WIRETAPPING—THE RIGHT TO PRIVACY—MINIMIZATION OF NONPERTINENT COMMUNICATIONS REQUIRED BY NEW JERSEY STATUTE —*State v. Molinaro*, 117 N.J. Super. 276, 284 A.2d 385 (Essex County Ct. 1971).

The New Jersey State Police "monitors," in order that they be proficient in their work, are "specially trained."[1] They first undergo the standard training program to which all state police officers are exposed. Then they are versed in the nuances of investigating organized crime and gambling operations.[2] Lastly, they are trained, by statutory mandate,[3] in what has been called the "dirty business"[4] of wiretapping.

The consequence of all this training is that these monitors, hour upon hour, day upon day, and often week upon week, listen to tapped telephones. And so, while crimes of violence soar to new heights, much time is spent intercepting calls which deal with weather bureau reports,[5] shopping lists,[6] or even perhaps the intercepted person's sex life.[7]

State v. Molinaro[8] deals with "monitors," with harmless private communications, and with the interpretation of the New Jersey Wiretapping and Electronic Surveillance Control Act (hereinafter referred to as the Wiretap Control Act).[9] In *Molinaro* a familiar situation is presented. An application for authorization to intercept telephonic communications was submitted by the Attorney General. It was based upon an affidavit made by a state police detective which recited that, upon receipt of information from an unnamed "reliable informant," illegal gambling operations were being conducted over specified tele-

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1 State v. Molinaro, 117 N.J. Super. 276, 290, 284 A.2d 385, 392 (Essex County Ct. 1971).

2 *Id.*

3 N.J. STAT. ANN. § 2A:156A-10(e) (1971).

4 Olmstead v. United States, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting).

5 United States v. Scott, 331 F. Supp. 233, 247 (D.D.C. 1971).

6 *Cf.* Burpo, *Electronic Surveillance by Leave of the Magistrate: The Case for the Prosecution*, 38 TENN. L. REV. 14, 30 (1970).

7 Spritzer, *Electronic Surveillance by Leave of the Magistrate: The Case in Opposition*, 118 U. PA. L. REV. 169, 190 (1969). One California assemblyman, in promulgating a wiretap statute for his state, easily dismissed such monitoring by stating:

> To be sure, the curious officer might well listen to a "juicy" conversation. The same officer would probably read a love letter when searching for an invoice.

Biddle, *Court-supervised Electronic Searches: A Proposed Statute for California*, 1 PACIFIC L.J. 97, 115 (1970).

8 117 N.J. Super. 276, 284 A.2d 385 (Essex County Ct. 1971).

9 N.J. STAT. ANN. §§ 2A:156A-1 *et seq.* (1971).

phone facilities "by an unknown male and other unidentified persons." While these perpetrators were not known to the informant, they were said to be associated with "other unknown persons or conspirators" as part of a larger gambling group.[10] Thereafter, an order authorizing the tapping ensued.

The electronic surveillance continued for at least fifteen days.[11] During this time, the "monitors" listened to and taped "*any* incoming or outgoing call."[12] This practice of indiscriminately taping every conversation that came over the tapped wire was the basis of Molinaro's motion to suppress, which, because of "a single overriding issue," was consolidated with the motions made by Richard Ptakowski, Anthony De Pasque and others.[13]

The court stated that the pivotal issue involved section 12(f) of the Wiretap Control Act. This section states in pertinent part:

> Every order entered under this section shall require that such interception . . . be conducted in such a manner as to *minimize* or *eliminate* the interception of such communications not otherwise subject to interception under this act.[14]

Because 45 percent of the total calls monitored in *Molinaro,* 16 of the 594 conversations in *Ptakowski,* and 58 of the approximately 1,296 conversations in *De Pasque* were classified by the State Police, themselves, as nonpertinent, defendants sought to suppress the evidence ultimately obtained due to the State's failure to eliminate or minimize the intercepted communications as required by statute.[15]

Judge Handler was therefore confronted with determining "the official rules by which the games of police wiretapping and bugging are to be conducted."[16] It seems only fitting that such a determination should have been brought in a New Jersey forum since this State has been a fertile field for wiretapping. In 1969, for example, nearly one-third of all wiretaps for gambling which were authorized under the federal wiretap statute took place in New Jersey.[17] That state authori-

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10 117 N.J. Super. at 279-80, 284 A.2d at 387. The informer did place several bets in the presence of the affiant with said unknown individuals.

11 *Id.* Initially the interceptions were authorized for not more than 15 days. However, in two of the cases, upon further applications, the periods were extended. The court does not state which two cases involved extensions. *Id.*

12 *Id.* at 281, 284 A.2d at 388 (emphasis added).

13 *Id.* at 279-81, 284 A.2d at 387.

14 N.J. STAT. ANN. § 2A:156A-12(f) (1971) (emphasis added).

15 117 N.J. Super. at 284, 284 A.2d at 389. The state conceded that only 31 percent of the total communications were nonpertinent.

16 Spritzer, *supra* note 7, at 176.

17 Burpo, *supra* note 6, at 25. It should be noted that of the total 302 authorized

ties should be eager to utilize their new state statute is only a natural consequence. Resultantly, Judge Handler found that:

> Upon these motions . . . the contention is sufficiently founded that the methodic practice of the New Jersey State Police to record every conversation uttered in the course of an interception without regard to its investigative quality will usually result in the interception of some conversations which are not evidentiary or meaningful to the criminal investigation.[18]

Because the "impermissible invasion of privacy was *extensive*" in *Molinaro*, but not in *Ptakowski* and *De Pasque*, Judge Handler suppressed the evidence only in the *Molinaro* case.[19] Nonetheless, *Molinaro* has tightened the rules for wiretapping in New Jersey.

The threat that wiretapping poses to a person's right of privacy was elucidated by the Supreme Court in *Berger v. New York*,[20] where it held a New York eavesdropping statute unconstitutional because it failed to demand particularity before authorization for the electronic surveillance was granted. One of the several facts which the Court found offensive to the fourth amendment was the indiscriminate seizure of the "conversations of any and all persons coming into the area covered by the device . . . without regard to their connection with the crime under investigation."[21] Approximately six months after the decision in *Berger*, the Court decided *Katz v. United States*,[22] in which it rejected the traditional theory that only physical trespasses came within the ambit of the fourth amendment. In proclaiming the individual's right to be free from unwarranted electronic intrusion, the Court in *Katz* observed that "the Fourth Amendment protects people, not places."[23] Also noted was the fact that "[o]n the single occasion when the statements of another person were inadvertently intercepted, the agents refrained from listening to them."[24] Yet the vitiating factor was that this exemplary restraint was self-imposed; there was no requisite interposition of a neutral judicial officer whose impartial judgment would determine the scope and duration of the surveillance. Thus, in *Katz*, the Court expressed its mistrust of unregulated eavesdropping.

In response to *Katz* and *Berger*, the United States Congress passed

interceptions, 102 of these were for gambling. Of these 102, 23 were to federal authorities, while 32 were issued to New Jersey law enforcement officials. *Id.*

18 117 N.J. Super. at 285, 284 A.2d at 390.

19 *Id.* at 293-94, 284 A.2d at 394 (emphasis added).

20 388 U.S. 41 (1967).

21 *Id.* at 59.

22 389 U.S. 347 (1967).

23 *Id.* at 351.

24 *Id.* at 354 n.15.

an electronic surveillance law in 1968 which codified standards for authorizing a wiretap. Title III of the Omnibus Crime Control and Safe Streets Act of 1968 made wiretapping and eavesdropping available to federal law enforcement authorities, and to state and local police where implementing state legislation existed.[25]

The New Jersey Legislature, when it enacted the Wiretap Control Act in 1968, "attempted to be scrupulous about the protections which it fashioned for individual privacy."[26] The Legislature shared the concern for the preservation of individual privacy from unwarranted electronic intrusion that was exhibited by the Supreme Court in *Katz* and *Berger*. And so, "[i]t adopted a broad definition of what constituted a private communication entitled to legislative and judicial care."[27] The New Jersey Act was based upon a proposed model statute,[28] as well as being purposefully designed to meet the minimum requirements of title III.[29] Because the statute not only incorporates the language of title III which demands that interception be minimized,[30] but also includes the word "eliminate," as in the model statute,[31] it is "more stringent than its forbears."[32] Among those states which have authorized electronic surveillance, New Jersey imposes the most rigid strictures in that "interception of nonsubject communications [must] be *either* eliminated *or* alternatively minimized in the conduct of a wiretap."[33]

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25 18 U.S.C. § 2516 (1970).

26 117 N.J. Super. at 287, 284 A.2d at 391. In State v. Kuznitz, 105 N.J. Super. 33, 37, 250 A.2d 802, 804 (Union County Ct. 1969), the court stated that the Act dealt with "regulating the use of electronic, mechanical or other devices for eavesdropping."

27 117 N.J. Super. at 287, 284 A.2d at 391 (citation omitted).

28 Blakey & Hancock, *A Proposed Electronic Surveillance Control Act*, 43 NOTRE DAME LAW. 657 (1968).

29 State v. Sidoti, 116 N.J. Super. 70, 76-77, 280 A.2d 864, 868 (Essex County Ct. 1971); State v. Christy, 112 N.J. Super. 48, 53, 270 A.2d 306, 308 (Essex County Ct. 1970).

30 18 U.S.C. § 2518(5) (1970) provides in pertinent part:

> Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

31 Blakey & Hancock, *supra* note 28, at 674.

32 117 N.J. Super. at 286, 284 A.2d at 390.

33 *Id.* at 286, 284 A.2d at 390 (emphasis added). Six jurisdictions require that nonsubject interceptions be minimized: COLO. REV. STAT. ANN. § 40-4-30(6) (Cum. Supp. 1969); Pub. A. No. 68 (April 29, 1971) [1971] CONN. LAWS, Jan. Sess. 82, 85; FLA. STAT. ANN. § 934.09(5) (Supp. 1971-72); MINN. STAT. ANN. § 626A.06(4)(h) (Supp. 1971); N.H. REV. STAT. ANN. § 570-A:9 (V) (Supp. 1971); N.Y. CODE CRIM. PRO. § 700.30(7) (1971). In three states where electronic surveillance is permitted, statutes do not require that nonsubject conversations be minimized. ARIZ. REV. STAT. ANN. §§ 13-1051 to -1059 (Supp. 1971-72); GA. CODE ANN. § 26-3004 (1971 Rev.); MASS. ANN. LAWS ch. 272, § 99 (Supp. 1971).

In State v. Blackburn, 35 Fla. Supp. 202 (Cir. Ct., Seminole County 1971) officers indis-

The New Jersey Legislature has therefore made plain its intention that only certain types of conversations may be intercepted and recorded by the police. The Act specifies that in an application for an order to intercept, the statement of facts must set forth "[t]he particular type of communication *to be intercepted.*"[34] This same phrase is also contained in the provision of the statute which contains the requisites to be included in an order authorizing a wiretap.[35] It should be noted that the statute does not use "to be monitored," "to be screened," or any other phrase connoting action subsequent to the interception. It specifically uses the term "to be intercepted," which would commonly be understood to mean that a law enforcement officer may not intercept communications of the type not authorized. However, the Legislature failed to define the most crucial words of the statute, minimize and eliminate.[36] Consequently, the threshold question in *Molinaro* is: What do minimize and eliminate mean?

In answering this interrogatory, Judge Handler found it necessary to expound upon the construction normally given these words. He wrote that "eliminate" means to "remove, expel, exclude, leave out of consideration, or to ignore," while "minimize" means "to make as slight as possible or to reduce to the smallest possible amount or degree."[37] To the State Police it seems that these terms meant confining the electronic surveillance to "the time of day when the incidence of incriminatory or evidentiary conversations will be highest."[38] The court, however, found otherwise.

> So understood, it would appear to be the intent of the Legislature . . . that the wiretapping of telephone calls in the context of a gambling investigation should be undertaken so that "communications not otherwise subject to interception," *i.e.*, communications which do not directly or indirectly pertain to gambling activities or to persons engaged in gambling or which would not be helpful in securing the arrests of such persons, either be excluded entirely from the interception or in the alternative, be included only to the slightest degree or smallest extent possible.[39]

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criminately intercepted 100 percent of defendants' communications for the period of the order. The court suppressed the evidence against defendants because, among other things, the police had exceeded the statutory limitation "to minimize."

34 N.J. STAT. ANN. § 2A:156A-9(c)(3) (1971) (emphasis added).

35 *Id.* § 2A:156A-12(d) (1971).

36 *Id.* § 2A:156A-2 (1971).

37 117 N.J. Super. at 283, 284 A.2d at 389.

38 *Id.* at 282, 284 A.2d at 388.

39 *Id.* at 283-84, 284 A.2d at 389.

The philosophy, wording, and mandate of the statute were found to be clear by the *Molinaro* court. It is enlightening to examine the arguments set forth by the State to show that it had complied with section 12(f). Initially, despite the fact that, as the court found, there were "calls which *clearly* did not in any way pertain to criminal activities,"[40] the monitor was "instructed explicitly that once monitoring [had] commenced every conversation [was] to be overheard and recorded in its entirety."[41] These included

> many lengthy conversations *between children* in which they exhibited typical youthful interest in shopping, clothes, fashions, hair styles, gifts, parties, social events, family outings, games, sports, friends, classmates, teachers, homework, school situations, religious school and music lessons. In other instances adult females discussed prosaic subjects such as draperies, getting their hair done, buying clothes, their children's problems at school, food and cooking, bingo, relatives, racial attitudes and church membership.[42]

The practice of listening to and recording the above conversations was not abated despite the fact that the detective, his superior officer, and a Deputy Attorney General would consult "daily during the course of a wiretap with a view toward evaluating the quality of the information obtained through the wiretap."[43] It is specious to contend that these three individuals, based on their cumulative education and experience, especially in the *Molinaro* case, could not reach the conclusion that the above conversations were obviously not within the penumbra of conversations authorized to be intercepted. The statute allows interception *only* if the communications would provide evidence of the commission, or of a conspiracy to commit, certain crimes, or if such conversations may provide evidence aiding in the apprehension of the perpetrators.[44] Obviously the statute does not contemplate that the above cited conversations were to be included as objects of the surveillance.

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40 *Id.* at 284-85, 284 A.2d at 389 (emphasis added).

41 *Id.* at 281, 284 A.2d at 388.

42 *Id.* at 285, 284 A.2d at 389-90 (emphasis added).

43 *Id.* at 282, 284 A.2d at 388.

44 N.J. STAT. ANN. § 2A:156A-8 (1971) provides that the attorney general, and county prosecutor or the chairman of the State Commission of Investigation may seek an interception order

> when such interception may provide evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, loan sharking, dealing in narcotic drugs, marijuana or other dangerous drugs, arson, burglary, embezzlement, forgery, receiving stolen property, escape, alteration of motor vehicle identification numbers or larceny punishable by imprisonment for more than one year, or any conspiracy to commit any of the foregoing offenses or which may provide evidence aiding in the apprehension of the perpetrator of any of the foregoing offenses.

The State's counterargument was that the major reason for its policy of recording all conversations "was a desire not to leave the monitoring officer with the ultimate decision as to what would be recorded."[45] As one New Jersey Superior Court Judge recently stated in *State v. Borino*[46] with regard to this reasoning, "it is unrealistic to expect the officer monitoring the calls to make snap decisions as to the pertinency of each call."[47] Judge Handler, however, made short work of this argument. He stated that "[i]t goes too far to argue that police officers are incapable of shouldering a discretion which entails the recognition of the criminal investigative value of a telephone call."[48] Also, he stated that "the exercise of discretion in executing a wiretap is inescapable,"[49] such as under the procedure presently followed where an overheard conversation is logged as either pertinent or nonpertinent by the monitor.[50] Even the detective supervising the investigation of the wiretap knew "that there was no difficulty in discerning when . . . [lengthy personal non-evidentiary] calls were in progress or in recognizing these conversations as being remote to the criminal activities under investigation."[51]

Further, the court noted the wide spectrum of discretionary duties a police officer must exercise in the routine performance of his job. With regard to these, the court stated that "[e]xamples are myriad."[52] They include "deciding when and how to investigate a crime or when to arrest a suspect,"[53] when the use of force should be implemented in effectuating an arrest,[54] and when, in the absence of a judicial warrant, the search and seizure of evidence of a crime is justified.[55]

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45 117 N.J. Super. at 289, 284 A.2d at 392. In Schwartz, *The Legitimation of Electronic Eavesdropping: The Politics of "Law and Order,"* 67 MICH. L. REV. 455, 466 (1969), the author seems to assert that irrespective of instructions, officers would exercise "the ultimate decision" anyway. He stated that "it is really asking too much of human nature to expect that police officers who are trying to put a suspect behind bars will refrain from listening in on his efforts to frustrate them." *Id.*

46 L- (N.J. Super. Ct., L. Div., Sept. 3, 1971).

47 *Id.* at 15.

48 117 N.J. Super. at 290, 284 A.2d at 392.

49 *Id.*, 284 A.2d at 393.

50 *Id.* at 281-82, 284 A.2d at 388.

51 *Id.* at 289-90, 284 A.2d at 392.

52 *Id.* at 292, 284 A.2d at 393.

53 *Id. See, e.g.*, State v. Braxton, 111 N.J. Super. 191, 268 A.2d 40 (App. Div.), *rev'd*, 57 N.J. 286, 271 A.2d 713 (1970); State v. Bell, 89 N.J. Super. 437, 215 A.2d 369 (App. Div. 1965); State v. Hope, 85 N.J. Super. 551, 205 A.2d 457 (App. Div. 1964).

54 State v. Mulvihill, 57 N.J. 151, 270 A.2d 277 (1970); State v. Washington, 57 N.J. 160, 270 A.2d 282 (1970); State v. Fair, 45 N.J. 77, 211 A.2d 359 (1965); State v. Owens, 102 N.J. Super. 187, 245 A.2d 736 (App. Div. 1968), *modified*, 54 N.J. 153, 254 A.2d 97 (1969), *cert. denied*, 396 U.S. 1021 (1970).

55 State v. Cox, 114 N.J. Super. 556, 277 A.2d 551 (App. Div.), *cert. denied*, 58 N.J. 93, 275 A.2d 149 (1971); State v. Boone, 114 N.J. Super. 521, 277 A.2d 414 (App. Div. 1971);

Also, and certainly embarrassing for the State, was the court's recognition of the Essex County Prosecutor's policy with regard to electronic surveillance under the New Jersey statute. That office places upon its monitors the obligation to determine whether the overheard conversation is "incriminatory in nature or needful in terms of the investigation," and if *he* reaches a negative conclusion "he is instructed to turn off the recording part of the machine and not listen to the conversation."[56]

In short, the court thought that it should not be a "remarkable attribute" to be able to discern telephone conversations which are personal, not incriminatory, and not helpful in the apprehension of criminal suspects.[57] Consequently, Judge Handler ruled that it was "patent" that the State Police monitors had violated the statute's command in that they did not "desist from further eavesdropping."[58]

Judge Handler's decision in *Molinaro* is not without precedent. In *United States v. Scott*[59] the Federal District Court for the District of Columbia was faced with a similar factual situation. In that case the Government, in a narcotics investigation, electronically intercepted certain telephone conversations. Agents of the Federal Bureau of Narcotics and Dangerous Drugs had monitored 100 percent of all calls, 24 hours a day, for the 30-day duration of the order. Approximately 60 percent of these calls were totally unrelated to narcotics. In fact, the court said that "the record clearly depicts certain communications that could not possibly involve drugs."[60] The court found that this surveillance did not even offer "lip service compliance"[61] with the order to minimize under the federal statute. In ruling that the monitors should have cut off certain interceptions, the court stated that "[t]he record is devoid of any attempt, no matter how slight, to minimize the *interception* of unauthorized calls."[62]

Molinaro and *Scott* represent one side in the imbroglio over the question of whether or not *all* telephone conversations should be monitored in an electronic surveillance. Advocates of the unfettered use of electronic surveillance usually support the position which Frank S. Hogan, District Attorney for New York, has taken, namely, that elec-

State v. Dennis, 113 N.J. Super. 292, 273 A.2d 612 (App. Div.), *cert. denied*, 58 N.J. 337, 277 A.2d 394 (1971).

56 117 N.J. Super. at 290, 284 A.2d at 392.

57 *Id.* at 292, 284 A.2d at 394.

58 *Id.* at 292-93, 284 A.2d at 394.

59 331 F. Supp. 233 (D.D.C. 1971).

60 *Id.* at 247.

61 *Id.*

62 *Id.* (emphasis added).

tronic surveillance is *the* most valuable weapon in the fight against organized crime.[63] Also, proponents of this position point to the value of such a procedure, "not only as a prosecutive tool, but as a strategic means of monitoring the activities of criminal undesirables, especially those engaged in organized crime."[64] As a result, supporters of "strategic intelligence" state that it is necessary to tape all conversations of those suspected of involvement in organized crime, so as to identify *non-criminal* as well as criminal associates, and their *legal* and illegal operations.[65] Another argument for interception of all conversations was advanced in *State v. Borino:*

> There was some comment made that if one of the members of the family of one of the members of this ring was in the course of making a date with a girl, or someone else, that this was not the type of conversation that would be monitored. *On the other hand, it might be possible that the date that was being made was in furtherance of the conspiracy. And it is not for the monitor to make a determination that it was not.*[66]

Judge Handler, however, sided with the opposition. He followed the *Berger* Court's mandate not to give an "officer a roving commission to 'seize' any and all conversations."[67] In so doing, he protected innocent members of society from unreasonable interference with their "reasonable expectation of privacy,"[68] as protected by the fourth amendment.

The fourth amendment protects an individual's right to privacy from unreasonable searches and seizures.[69] As stated above, a telephone conversation is vulnerable to seizure. However, as was stated in *Katz*, eavesdropping will be lawful only where it serves the "legitimate *needs* of law enforcement."[70] Thus, "a person's reasonable expectation of privacy may be surmounted where the interests of law enforcement *can*

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63 Schwartz, *supra* note 45, at 477 n.102.

64 Burpo, *supra* note 6, at 23-24.

65 Schwartz, *supra* note 45, at 470.

66 State v. Borino, L- (N.J. Super. Ct., L. Div., Sept. 3, 1971), at 16-17 (emphasis added).

67 388 U.S. at 59.

68 Burpo, *supra* note 6, at 21. *See* Katz v. United States, 389 U.S. 347, 361 (Harlan, J., concurring).

69 U.S. CONST. amend. IV provides:

> 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.

70 Lopez v. United States, 373 U.S. 427, 464 (1963) (Brennan, J., dissenting) (emphasis added).

be justified."[71] Therefore, an individual's zone of privacy,[72] while not immune from governmental intrusion, will be safe where the invasion is unreasonable. The *Molinaro* court recognized the admittedly "legitimate government interest in criminal conversations,"[73] but in so doing, it also found that in order to invade the "sanctity of a man's home and the privacies of life,"[74] the conversations must be criminal and must not involve a beauty parlor appointment!

Even a supporter of the state's argument has had to admit that serious fourth amendment questions arise where the police possess unbridled license in electronic surveillance.[75] In *United States v. Escandar*[76] it was stated that

> reasonableness, which is paramount in the consideration of any Fourth Amendment search, is based on the degree to which the interception is properly limited *in scope* and duration to the purpose of establishing the content of the illegal telephonic communications.[77]

Can it be argued that the monitoring of weather forecasts, children's conversations, shopping lists, as well as hundreds of other trivial matters comes within the ambit of reasonableness "in scope" to establish the content of an illegal telephone conversation, and that such intrusion is not protected by the fourth amendment? The Supreme Court of the State of Georgia, in *Cross v. State*[78] answered in the negative:

> [C]onsiderable portions of the tapes . . . recorded conversations which were totally irrelevant to any question relating to gambling. . . . [U]nder the warrant the investigating officers were permitted to conduct a general and wide ranging search through all of the telephone conversations conducted on the telephone

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71 Burpo, *supra* note 6, at 21 (emphasis added).

72 Privacy has been described as "the condition of human life in which acquaintance with a person or with affairs of his life which are personal to him is limited." Gross, *The Concept of Privacy*, 42 N.Y.U.L. REV. 34, 36 (1967) (emphasis omitted). It has also been defined as the "*control* we have over information about ourselves." Fried, *Privacy*, 77 YALE L.J. 475, 482 (1968).

73 Burpo, *supra* note 6, at 28 (emphasis added).

74 Boyd v. United States, 116 U.S. 616, 630 (1886).

75 Burpo, *supra* note 6, at 24.

76 319 F. Supp. 295 (S.D. Fla. 1970).

77 *Id.* at 301 (emphasis added). In *Berger*, Justice Stewart, in his concurring opinion, stated that "[t]he standard of reasonableness embodied in the Fourth Amendment demands that the showing of justification match the degree of intrusion." 388 U.S. at 69. Such a showing would seem to be no mean task in light of the fact that "[a] tapped wire is the greatest invasion of privacy possible." Application For an Order Permitting the Interception of Telephone Communications of Anonymous, 207 Misc. 69, 73, 136 N.Y.S.2d 612, 616 (Sup. Ct. 1955).

78 225 Ga. 760, 171 S.E.2d 507 (1969).

> lines in question during a period covering approximately 20 days and to seize and record matters in no way related to the crime which they were investigating. *Such a search* constituted a violation of the defendants' right to privacy guaranteed to them under the terms of the Fourth Amendment of the United States Constitution . . . .[79]

It is suggested that such a conclusion could only result when the criterion for monitoring specific conversations is whether they "are criminal and would undoubtedly have a deleterious effect on other innocent members of the society."[80]

Molinaro, then, is an important decision. It explains the statutory standards under which law enforcement agencies may utilize electronic eavesdropping. A criticism, however, must be made. Judge Handler, in suppressing the evidence in *Molinaro*, but not in *Ptakowski* and *De Pasque*, because the former was in a "different posture" than the latter two, failed to give full effect to the philosophy of *Berger*, *Katz*, title III, and the New Jersey Act. Unlike *Ptakowski* and *De Pasque*, the Judge found that "[t]he evil to be forestalled by section 12(f) was not *fortuitously* avoided."[81] He also stated that "[*b*]*y sheer coincidence*"[82] a recording of every conversation, regardless of content, by the State Police in *Ptakowski* and *De Pasque* "did not in fact result in the acquisition of any *substantial number* of nonsubject communications."[83] Consequently, they were not "extensive" and the evidence was not suppressed. And so, while Judge Handler followed in spirit the language of the *Scott* court, he failed to fully implement it.

> If this Court were to allow the Government agents to indiscriminately intercept every conversation made and to continue monitoring such calls when it becomes clear that they are not related to the "authorized objectives" of the wiretap and in violation of the limiting provisions of the order such order would become meaningless verbiage and the protections to the right of privacy outlined in *Berger* and *Katz* would be illusory.[84]

It is submitted that since the Legislature has incorporated the exclusionary rule into the statute,[85] the decision to suppress the evidence

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79 *Id.* at 767, 171 S.E.2d at 511 (emphasis added).

80 Burpo, *supra* note 6, at 28.

81 117 N.J. Super. at 293, 284 A.2d at 394 (emphasis added).

82 *Id.* (emphasis added).

83 *Id.* (emphasis added).

84 331 F. Supp. at 248 (quoted in State v. Molinaro, 117 N.J. Super. at 295, 284 A.2d at 395).

85 N.J. STAT. ANN. § 2A:156A-21 (1971). The court noted that while suppression of evidence is a court-authored remedy, the legislature specifically included it in the state statutes with regard to wiretapping. 117 N.J. Super. at 294, 284 A.2d at 394.

should not hinge upon the number of nonpertinent calls which may or may not, in the court's discretion, be considered "extensive." The suppression of evidence in a criminal matter should not depend upon whether the evil to be forestalled is avoided "fortuitously" or by "sheer coincidence." Were it otherwise, the extensiveness of each case would depend upon the whim and caprice of the court hearing the suppression motion. For instance, one judge might accept the prosecution's assertion that only 31 percent of the communications in *Molinaro* were impermissible and yet sustain the motion. Another jurist might accept the 45 percent figure of the defendants, and yet deny the motion as not being extensive enough. Admittedly, the *De Pasque* and *Ptakowski* cases are less capable of a definitive determination. The reasonableness of a search under this amendment, or its permissible extent under the statute, should not depend upon an evaluation as to the percentage of pertinent material actually confiscated during its execution. As Justice Holmes said in *Olmstead*: "I think it a less evil that some criminals should escape than that the government should play an ignoble part."[86]

Nonetheless, Judge Handler penned a significant decision by stating that:

> [T]elephone conversations *shall not be overheard or recorded* if and when it becomes clear in the mind of the executing officer exercising reasonable judgment under all the circumstances that such conversations do not in any way pertain to the objects of the criminal investigation.[87]

Assuredly, he limited the possibility of a situation arising such as that faced by the Supreme Court of California in *People v. Tarantino*,[88] wherein for a period of over 14 months, "the police listened to every sound that was made in defendant's room."[89] And thus he forestalled another step toward a society in which, as Justice Brennan has warned, the only way to secure one's privacy would be "to keep one's mouth shut on all occasions."[90] To some, consideration of George Orwell's 1984 is a little farfetched. However, the thoughts of one legal writer on this subject are germane.

> [N]o judge has ever considered it within his province to issue the constable a warrant to lurk under a householder's eaves or to hide in his attic or broom closet to listen for incriminatory conversation. *What has technology wrought?*[91]

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86 277 U.S. at 470.

87 117 N.J. Super. at 292-93, 284 A.2d at 394 (emphasis added).

88 45 Cal. 2d 590, 290 P.2d 505 (1955).

89 *Id.* at 593, 290 P.2d at 508.

90 Lopez v. United States, 373 U.S. 427, 450 (1963) (Brennan, J., dissenting).

91 Spritzer, *supra* note 7, at 180 (emphasis added).

In a time when scientific advances make it possible to "bug" almost anyone, anywhere, and at any time,[92] legislation such as the New Jersey Act, and a decision such as *Molinaro*, are certainly timely.[93]

It can only be hoped that the result of this decision will be that in reviewing applications for electronic surveillance, and in issuing orders permitting it, courts will be admonished to instruct the monitoring officers to desist from intercepting, overhearing, and recording any conversation when it becomes clear to the monitor that the conversation is not subject to interception under the statute as outlined in *Molinaro*. This, as Judge Handler found, is what the statute means.[94] A court order should not constitute a mere "loose hobble"[95] upon the monitors.

Although the New Jersey Legislature "evinced a sensitivity to the unique threat to individual privacy posed by electronic invasions,"[96] the Act was not intended to hamper or deter law enforcement officers in protecting the interests of society. It was intended, however, to restrain law enforcement officers from indiscriminate electronic surveillance. While these men are the trustees of the people in a burgeoning fight against crime, overzealousness on their part without regard to the inherent dangers of electronic surveillance may result in a greater evil than that which is sought to be curtailed. Legal intricacies and the philosophical labyrinth with which courts are prepared and designed to deal are often beyond the ken of laymen. It is, therefore, incumbent

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92 *Cf.* Karabian, *The Case Against Wiretapping*, 1 PAC. L.J. 133, 137 (1970).

93 Of course, an even stronger statement by the legislature might have been desirable. In the REPORT OF JOINT LEGISLATIVE COMMITTEE TO STUDY CRIME AND THE SYSTEM OF CRIMINAL JUSTICE IN NEW JERSEY (April 22, 1968), it was stated:

> Let no one misunderstand our recommendation to this effect. We do not believe electronic eavesdropping should be used widely or on a miscellaneous basis or as a lazy substitute for other types of intelligent and vigorous investigation. To the contrary, we recommend that electronic eavesdropping be permitted *only* where there is no other probable way to obtain evidence of these serious crimes; it would be confined to restrictive situations, under *tight court control*, pursuant to standards which have received implicit approval from the courts in the past year, including the United States Supreme Court.

Id. at 12 (emphasis added). Perhaps, however, the language the California Legislature adopted is ideal:

> The Legislature hereby declares that advances in science and technology have led to the development of new devices and techniques for the purpose of eavesdropping upon private communications and that the invasion of privacy resulting from the continual and increasing use of such devices and techniques has created a serious threat to the free exercise of personal liberties and cannot be tolerated in a free and civilized society.
>
> The Legislature by this chapter intends to protect the right of privacy of the people of this state.

CAL. PENAL CODE § 630 (West 1970).

94 117 N.J. Super. at 293, 284 A.2d at 394.

95 State v. Sidoti, 116 N.J. Super. 70, 85, 280 A.2d 864, 872 (Essex County Ct. 1971).

96 *Id.* at 80, 280 A.2d at 869.

upon the courts, as Judge Handler has done, to safeguard the individual citizen's freedom from unreasonable intrusion even when it is motivated by the highest of intentions. In this regard, the words of Justice Brandeis are particularly apropos.

> The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.[97]

Howard E. Drucks

[97] Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting) (footnote omitted).