court order to listen to an AM radio."[74] Thus, even if the police inadvertently obtained information, they would be in violation of section 2516. Further, the failure to obtain the court order could conceivably lead to civil and criminal sanctions.[75] Most importantly, the Court stated:

> [t]hus, the citizen who reported defendants' communications to the police could be subject to criminal prosecution as well as a civil lawsuit, as could the Woonsocket police department and its officers who participated in the investigation. We can-

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67 488 A.2d 688 (R.I. 1985).

68 *Id.* at 690.

69 *Id.* at 690.

70 *Id.* at 690.

71 *Id.* at 692 [citing United States v. Cianfrani, 573 F.2d 835, 855 (3d Cir. 1978)].

72 488 F.2d 193 (9th Cir. 1973). *Hall's* analysis distinguished between calls from one landline phone to another, calls between two cordless phones, and calls involving one landline phone and one cordless phone.

73 *Delaurier*, 488 A.2d at 694.

74 *Id.* at 694 (citing 18 U.S.C. § 2516).

75 *Id.* (citing 18 U.S.C. §§ 2511, 2520).

not accept this result.[76]

The court further explained that there must be a justifiable subjective expectation of privacy for a violation to be present.[77] As in *Howard*, the fact that the owner's manual warned the user as to the nature of the equipment was enough to satisfy the court that there was no expectation of privacy.[78] The court also stated that Congress did not mean to include an ordinary AM radio within the definition of "device".[79] Furthermore, the *Delaurier* court emphasized that callers who were not aware they were communicating over a cordless phone would have had an expectation of privacy.[80]

Hall was cited in the House Report as "the major relevant federal case" as sharply conflicting with the *Delaurier 'Howard* approach.[81] *Hall* held that section 605 of the FCC Act did not apply to an originally inadvertent interception over a radio of conversations between two radio-telephones in automobiles.[82] The *Hall* court also noted *in dicta* that, at least under section 605, disclosure by the interceptor to a law enforcement official would probably not violate section 605, but did not address the wiretap statute.[83]

A case not cited in *Delaurier* or *Howard*, but reflective of the potential for more civil actions, is *Kemp v. Block*.[84] In *Kemp*, plaintiff and defendant were electronic integrated systems mechanics with the Nevada National Guard.[85] A loud argument took place between the plaintiff and his foreman.[86] The defendant, present during the argument, recorded the conversation.[87] The defendant later informed the plaintiff and the foreman that he recorded most of the argument.[88] The foreman took the recorder from the defendant and the tape was later played "before employees of the National Guard and, at the plaintiff's insistence, during two personnel pro-

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76 *Id.*
77 *Id.*
78 *Id.*
79 *Id.* at 694-95.
80 *Id.* at 694 n.4.
81 HOUSE REPORT, *supra* note 13, at 21.
82 488 F.2d at 194-95, 195 n.3.
83 *Id.* at 196 n.4.
84 607 F. Supp. 1262 (D. Nev. 1985).
85 *Id.* at 1263.
86 *Id.*
87 *Id.*
88 *Id.*

ceedings."[89] The plaintiff's employment was ultimately terminated.

The plaintiff sued the defendant for invasion of privacy and for making a recording in violation of section 2511.[90] The court stated that the plaintiff must first exhibit a subjective expectation of privacy, and the court must determine whether that expectation, viewed objectively, was reasonable under the circumstances.[91] The court found that the plaintiff took no steps to ensure his privacy, and therefore, had no expectation of privacy.[92]

With regard to the interception of oral communications, the court found that the elements of the offense under section 2510 were "(1) a willful interception of an oral communication by a device; (2) the communication must have been uttered by a person who exhibited an expectation that it would not be intercepted; and (3) the communication must have been uttered under circumstances that justified the expectation."[93] The court also stated that an important factor was that the defendant "overheard the communication with the naked ear under uncontrived circumstances."[94] The court referred to the legislative history of section 2510 to indicate "that an expectation that an oral communication will not be intercepted is unwarranted where the speaker talks too loudly."[95] The court thereby granted the defendant's motion for summary judgment and dismissed the action.[96]

In *Pulawski v. Blais*,[97] the Rhode Island Supreme Court cited *Delaurier* for the proposition that Title III extends to state court actions. *Pulawski* involved an intentional wiretap of a phone by a jealous husband. The husband sued the wife's lover as a result of the intercepted conversation. The Rhode Island Supreme Court ruled that the evidence was inadmissible.[98]

What is particularly noteworthy about *Pulawski* is its application of the federal statute to evidentiary questions in a state court. This could lead to confusion as to what law will apply in such cases due to

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89 *Id.*
90 *Id.* at 1263-64.
91 *Id.* at 1264.
92 *Id.*
93 *Id.* [citing United States v. Carroll, 337 F. Supp. 1260, 1262 (D.D.C. 1971)].
94 *Id.*
95 *Id.* at 1265 [citing 1968 U.S. CODE CONG. & ADMIN. NEWS 2112, 2178].
96 *Id.*
97 506 A.2d 76 (R.I. 1986).
98 *Id.* at 78.

the differences between the federal statute and the various state statutes. In other words, where a jurisdiction has a wiretap statute that lacks the specificity of the current federal one, a conscientious plaintiff could argue under *Pulawski* that the stronger federal prohibitions apply.

Pulawski also held that there is no exception to the wiretap statute for interspousal wiretapping.[99] This may become authority for the proposition that evidentiary privileges are not waived or lost if there is violation of section 2511.[100]

One need not be imaginative to find other circumstances in which this issue becomes relevant. In *United States v. Rose*,[101] an employee in the monitoring branch of the enforcement division of the Federal Communications Commission [hereinafter FCC] intercepted a point-to-point communication transmitted on a "ham" radio operators band. The FCC turned the information over to the United States Coast Guard, which approached two vessels "apparently transferring bales of marijuana from one to the other."[102] In determining that this was an oral communication, the court stated that

> [t]he manner in which the communications were transmitted indicates that appellants were aware that their communications were likely to be intercepted. They switch frequencies during the course of their transmissions; they did not identify the stations they were operating as required by the FCC; they did not identify themselves; and lastly, they chose to use code from time to time to disguise the content of their communications.[103]

In *United States v. Hoffa*,[104] telephone "calls were placed from mobile telephone units located in automobiles owned by Teamsters Local No. 299. They were monitored at the Detroit FBI office by

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99 *Id.* at 77 n.2.

100 For example, a disgruntled parishioner who intercepts a communication between a clergyman and another parishioner would not have destroyed the privilege attaching to that communication under Fed. R. Evid. 502 and applicable state law. The sound rule would be that there is no waiver of a privilege by utilizing either cordless or wireless telephones.

101 669 F.2d 23 (1st Cir. 1982).

102 *Id.* at 25.

103 *Id.* at 25-26. *See also* Bianco v. American Broadcasting Company, Inc., 470 F. Supp. 182, 185 (N.D. Ill. 1979).

104 436 F.2d 1243 (7th Cir. 1970), *cert. denied*, 400 U.S. 494 (1971).

means of ordinary commercial type F.M. radio receivers."[105] The court stated that "there was no expectation of privacy as to the Hoffa calls in Detroit which were exposed to everyone in that area who possessed a F.M. radio receiver or another automobile telephone tuned in to the same channel."[106]

In *Roberts v. State*,[107] a woman heard strange half-rings on her telephone and picked up the phone. The woman overheard a conversation in which the speaker stated that he had been shot.[108] She reported the incident to the police who encouraged her to listen to further conversations.[109] This case did not involve cordless or wireless phones but rather "crossed wires."[110] In interpreting the Alaska statute, the court found that there must be an intentional interception.[111] The court stressed the fact that the interceptors "had ordered and paid for a private telephone."[112] As the court stated:

> [w]e have a situation in which a private citizen, acting in good faith and on her own initiative, without any prior solicitation, assistance, knowledge, connivance, or cooperation from law enforcement authorities, effectuated an "inadvertent interception of a telephone conversation over party lines." Admittedly, we would be faced with a significantly altered situation if the suppression hearing disclosed that the police had obtained evidence from, or as a result of, any of the subsequent interceptions which they had both encouraged and attempted to assist the Marines in undertaking.[113]

The court also emphasized that, at least with regard to its discussion of section 605, it was persuaded:

> that the Congress of the United States never intended to prohibit disclosure to law enforcement authorities in the case where a private citizen, such as Mrs. Marine, on her own initia-

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105 *Id.* at 1246.

106 *Id.* at 1247.

107 453 P.2d 898 (Alaska 1969).

108 *Id.* at 899.

109 *Id.* at 899-900.

110 *See id.* at 900. No discussion here relates to "crossed lines" in cases whose normal phone users can hear other people on the line. *See* State v. McCartin, 135 N.J. Super. 81, 342 A.2d 591 (Law Div. 1975). *See also* 49 A.L.R. 4th 430 (1987) (privacy actions for listening on extensions).

111 Roberts v. State, 453 P.2d 898, 901 (Alaska 1969).

112 *Id.* at 901.

113 *Id.* at 902. The court continued with a discussion of section 605 in terms of admissibility of evidence even if it were illegally obtained.

> tive without any suggestions of police direction, coercion or assistance, inadvertently overheard a conversation of what was believed by her to be a private line.[114]

Roberts did not address the implication of OCCSSA, probably because the acts involved occurred prior to 1968. Nonetheless, the police expressed that an inadvertent interceptor of criminal conversation would not be penalized for coming forward with the information, *even after deliberate* recordings are made following the inadvertent interception.

In New Jersey, *State v. McCartin*[115] follows the *Roberts* analysis in a case involving an inadvertent interception of voices over a private telephone.[116]

V. The Legislative Reform

A. *Electronic Communications Privacy Act of 1986*

As a result of a report by the Office of Science and Technology and hearings before the House Judiciary Committee Subcommittee on Courts, Civil Liberties and the Administration of Justice,[117] various inadequacies with the federal surveillance laws were discovered. One area which was not addressed in the surveillance laws involves the contents of phone conversations transmitted over microwave towers or satellites and conversations conducted over cellular mobile telephones or cordless phones. Additional inadequacies included: computerized electronic mail; surveillance by hidden beepers or electronic visual

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114 *Id.* at 904-05. *See* F. Lee v. Florida, 392 U.S. 378 (1968). *See also* State v. McCartin, 135 N.J. Super. 81, 87, 342 A.2d 591, 595 (Law Div. 1975). *McCartin* is the only New Jersey case close to the point, and involved an inadvertent interception which the police later taped without a warrant. The court stated that since there was no *willful* interception, there would be no suppression of the evidence in the criminal proceeding; "[t]o suppress this evidence would be the same as holding that it was a useless gesture for this public-spirited citizen to report possible criminal activity to the police." *Id.* at 87, 342 A.2d at 595. *McCartin*, in discussing both the federal and state wiretap statutes, stated that "statutes are aimed at the *willful* interception and revelation of wire or oral communication where privacy is an anticipated concomitant of the instrument's use." *Id.* at 83, 342 A.2d at 592 (emphasis added).

115 135 N.J. Super. 81, 342 A.2d 591 (Law Div. 1975).

116 *Id.*, 342 A.2d 591.

117 *Electronic Communications Privacy Act of 1986: Hearings on H.R. 3378 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 99th Cong., 1st & 2nd Sess. (1986).

surveillance; and the legal framework for government surveillance of national computer data bases.[118] Other issues have been discussed in terms of call-detailing systems and computer matching.[119]

The Electronic Communications Privacy Act of 1986[120] significantly changes the current law and addresses some of the concerns which have been referred to in this article regarding the New Jersey bill.[121]

The definitional section of the Act is extensively amended. "Any communication" is replaced by "any aural transfer,"[122] with "aural transfer" now defined as "a transfer containing the human voice at any point between and including the point of origin and the point of reception."[123] The definition of wire communication excludes "the radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit."[124] In essence, this is a recognition that such conversations are subject to interpretation as normal AM radios.

Another amendment "makes clear that cellular communications—whether they are between two cellular telephones or between a cellular telephone and a 'land line' telephone—are included in the definition."[125] Thus, the "absurd" result reached by the *Hall* court is no longer absurd. The Act's definition of wire communication includes any human voice communication, except between the handset and base unit of a cordless phone, which is the portion accessible by non-specialized equipment.[126] The definition of electronic communication is added to the Act to cover any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by wire, radio, electromagnetic, photoelectronic or photo-optical

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118 Burnham, *Agency Finds Lag in Laws to Bar Abuse of Electronic Surveillance*, N.Y. Times, Oct. 24, 1985, at 11, col 5.

119 *See generally* Nat'l. L.J. 12986 (1985); National Journal, Jan. 14, 1984, 11484.

120 Pub. L. No. 99-508, 100 Stat. 1848 (1986).

121 *Compare* N.J. STAT. ANN. § 2A:156A-1 to -21 (West 1985), *with* A.2955, 202 Leg., 2nd Sess. (1986).

122 Pub. L. No. 99-508, § 101(a)(1)(A).

123 *Id.* § 101 (a)(6)(c)(18).

124 *Id.* § 101(a)(1)(D).

125 SENATE REPORT, *supra* note 9, at 11.

126 *Id.* at 12.

systems. . .," not including any wire or oral communication.[127] Another significant change is the addition of "oral communication" to specifically exclude "any electronic communication."[128] Congress made it clear that an oral communication "is one carried by sound waves, not by an electronic medium."[129] Furthermore, section 2510(4)'s definition of "intercept" is amended to clarify that non-voice portions of wire communications are also protected.[130]

Section 2511(2) was amended to make it lawful for a person to intercept an electronic communication made through an electronic communication system that is readily accessible to the general public.[131] The definition of electronic communication system means any "wire, radio, electromagnetic, photooptical, or photoelectronic facilities for the transmittal of electronic communications."[132] Thus, the definition includes portions of the cordless telephone system as well as the entire cellular telephone system. The House Report notes that under section 101(b)(4) "nothing carried by wire is 'readily accessible to the general public.' "[133]

The Act's operative section prohibiting the interception or disclosure of covered communications,[134] was amended in an attempt to afford some degree of balance to a journalist's interests by eliminating the words "for the purpose of committing any other injurious act."[135] The Act now provides an exception to the wiretap statute if the parties to wire or oral communications tape the conversation regardless of purpose.[136]

The amendment makes clear that all remedies and sanctions are applicable only to non-constitutional violations.[137] Thus, all constitutional tort violations would be preserved. The question

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127 Pub. L. No. 99-508, § 101(a)(6)(c)(12).

128 *Id.* § 101(a)(2).

129 SENATE REPORT, *supra*, note 9, at 13.

130 *Id.*

131 Pub. L. No. 99-508, § 101(b)(4)(g)(i).

132 *Id.* § 101(a)(6)(c)(14).

133 Under Pub. L. No. 99-508, § 101(B)(4)(i), "[n]othing carried by wire is 'readily accessible to the general public.' " HOUSE REPORT at 41.

134 18 U.S.C. § 2511 (1982).

135 Pub. L. No. 99-508, § 101(b)(2).

136 Previously, the purpose was relevant.

137 Pub. L. No. 99-508, § 101(e)(c).

becomes whether an action for invasion of privacy is a constitutional right or whether such an action is precluded by section 2511.

Section 2520 was amended to provide that "any person whose wire, oral or electronic communication is intercepted, disclosed, or used intentionally in violation of this chapter" can recover damages or such relief as the court deems appropriate from the person or entity who has violated this section.[138] Damages are fixed at $10,000 or $100 per day each day of the violation, whichever is greater.[139]

Section 2520 further provides that any person whose wire, oral or electronic communication is intercepted, disclosed or *intentionally* used may recover damages from the violator. Similarly, "intentionally" replaced "willfully" in section 2511[140] so as to shield the inadvertent interceptor and focus on the conscious objective of the interceptor.[141] The Senate Report makes clear that a laudable motive will not legitimize an otherwise intentional violation.

The Act does permit providers of electronic communication receivers to disclose intercepted information to law enforcement officials if the intercepted communication apparently pertains to a crime.[142] However, such information cannot be disclosed if the interceptor "purposefully sets out to monitor conversations to ascertain whether criminal activity has occurred."[143]

Thus, there is a clear intent in the federal statute to protect innocent interceptors.[144] There is no similar intent evident in the amendments to the New Jersey wiretap statute. In New

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138 *Id.* § 103(a).

139 *Id.* § 103(c)(2)(B).

140 *Id.* § 101(f).

141 SENATE REPORT, *supra* note 9, at 6, 23-24.

142 Pub. L. No. 99-508, § 102(3)(b)(iv).

143 SENATE REPORT, *supra* note 9, at 26.

144 SENATE REPORT, *supra* note 9, at 6 is quite clear:

> In order to underscore that the inadvertent reception of a protected communication is not a crime, the subcommittee changed the state of mind requirement under Title III of the Omnibus Crime Control and Safe Streets Act of 1968 from "willful" to "intentional." This change in the law addresses the concerns of radio scanners that in the course of scanning radio frequencies in order to receive public communications, one could inadvertently tune through a protected communication like a cellular telephone call. This provision makes clear that the inadvertent

Jersey, innocent interceptors such as the individuals in *Roberts*, *Delaurier*, and *Howard* are in violation of the willful use provisions of the statute if they turn over information to the police, reporters, or public officials.[145] Moreover, assuming the police are in possession of the information, can they act upon it? By willfully turning over the information to the police, has the inadvertent interceptor (but willful "user") now tainted the evidence, and exposed himself to civil liability?

The other major amendment to the Act is the state of mind provision,[146] which changes "willfully" to "intentionally" in section 2511.[147] The purpose of this amendment is to underscore the fact that inadvertent interceptions are protected under the Act. However, the Act does not address the issue of intentional use of information after the initial inadvertent interception, and does not define inadvertence. These are areas which the Act should have addressed.

An information statement[148] released by Representative Kastenmayer's office indicates that cellular phone calls are currently covered under the Act, at least when they are connected to land line phones.[149] Since cellular phones can be intercepted by private parties and police, the Act clarifies the privacy rights of the parties to a cellular phone call and provides protection from that interception.[150] The privacy rights of those parties, as noted above, may differ in a civil context. The information statement also notes that cordless phones are not accorded legal protection under the Act since those calls can be easily intercepted on non-specialized equipment such as AM radios.[151] The statement notes that inexpensive encryption is widely available, and that the Federal Communications Commission has required cordless

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interception of a protected communication is not unlawful under the Act.

No such statement exists with the New Jersey bill.

145 N.J. STAT. ANN. § 2A:156A-3 (West 1985).

146 HOUSE REPORT at 48-49.

147 *Id.*

148 STAFF OF REP. KASTENMEYER'S OFFICE, 99TH CONG., 1ST & 2ND SESS., INFORMATION STATEMENT ON THE ELECTRONIC COMMUNICATIONS PRIVACY ACT 2 (1986).

149 *Id.*

150 *Id.* at 3.

151 *Id.*

phones to have a privacy disclaimer at the time of sale.[152]

The Senate Report[153] also makes clear that "[t]he wire portion of a cordless communication remains fully covered . . ." by the Act.[154] However, the radio portion transmitted between the cordless handset and the land line unit is not protected. This is because it can be easily intercepted by use of ordinary equipment.[155] The report further notes that "it would be inappropriate to make an interception of such a communication a criminal offence [sic]."[156] This leaves unanswered, however, the problem presented in *McCartin*[157] and *Roberts*.[158] In these cases, the interception was directly from a wire. It is possible that someone could also intercept the wire portion of the cordless conversation from a land line phone. The subsequent willful disclosure of information obtained through the interception to a law enforcement official would trigger liability.[159] This is of particular concern in light of the Act's civil liability section.[160] Under this section, the interception is inadvertent, the interceptor would face civil liability if he intentionally divulges intercepted information to another, even if the interception itself was inadvertent.[161]

B. *The New Jersey Bill*

Assembly Bill No. 2955,[162] adds the following language to the definition of wire communication:

> [i]ncluding communications through or between wireless telephones utilizing radio frequency transmissions such as cordless, mobile or cellular telephones, if the services are

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152 Certain radio groups objected to the bill on the grounds that hobbyists may innocently listen in on telephone conversations.

153 SENATE REPORT, *supra* note 9, at 12.

154 *Id.*

155 *E.g.*, an AM Radio.

156 SENATE REPORT, *supra* note 9, at 12. *See also* HOUSE REPORT at 33 which cites 47 C.F.R. § 15.236(a) Part 15, subpart E of the Rules of the Federal Communications Commission.

157 State v. McCartin, 135 N.J. Super. 81, 342 A.2d 591 (Law Div. 1975).

158 Roberts v. State, 453 P.2d 898 (Alaska 1969).

159 *Id.*

160 18 U.S.C. § 2520 (1982).

161 Such an act would by definition be intentional. The bill passed the Assembly by a 71-0 voice vote in December 1986. Introduced June 30, 1986, an act concerning telephone surveillance and amending P.L. 1986 c. 409.

162 N.J. STAT. ANN. § 2A:156A-2(9) (West 1985).

provided through a communication common carrier.[163]

The statement attached to the Act[164] in essence provides that the bill extends the same protections against warrantless interceptions and disclosures to wireless telephone users under certain circumstances. The statement also notes that the Bill attempts to clarify the contradictory holdings of various courts that have considered the issue, and that wireless communications will not be considered oral communications even if an objective expectation of privacy is established; "[t]his Bill would clearly establish that wireless telephone communications are, for the instant purpose, to be treated as wire linked telephone communications, if the service is provided to a communication common carrier."[165] Thus, there is no need to address the issue of whether there is an expectation of privacy. Therefore, under section 2A:156A-3, any person willfully intercepting, disclosing, or using the contents of a conversation conducted over a wireless telephone would be in violation of the Act.

Significantly, the Bill does not distinguish between cordless and cellular phones despite the technological differences. Moreover, the Bill does not address the issue of inadvertent interception and the first amendment rights of a reporter or public servant who comes into possession of the information. This is perhaps the most troublesome part of the Bill since it does not afford the protections offered under the Federal Act. Thus, an individual who inadvertently intercepts a communication would be in violation of the New Jersey statute if he willfully turns the information over to a reporter, a public figure, or even a law enforcement official.

Furthermore, a person who has a first amendment right to comment on issues or, at the very least, to provide information concerning the commission of a crime would be in violation of the Act. Even if the individual were not prosecuted, he would be opening himself up to a civil suit by the overheard party who could sue under the Act[166] or under a common law invasion of privacy theory. Thus, the reporter or political figure would have to choose to violate the

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163 See copy of Statement attached to the Act.

164 *Id.*

165 N.J. STAT. ANN. § 2A:156A-24 (West 1985).

166 One of the purposes underlying the Federal Act was to prohibit industrial spies. HOUSE REPORT at 22. It is conceivable for someone to set up sophisticated non-intrusive equipment to intercept phone calls of competitors—even follow around a car with a cellular phone.

statute, or not pursue the obligations of his office. Thus, the woman in *Roberts*, and the individuals in *Delaurier* and *Howard* would be faced with the dilemma of not reporting information known to be criminal, or reporting it to the police and violating the statute.[167]

A somewhat different issue is presented if an individual discloses information to a reporter or public official. In this situation, the public official has an affirmative duty to those he represents.[168] If he does not disclose the information to the appropriate law enforcement officials he may be in violation of his duty. However, if he does disclose the information, he may face civil liability or criminal prosecution under the Bill. Moreover, while it has been stated that there is no constitutional right to the gathering of news,[169] if a reporter prints a transcript of a discussion he could possibly be prosecuted under the wiretap statute.

While the Bill is laudable in its attempt to clarify the question of whether the cellular or wireless telephone user has an expectation of privacy, it leaves open more loopholes than it closes. The Bill does not address the willful use of the overheard conversations, even if inadvertent. The definitions of "intercept" and the provisions of Sections 2A:156A-3(b) and (c) do not offer protections to inadvertent interceptors.[170]

VI. Balance of Interests

The Plainsboro case[171] involves a conflict between the first amendment rights of an elected public official to use information and the statutory rights (as well as privacy rights) of the individuals whose conversations were overheard. First and foremost, an elected official owes a public duty to his office.[172] Public officials have discretionary functions.[173] The exercise by public officials of their "judgment and discretion in the performance of their du-

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167 HOUSE REPORT at 39-40.

168 Lewis, *infra* note 187, at 610.

169 N.J. STAT. ANN. § 2A:156A-3(b)(c) (West 1985).

170 Spanos v. Daily Home News, *supra* note 2.

171 *See generally* Sullivan, *Cordless Phones Raise An Eavesdropping Issue*, N.Y. Times, Mar. 11, 1987, § B, at 3, col. 1, *supra* note 2.

172 Defeo v. Smith, 17 N.J. 183, 189, 110 A.2d 553, 557 (1955).

173 New Jersey State AFL-CIO v. State Federation of District Board of Education of N.J., 93 N.J. Super. 31, 41, 224 A.2d 519, 524-25 (Ch. Div. 1966).

ties" precludes individual liability as a matter of common law.[174] Moreover, a public official may have a duty to inquire into an expressed view about a situation.[175] Further, a public employee is entitled to speak, pursuant to his rights under the first amendment, when his speech deals with a matter "of significant public and not merely personal or private interest."[176]

Under the Act, a public official would be subject to criminal and civil liability if he came into possession of a communication intercepted from cellular or cordless phones. The state of mind exemptions apply only to the original inadvertent interception and would probably not aid public officials since any subsequent use would be deliberate, and not inadvertent. However, it could also be argued that since the wireless portions of a cordless conversation is not covered under the Act, any subsequent "holder" of that information could use it freely. The fact that the inadvertent interception was not from crossed lines,[177] as was the case in *Roberts* and *McCartin*, should not be a factor.

Similarly, a newspaper reporter has first amendment privileges[178] and certain protections.[179] Such privileges are also obligations; the New Jersey Supreme Court has recognized the vital role of the press.[180] However, if a person intentionally records a cordless or cellular phone conversation and turns it over to a journalist, the journalist might not have the protection of New

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174 Visidor Corp. v. Cliffside Park, 48 N.J. 214, 227, 225 A.2d 105 (1966), *cert. denied*, 386 U.S. 972 (1967).

175 O'Connor v. Harms, 111 N.J. Super. 22, 27, 266 A.2d 605, 607 (App. Div. 1970).

176 Czurlanis v. Albanese, 721 F.2d 98, 105 (3d Cir. 1983). Political activities, of course, fall within the first amendment. In In Re Gulkin, 69 N.J. 185, 351 A.2d 740 (1976), there is also a qualified privilege extended to public officials in terms of libel and slander action. *See* F.J.D. Construction Corp. v. Isaacs, 51 N.J. 263, 268-69, 239 A.2d 657, 659-60 (1968) (certain communications before governing bodies may be absolutely privileged).

177 For a general discussion of the right to recover civilly for the tortious invasion of privacy by eavesdropping on *extension* telephone, see 49 A.L.R. 4th 430 (1986).

178 Another issue may arise as to the rights of a private investigator to attempt to intercept communications from cordless or cellular telephones. The imagination can run to other examples, such as a clergyman desiring to "clean up" a town and seeks to listen in on conversations of certain other people. Such intentional interception would be illegal, but what of the use by the clergyman of information inadvertently obtained by one of his parishioners?

179 N.J. STAT. ANN. § 2A:84A-21 (West Supp. 1986).

180 *See* Marezza v. New Jersey Monthly, 89 N.J. 176, 445 A.2d 376 (1982).

Jersey's Shield Law[181] if the information is printed.[182]

Even where there is inadvertent interception, the act of bringing the information to a journalist's attention is intentional. The journalist should not be in the same position of a law enforcement official who could not use the information under the Act. However, under its provisions, the journalist could not act upon the information without incurring criminal and/or civil liability.

In *New York Times v. Sullivan*,[183] the Supreme Court referred to "a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open."[184] In *Time, Inc. v. Hill*,[185] the Supreme Court upheld the right of the press to write on any topic: "[t]he risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press."[186] The question becomes: does the right to privacy in one's home outweigh the right of a reporter to use the overheard conversation? An individual whose conversations are intercepted presumably would have to meet the standard set forth in *Time v. Hill* in order to sue a reporter for libel. It is not clear, however, what impact the wiretap bills would have, particularly if the journalist asserts his privilege.

The above discussion is predicated upon the inadvertent or accidental turnover of information to a public official or reporter. This analysis would not apply, however, if the reporter or public official actually sought out to overhear and intercept conversations.

An important question, of course, is where to draw the line. Should certain persons be entitled to use information obtained inadvertently?[187] If the discussion or dissemination of such information is prohibited, is this a prior restraint on expression in

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181 N.J. STAT. ANN. § 2A:84A-21 (West Supp. 1986).

182 State v. Boiardo, 82 N.J. 446, 414 A.2d 14 (1980); *In re* Farber, 78 N.J. 259, 394 A.2d 330 (1978).

183 376 U.S. 254 (1964).

184 *Id.* at 270.

185 385 U.S. 374 (1967).

186 *Id.* at 388.

187 *See* Lewis, *A Preferred Position for Journalism*, 7 HOFSTRA L. REV. 595 (1979), suggesting that journalists should not occupy any preferred position in the scope of first amendment issues.

violation of the First Amendment.[188]

The *DeLaurier* and *Howard* courts stated *in dicta* that the person at the other end of a cordless telephone conversation has a reasonable expectation of privacy, and as to that person, a civil action for invasion of privacy on grounds for suppressing incriminating statements regarding him may exist.[189] The House Report reiterates the notion that this person, unlike the cordless phone user, who has been warned in the sales material, has no knowledge of the risks of interception.[190]

It is suggested here that the user of the cordless telephone has a duty to advise the third party that a cordless phone is being used. With today's technology, an individual may not necessarily know that the speaker on the other end is using a "speaker phone". Similarly, if there is no liability regarding the tape recording of a conversation of one of the parties to it on the grounds of a willing and knowledgeable "waiver" of privacy, there is no reasonable basis for a distinction for using cordless or wireless phones. The situation is no different from the *Roberts* case involving crossed wires.

VII. Conclusion

In today's society, many people speak freely over cellular and mobile phones. The failure of the new legislation and proposals is that they do not address the rights involved in such communications. They also offer no guidance for ham radio operators or the inadvertent interceptor who overhears evidence of criminal activity or matters of public concern. At the very least, the bill should allow for a good faith defense for inadvertent interceptors. Moreover, immunity should be granted to such individuals if they turn over information to law enforcement officials. The bills should further provide that law enforcement officials must obtain a search warrant before any further interception may take place. Thus, the police could not ask the individuals who

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188 E-Bru, Inc. v. Graves, 566 F. Supp. 1476, 1478 (D.N.J. 1983). The disfavor of prior restraints goes back to Near v. Minnesota, 283 U.S. 697 (1931). Actually, to draw a distinction between the different types of persons who would use the information would begin to pose problems of definitions of who belongs to which class. Lewis, *supra* note 187.

189 HOUSE REPORT at 21.

190 HOUSE REPORT at 21.

intercepted the information to tape the conversation. Moreover, the police would not be able to record further conversation, without a search warrant. This situation is analogous to an informant who overhears certain information. The police are still required to obtain a search warrant based upon the information supplied by the informant. This could protect the privacy interest as well as society's interest.

Additionally, attention must be paid to all individuals who subsequently obtain the information. Once a public official or reporter acquires the information they have certain obligations to act. If they do so, they risk criminal prosecution or civil liability.

Clearly, the public is forewarned of the risks in using cellular and cordless phones. The burdens placed on the public to use some degree of caution cannot outweigh the first amendment obligations of public officials and journalists.

States contemplating amendments to their own wiretap statutes should at least differentiate between cordless and cellular phones. New Jersey's proposed law lacks even the most minimal of safeguards engrained in the Federal Act.

One possibility would be to exempt inadvertent interceptors from prosecution or liability under the statute and those who receive the information in good faith. Such an exemption is found in the Alaska statute,[191] and was relied upon by the Alaskan Supreme Court in *Roberts v. State*.[192] Interpreting section 605, the *Roberts* Court stated:

> [w]e are persuaded that the Congress of the United States never intended to prohibit disclosures to law enforcement authorities in the case where a private citizen, such as Mrs. Marine, on her own initiative without any suggestions of police direction, coercion, or assistance, inadvertently overheard a conversation over what was believed by her to be a private line.[193]

Furthermore, the New Jersey Legislature has not addressed the issue presented to the Court in *Plainsboro*. Any reform the legislature should take, should be modelled on the federal statute.

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191 ALASKA STAT. § 11.60.280 (1983).

192 453 P.2d 898, 901 (Alaska 1969).

193 *Id.* at 904-905.