

## THE MINIMIZATION REQUIREMENT AFTER *UNITED STATES v. SCOTT*: MYTH OR REALITY?

In 1970 a federal district court judge authorized federal narcotics agents to wiretape a telephone registered to one of nine individuals believed to be participants in a conspiracy to import and distribute narcotics in the Washington, D.C., area. Seven years later the admissibility of evidence obtained by that wiretape remained in doubt as the Supreme Court granted certiorari in *United States v. Scott*<sup>1</sup> on an issue portending grave implications for what Mr. Justice Brandeis called "the right most valued by civilized men"<sup>2</sup>—the right to privacy.

The source of the legal battle was a frequently litigated, but seldom understood, provision of Title III of the Omnibus Crime Control and Safe Streets Act of 1968<sup>3</sup> that requires government agents monitoring wiretaps to minimize the interception of conversations that fall outside the scope of the wiretap order.<sup>4</sup> Although the monitoring agents in

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1. 434 U.S. 888 (1977). The full case history follows: 331 F. Supp. 233 (D.D.C. 1971), *rev'd*, 504 F.2d 194 (D.C. Cir.), *on remand*, No. 1088-70 (D.D.C. Nov. 12, 1974) (unpublished opinion), *rev'd*, 516 F.2d 751 (D.C. Cir.), *rehearing en banc denied*, 522 F.2d 1333 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 917 (1976), *conviction aff'd*, 551 F.2d 467 (D.C. Cir. (mem.)), *cert. granted*, 434 U.S. 888 (1977), *aff'd*, 436 U.S. 128 (1978).

2. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

3. 18 U.S.C. §§ 2510-2520 (1970). These provisions of the Act, which pertain to the use of electronic surveillance, are commonly referred to as "Title III."

4. 18 U.S.C. § 2518(5) (1970) provides in part:

Every order and extension thereof shall contain a provision that the authorization to intercept . . . shall be conducted in such a way as to minimize the interception of communications not subject to interception under this chapter . . . .

Literally, § 2518(5) does not impose a duty to minimize on the agents who monitor the wiretap; rather, the section requires that every wiretap order include a minimization provision. Any "aggrieved person," however, may move to suppress the contents of any intercepted communication on the ground that the interception was not made in conformity with the wiretap order, *see* 18 U.S.C. § 2518(10)(a). Therefore, inclusion of the minimization directive in the authorization order in effect imposes a duty on monitoring agents to minimize their interceptions of innocent conversations.

Courts that first interpreted this provision adopted a number of shorthand expressions for its reference to "communications not otherwise subject to interception under this chapter." A number of courts utilized the label "nonpertinent." *See, e.g., United States v. Sisca*, 361 F. Supp. 735, 755-45 (S.D.N.Y. 1973), *aff'd*, 503 F.2d 1337 (2d Cir.), *cert. denied*, 419 U.S. 1008 (1974); *United States v. Lanza*, 349 F. Supp. 929, 932 (M.D. Fla. 1972); *United States v. King*, 335 F. Supp. 523, 538 (S.D. Cal. 1971), *rev'd on other grounds*, 478 F.2d 494 (9th Cir. 1973), *cert. denied*, 417 U.S. 920 (1974). Other courts stated that interceptions of "innocent" conversations must be minimized. *See, e.g., United States v. Askins*, 351 F. Supp. 408, 415 (D. Md. 1972); *United States v. LaGorga*, 336 F. Supp. 190, 197 (W.D. Pa. 1971). Whatever the label, "minimization" is the

*Scott* knew of the minimization requirement, they made no attempt to limit their interceptions to those calls related to the narcotics conspiracy under investigation.<sup>5</sup> In fact, the agents listened to and tape recorded in entirety each of the 384 calls completed over the wiretapped telephone during the thirty-day surveillance period, even though they characterized only forty percent of the intercepted calls as narcotics-related.<sup>6</sup>

The Supreme Court held, however, that the agents' conduct violated neither the minimization requirement of Title III nor the fourth amendment's proscription of unreasonable searches and seizures.<sup>7</sup> In its first interpretation of the minimization provision,<sup>8</sup> the Court reasoned that the proper standard for assessing compliance with the minimization requirement is an objective evaluation of the agents' conduct in light of the facts and circumstances at the time of the wiretape with-

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process by which law enforcement officials attempt to confine the interception and monitoring of calls to those described in the authorization order.

5. 331 F. Supp. 233, 247 (D.D.C. 1971).

6. *Id.*

7. 436 U.S. 128, 137-39 (1978).

The Supreme Court ordinarily tests the constitutionality of electronic surveillance practices against the requirements of the fourth amendment:

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

U.S. CONST. amend. IV. Although the protections of the fourth amendment extend to people rather than places, its coverage generally requires reference to a place. A person is protected wherever he has a reasonable expectation of privacy; thus, electronic as well as physical intrusion by the government into a person's privacy may violate the fourth amendment. *Katz v. United States*, 389 U.S. 347, 360-61 (1967) (Harlan, J., concurring). See *Berger v. New York*, 388 U.S. 41 (1967). The seizure of physical property is not required to invoke the protections of the fourth amendment. *Silverman v. United States*, 365 U.S. 505 (1961). The seizure of conversations, therefore, when it invades a person's reasonable expectations of privacy, comes within the purview of the fourth amendment. *Accord, Berger v. New York*, 388 U.S. 41, 51 (1967); *Wong Sun v. United States*, 371 U.S. 471, 485 (1963). See *Katz v. United States*, 389 U.S. 347, 361-62 (1967) (Harlan, J., concurring).

8. The Supreme Court previously had denied certiorari in several cases that raised minimization issues. See, e.g., *United States v. Manfredi*, 488 F.2d 588 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974); *United States v. Tortorello*, 480 F.2d 764 (2d Cir.), *cert. denied*, 414 U.S. 866 (1973); *State v. Dye*, 60 N.J. 518, 291 A.2d 825, *cert. denied*, 409 U.S. 1090 (1972) (construing the New Jersey electronic surveillance statute's minimization provision, N.J. STAT. ANN. § 2A:156A-12 (1971)). Minimization issues were raised, but not confronted by the Court, in *United States v. Bynum*, 360 F. Supp. 400 (S.D.N.Y.), *aff'd*, 485 F.2d 490 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 903 (1974), and in *United States v. Focarile*, 340 F. Supp. 1033 (D. Md.), *aff'd sub nom. United States v. Giordano*, 469 F.2d 522 (4th Cir. 1972), *aff'd*, 416 U.S. 505 (1974).

out regard to the agents' subjective intent to minimize their interceptions of innocent conversations.<sup>9</sup> Because the agents reasonably could have believed that each intercepted call contained evidence of criminal activity, the interceptions were neither unlawful nor unconstitutional.<sup>10</sup>

To assess the suitability of the objective reasonableness standard adopted by the Court for evaluating compliance with Title III's minimization provision, this Note analyzes the constitutional and statutory origins of the minimization requirement, the evolution of the minimization doctrine prior to *Scott*, the Court's holding and reasoning in *Scott*, and the decision's impact on the minimization doctrine.<sup>11</sup>

## I. THE MINIMIZATION REQUIREMENT: ITS CONSTITUTIONAL AND STATUTORY ORIGINS

Devising a criminal justice system that strikes a fair balance between society's need for effective law enforcement and the individual's right to privacy has long been a source of difficulty for legislatures and courts alike.<sup>12</sup> As crime control techniques have become increasingly sophisticated, this difficulty has become increasingly acute, particularly as technological advances have created a greater potential for the use and misuse of electronic surveillance.<sup>13</sup> Although wiretapping may be

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9. 436 U.S. at 137-39.

10. *Id.* at 141-43.

11. Although the scope of this Note is limited to the standard by which minimization efforts should be evaluated, the minimization requirement also raises a number of other issues. See *United States v. Bynum*, 423 U.S. 952 (1975) (Brennan, J., dissenting from denial of certiorari). Two of the more important issues concern the definition of "interception" and the remedy for violations of the minimization requirement. For a treatment of these issues, see Decker & Handler, *Electronic Surveillance: Standards, Restrictions, and Remedies*, 12 CAL. WEST. L. REV. 60 (1975); Comment, *Post-Authorization Problems in the Use of Wiretaps: Minimization, Amendment, Sealing, and Inventories*, 61 CORNELL L. REV. 92 (1975); Note, *Minimization and the Fourth Amendment*, 19 N.Y.L.F. 861 (1974); Note, *Minimization of Wire Interception: Presearch Guidelines and Postsearch Remedies*, 26 STAN. L. REV. 1411 (1974); Note, *Minimization: In Search of Standards*, 8 SUFFOLK U.L. REV. 60 (1973).

12. See generally THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* (1967) [hereinafter cited as *THE CHALLENGE OF CRIME IN A FREE SOCIETY*].

13. Two centuries ago, eavesdropping was a common-law nuisance, described by Blackstone as "listening under walls or window, or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales." 4 W. BLACKSTONE, *COMMENTARIES* 168 (Lewis ed. 1897). Today, that description hardly seems adequate to reflect the tremendous scientific and technological developments that have made possible the widespread use and abuse of electronic surveillance. For an excellent treatment of the manner in which technology has revolutionized the art of electronic surveillance, see VanDewerker, *State of the Art of Electronic Surveil-*

one of the most effective means of gathering evidence necessary to convict the guilty,<sup>14</sup> it simultaneously creates the danger of subjecting all individuals, guilty or innocent, to undiscernible governmental intrusion into their lives.<sup>15</sup>

*Berger v. New York*<sup>16</sup> and *Katz v. United States*<sup>17</sup> mark the beginnings of the Supreme Court's modern approach to this dilemma.<sup>18</sup> In *Berger* the Court declared unconstitutional New York's wiretapping statute<sup>19</sup> because it failed to conform to the "precise and discriminate" requirements of the fourth amendment.<sup>20</sup> Specifically, the Court noted that the statute failed to require a showing of probable cause that evidence of a crime would be obtained through the wiretap, to insist upon a particular description of the conversations to be seized, to place definite and reasonable time limits on the wiretap's execution, and to de-

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lance, in COMMISSION STUDIES, NATIONAL COMMISSION FOR THE REVIEW OF FEDERAL AND STATE LAWS RELATING TO WIRETAPPING AND ELECTRONIC SURVEILLANCE 141-215 (1976).

Although the term "electronic surveillance" encompasses a broad spectrum of techniques by which close observation of a person or group may be accomplished from a distance through the use of electronic devices, Title III governs only the interception of wire or oral communications without the consent of any one participant. See 18 U.S.C. § 2510 (1970). Accordingly, the term "electronic surveillance" will be used throughout this Note to refer only to wiretapping (the interception of wire communications through the use of a listening device attached to the communication facility) and bugging (the interception of oral communications through the use of a microphone).

14. Frank S. Hogan, District Attorney for New York County for over twenty-seven years, described wiretapping as "the single most valuable weapon in law enforcement's fight against organized crime." *Hearings on S.674 and S.675 Before the Subcomm. on Criminal Laws and Procedure of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 1092 (1967). See THE CHALLENGE OF CRIME IN A FREE SOCIETY, *supra* note 12, at 201.

15. In the view of Mr. Justice Brennan, "[E]lectronic surveillance, in fact, makes the police omniscient, and police omniscience is one of the most effective tools of tyranny." *Lopez v. United States*, 373 U.S. 427, 466 (1963) (Brennan, J., dissenting). See A. MILLER, *THE ASSAULT ON PRIVACY* (1971); Askins, *Surveillance: The Social Science Perspective*, 4 COLUM. HUMAN RIGHTS L. REV. 59 (1972); Courtney, *Electronic Eavesdropping, Wiretapping, and Your Right to Privacy*, 26 FED. COMM. B.J. 1 (1974).

16. 388 U.S. 41 (1967).

17. 389 U.S. 347 (1967).

18. For detailed discussions on the Supreme Court's treatment of electronic surveillance prior to *Berger* and *Katz*, see REPORT OF THE NATIONAL COMMISSION FOR THE REVIEW OF FEDERAL AND STATE LAWS RELATING TO WIRETAPPING AND ELECTRONIC SURVEILLANCE 33-38 (1976); Courtney, *supra* note 15, at 7-26; Scoular, *Wiretapping and Eavesdropping Constitutional Development from Olmstead to Katz*, 12 ST. LOUIS U.L.J. 513, 515-39 (1968); Note, *Federal Decisions on the Constitutionality of Electronic Surveillance Legislation*, 11 AM. CRIM. L. REV. 639, 642-55 (1973).

19. Ex Parte Orders For Eavesdropping, Ch. 676, 1958 N.Y. Laws (declared facially unconstitutional in *Berger v. New York*, 388 U.S. 41 (1967)).

20. 388 U.S. at 58 (citing *Osborn v. United States*, 385 U.S. 323, 329 (1966)).

mand a return on the warrant or provide notice to those persons whose conversations had been seized.<sup>21</sup> An officer executing a wiretap order under the statute thus had “a roving commission to ‘seize’ any and all conversations.”<sup>22</sup> In *Katz* the Court clearly established that electronic eavesdropping is a search and seizure within the meaning of the fourth amendment.<sup>23</sup> Absent any recognized exception to the fourth amendment’s warrant clause,<sup>24</sup> government investigators must obtain judicial authorization prior to any electronic surveillance.<sup>25</sup>

Although *Berger* and *Katz* did not specifically enumerate criteria that, if met, would enable a wiretapping statute to withstand constitutional scrutiny, Congress regarded the decisions as a blueprint for its

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21. 388 U.S. at 58-60.

22. *Id.* at 59.

23. *Katz v. United States*, 389 U.S. 347, 353 (1967). A seminal case in modern fourth amendment doctrine, *Katz* gave judicial substance to the idea that “the Fourth Amendment protects people—and not simply ‘areas’—against unreasonable searches and seizures.” *Id.* See note 7 *supra*. In *Katz*, FBI agents without prior judicial approval attached an electronic listening and recording device to the outside of a public telephone booth from which defendant made calls to convey wagering information. 389 U.S. at 348. The agents’ conduct “violated the privacy upon which [defendant] justifiably relied while using the telephone booth and thus constituted a ‘search and seizure’ within the meaning of the Fourth Amendment.” *Id.* at 353.

24. The Court acknowledged, however, that the recognized exceptions to the warrant clause probably would be unavailable in the context of electronic surveillance. “It is difficult to imagine how any of those exceptions could ever apply to the sort of search and seizure involved in this case.” *Id.* at 357. *Cf.* *United States v. Ramsey*, 431 U.S. 606 (1977) (border search of first-class letter); *South Dakota v. Opperman*, 428 U.S. 364 (1976) (inventory search of automobile); *United States v. Matlock*, 415 U.S. 164 (1974) (third-party consent search); *United States v. Robinson*, 414 U.S. 218 (1973) (search incident to custodial arrest); *Almedia-Sanchez v. United States*, 413 U.S. 266 (1973) (border search); *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973) (consent search); *Chambers v. Maroney*, 399 U.S. 42 (1970) (search of moving vehicle); *Terry v. Ohio*, 392 U.S. 1 (1967) (stop and frisk); *Harris v. United States*, 390 U.S. 234 (1968) (seizure of evidence in plain view); *Warden v. Hayden*, 387 U.S. 294 (1967) (close pursuit of fleeing suspect); *Cooper v. California*, 386 U.S. 58 (1967) (inventory search of automobile); *Schmerber v. United States*, 384 U.S. 767 (1966) (preservation of evidence); *United States v. Edwards*, 498 F.2d 496 (2d Cir. 1974) (airport search).

25. *Katz v. United States*, 389 U.S. 347, 357 (1967). See *Osborn v. United States*, 385 U.S. 323, 330 & n.9 (1966); *Lopez v. United States*, 373 U.S. 427, 464 (1963) (Brennan, J., dissenting).

“[T]he procedure of antecedent justification before a magistrate,” *Ohio ex rel. Eaton v. Price*, 364 U.S. 263, 272 (1960) (per curiam affirmance by an equally divided court) (Brennan, J., dissenting), not only satisfies the Court’s general preference that searches be authorized by warrant, *id.*; see *Katz v. United States*, 389 U.S. 347, 357 (1967); *United States v. Ventressa*, 380 U.S. 102 (1965), but also acts as an important check on unconfined and indiscriminate electronic surveillance. 389 U.S. at 354-55; *Berger v. New York*, 388 U.S. 41, 58-60 (1967); *Osborn v. United States*, 385 U.S. 323, 329 (1966); *Lopez v. United States*, 373 U.S. 427, 441 (1963) (Warren, C.J., concurring). This concern over indiscriminate surveillance is the germ of the minimization requirement in Title III. 53 TUL. L. REV. 264, 266 (1978). See notes 26-28 *infra* and accompanying text.

efforts to promote a more effective control of crime consistent with the individual's reasonable expectations of privacy.<sup>26</sup> Title III of the Omnibus Crime Control and Safe Streets Act of 1968 represents the archetype.<sup>27</sup> In accordance with the guidelines suggested by *Berger* and *Katz*, Title III prohibits the interception or disclosure of any wire or oral communication except by law enforcement officials who have complied with the detailed procedural requirements prescribed in the statute.<sup>28</sup>

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26. See S. REP. NO. 1097, 90th Cong., 2d Sess. 66 (1968), reprinted in [1968] U.S. CODE CONG. & AD. NEWS 2112, 2153.

Congress had begun to consider legislation regarding electronic surveillance even before the Supreme Court decided *Berger*. Senator McClellan introduced the Federal Wire Interception Act, S. 675, 90th Cong., 1st Sess. (1967), on January 25, 1967, less than two months after the Court granted certiorari in *Berger*, 385 U.S. 967 (1966). Within days after the *Berger* decision, Senator Hruska introduced a second bill, the Electronic Surveillance Control Act of 1967, S. 2050, 90th Cong., 1st Sess. (1967). Title III is essentially a combination of the two bills drafted to conform with the standards set forth in *Berger* and *Katz*. See S. REP. NO. 1097, 90th Cong., 2d Sess. 66 (1968), reprinted in [1968] U.S. CODE CONG. & AD. NEWS 2112, 2153.

27. 18 U.S.C. §§ 2510-2520 (1970). The Supreme Court has issued six opinions interpreting Title III provisions since the passage of the statute in 1968, but none of the decisions have addressed the constitutionality of the statute. See *United States v. Chavez*, 416 U.S. 562 (1974); *United States v. Giordano*, 416 U.S. 505 (1974); *United States v. Kahn*, 415 U.S. 143 (1974); *Gelbard v. United States*, 408 U.S. 41 (1972); *United States v. United States District Court*, 407 U.S. 297 (1972); *Alderman v. United States*, 394 U.S. 165 (1969). Ten of the eleven circuits of the federal courts of appeals, however, have affirmed the constitutionality of the statute. See *United States v. Turner*, 528 F.2d 143 (9th Cir.), cert. denied, 423 U.S. 996 (1975); *United States v. Sklaroff*, 506 F.2d 837 (5th Cir.), cert. denied, 423 U.S. 874 (1975); *United States v. Ramsey*, 503 F.2d 524 (7th Cir. 1974), cert. denied, 420 U.S. 932 (1975); *United States v. Martinez*, 498 F.2d 464 (6th Cir.), cert. denied, 419 U.S. 1056 (1974); *United States v. James*, 494 F.2d 1007 (D.C. Cir.), cert. denied, 419 U.S. 1020 (1974); *United States v. Tortorello*, 480 F.2d 764 (2d Cir.), cert. denied, 414 U.S. 866 (1973); *United States v. Bobo*, 477 F.2d 974 (4th Cir. 1973), cert. denied, 421 U.S. 909 (1975); *United States v. Cafero*, 473 F.2d 489 (3d Cir. 1973), cert. denied, 417 U.S. 918 (1974); *United States v. Cox*, 462 F.2d 1293 (8th Cir. 1973), cert. denied, 417 U.S. 918 (1974); *United States v. Cox*, 449 F.2d 679 (10th Cir. 1971), cert. denied, 406 U.S. 934 (1972). Moreover, all but one of the federal district courts that have considered the constitutionality of Title III have upheld the statute, and the sole exception was reversed. See *United States v. Whitaker*, 343 F. Supp. 358 (E.D. Pa. 1972), rev'd, 474 F.2d 1246 (3d Cir.), cert. denied, 412 U.S. 953 (1973). Despite the absence of Supreme Court approval, the constitutionality of Title III seems to be a foregone conclusion. *Contra*, Fife, *Eavesdropping Under Court Order and the Constitution: Berger v. New York*, 1 LOY. U.L. REV. 143 (1968); Schwartz, *The Legitimization of Electronic Eavesdropping: The Politics of "Law and Order"*, 67 MICH. L. REV. 455 (1969); Spritzer, *Electronic Surveillance by Leave of the Magistrate: The Case in Opposition*, 118 U. PA. L. REV. 169 (1969).

28. 18 U.S.C. § 2511 (1970). The statute recognizes four exceptions to its procedural requirements. Section 2518(7) allows law enforcement officers specially designated by the Attorney General to conduct surveillance without prior judicial authorization in certain emergency situations, provided that certain post-surveillance requirements are also met. Sections 2511(2)(c) and (d) exclude from the Title III procedural requirements surveillance conducted with the consent of a

Applications for wiretap orders first must be authorized by the Attorney General or his special designate<sup>29</sup> and contain the statutorily specified information designed to provide a judge with "a full and complete statement of the facts and circumstances" that justify the proposed wiretap and establish clear lines of responsibility for its execution.<sup>30</sup> In addition, applications may be made only in the investigation of certain major crimes enumerated by the statute.<sup>31</sup>

Upon review of an application, the judge may issue an interception order only after determining that normal investigative procedures have failed and that probable cause exists to believe particular communications concerning the offense under investigation will be obtained through the interception.<sup>32</sup>

Each authorization order must specify the identity of the person whose communications are to be intercepted, the place where interception is authorized, the particular type of communication sought to be intercepted, the identity of the agency authorized to intercept the communications, and the period of time during which interception is permitted.<sup>33</sup> The order may also require monitoring agents to submit periodic reports to the issuing judge on the progress of the wiretap toward achievement of the authorized objective and on the need for continued interception.<sup>34</sup>

Immediately upon expiration of the order, the intercepting agency

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party to the conversation. Sections 2511(2) and (3) permit interception by telephone companies and the Federal Communications Commission in the absence of a court order if the interception is within the normal course of their activities. Section 2511(3) creates a "national security" exception for the President in the exercise of his constitutional powers.

Title III applies not just to federal electronic surveillance activities, but also to wiretaps conducted by state law enforcement officials. By requiring that state statutes conform to the minimum federal standards established by Title III, Congress has preempted those statutes less restrictive than the federal provisions; the states, however, may adopt statutes affording greater protection to the fourth amendment right of privacy. *See* S. REP. NO. 1097, 90th Cong., 2d Sess. 66 (1968), *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2112, 2187. *See also* *People v. Conklin*, 12 Cal. 3d 259, 522 P.2d 1049, 114 Cal. Rptr. 241, *appeal dismissed*, 414 U.S. 804 (1974); *State v. Siegel*, 266 Md. 256, 292 A.2d 86 (1972); *Commonwealth v. Vitello*, 327 N.E.2d 819 (Mass. 1975).

29. 18 U.S.C. § 2516(1) (1970). At the state or local level, the principal prosecuting attorney for the jurisdiction performs this function. 18 U.S.C. § 2516(2) (1970).

30. 18 U.S.C. § 2518(1) (1970). In addition, the judge may require the applicant to furnish additional evidence in support of the application. 18 U.S.C. § 2518(2) (1970).

31. 18 U.S.C. § 2516(1)(a)-(g) (1970).

32. 18 U.S.C. § 2518(3) (1970).

33. 18 U.S.C. § 2518(4) (1970).

34. 18 U.S.C. § 2518(6) (1970).

must convey the recordings of the intercepted conversations to the judge who authorized the wiretap.<sup>35</sup> In turn, the judge must seal the recordings and serve notice of the surveillance upon all parties named in the interception order and, in the judge's discretion, upon other parties whose conversations were intercepted.<sup>36</sup>

Despite the detailed manner in which Title III was drafted, however, Congress failed to elaborate upon what many regard as the heart of the statutory safeguards—the minimization requirement:

Every order and extension thereof shall contain a provision that the authorization to intercept . . . shall be conducted in such a way as to minimize the interception of communications not subject to interception under this chapter . . . .<sup>37</sup>

Neither the statute's language nor its legislative history<sup>38</sup> prescribes the procedures that courts should employ to determine whether minimization has been achieved.<sup>39</sup> Consequently, few provisions of Title III have engendered as much uncertainty as the minimization requirement.

Congress, in the wake of *Berger* and *Katz*, could have regarded the minimization provision in any one of three ways: (1) as a statutory but not a constitutional requirement;<sup>40</sup> (2) as the codification of a constitutional requirement;<sup>41</sup> or (3) as a statutory requirement stricter than what the Constitution mandates in the execution of wiretaps.<sup>42</sup>

The argument on behalf of the first view<sup>43</sup>—that the duty to mini-

35. 18 U.S.C. § 2518(8)(a) (1970).

36. 18 U.S.C. § 2518(8)(d) (1970).

37. 18 U.S.C. § 2518(5) (1970). This section also requires that the government execute the authorization to intercept as soon as practicable and terminate interception upon attainment of the authorized objective, or in any event in thirty days. In this Note, however, the term "section 2518(5)" will refer exclusively to the minimization requirement within the provision.

38. The legislative history of the minimization requirement is merely a single-sentence paraphrase of the statutory language. See S. REP. NO. 1097, 90th Cong., 2d Sess. 66 (1968), reprinted in [1968] U.S. CODE CONG. & AD. NEWS 2112, 2192.

39. See note 4 *supra*.

40. See notes 43-48 *infra* and accompanying text.

41. See notes 49-57 *infra* and accompanying text.

42. See notes 58-59 *infra* and accompanying text.

43. This view is proposed in Note, *Minimization: In Search of Standards*, 8 SUFFOLK U.L. REV. 60, 62-63 (1973). The author also argues that because the large majority of states do not include a minimization provision in their electronic surveillance statutes, this "reveals a general belief that 'minimization' is *not* constitutionally mandated." *Id.* at 63 n.21 (emphasis in original). Granting whatever validity there may be to the author's inference, the argument is misleading at best. Included in "the large majority" were twenty-six states that either had no statute concerning electronic surveillance or had statutes that totally prohibited such activity. Thus, of the twenty-

mize is solely statutory—derives from the belief that Title III’s probable cause<sup>44</sup> and particularity<sup>45</sup> requirements adequately satisfy the demands of the warrant clause.<sup>46</sup> The *Berger* Court’s primary objection to the New York wiretapping statute<sup>47</sup> stemmed from its failure to require that a wiretap authorization “particularize” the conversations subject to interception.<sup>48</sup> Restricted by the limitations of Title III, however, monitoring agents no longer have “a roving commission to ‘seize’ any and all conversations,”<sup>49</sup> nor engage in the kind of general search proscribed by the fourth amendment.<sup>50</sup> The minimization requirement, therefore, constitutes a statutory, but not a constitutional, addi-

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four states that authorized wiretapping, twelve did not include minimization provisions in their statutes. Moreover, Title III preempts those state statutes that do not conform to its minimum federal standards. S. REP. NO. 1097, 90th Cong. 2d Sess. 66 (1968), *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2112, 2187. Thus, Congress’ intent about the constitutional necessity of the minimization requirement is the appropriate focus for analysis.

44. Under the provisions of Title III, a judge may issue an interception order only if he determines:

- (a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;
- (b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;
- (c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;
- (d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

18 U.S.C. § 2518(3) (1970).

45. Interception orders issued pursuant to Title III must include:

- (a) the identity of the person, if known, whose communications are to be intercepted;
- (b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;
- (c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;
- (d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and
- (e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

18 U.S.C. § 2518(4) (1970).

46. “[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. CONST. amend. IV.

47. See note 19 *supra*.

48. See notes 19-21 *supra* and accompanying text.

49. *Berger v. New York*, 388 U.S. 41, 59 (1967).

50. *Id.*

tion to the protections of the warrant clause's imperative of particularity.

The weakness in this view is that the warrant clause of the fourth amendment is not the sole measure of the constitutionality of a search and seizure; the fourth amendment also proscribes unreasonable searches and seizures.<sup>51</sup> Even a search conducted pursuant to a facially sufficient warrant must be executed in a reasonable manner.<sup>52</sup> Thus, the second view of the minimization provision argues that section 2518(5), in acting to prevent unreasonable searches and seizures, codifies a constitutional requirement for the execution of wiretaps.<sup>53</sup> The reasoning of *United States v. Kahn*<sup>54</sup> supports this view. *Kahn* held that the admission into evidence of conversations intercepted under a valid Title III wiretap order against a participant in those conversations who was not named in the order violates neither Title III nor the fourth amendment.<sup>55</sup> In rejecting the argument that this holding

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51. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." U.S. CONST. amend. IV.

52. The original draft of the fourth amendment presented by the Committee of Eleven contained no prohibition against unreasonable searches and seizures, but only what is now regarded as the warrant clause. Subsequently, a motion to amend the draft to include this prohibition was adopted. 1 ANNALS OF CONG. 753 (Gales & Seaton eds. 1789). As explained by one author:

The general right of security from unreasonable search and seizure was given a sanction of its own and the amendment intentionally given a broader scope. That the prohibition against "unreasonable searches" was intended, accordingly, to cover something other than the form of the warrant is a question no longer left to implication to be derived from the phraseology of the Amendment.

N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 103 (1937). See *Boyd v. United States*, 116 U.S. 616, 624-35 (1886). The reasonableness requirement limits the discretion of those who search under a valid warrant. For government agents to regard "a seemingly precise and legal warrant only as a ticket to get into a man's home, and, once inside, to launch forth upon unconfined searches and indiscriminate seizures as if armed with all the unbridled and illegal power of general warrant," is to engage in both unreasonable and unconstitutional conduct. *Stanley v. Georgia*, 394 U.S. 557, 572 (1969) (Stewart, J., concurring). See generally 2 W. LAFAVE, SEARCH AND SEIZURE 151-84 (1978). Application of this principle to of electronic surveillance is straightforward. Once a monitoring agent determines that a call does not relate to the offense under investigation, he must terminate the interception, not because he lacked probable cause to initially monitor the call, or failed to obtain a properly particularized wiretap order, but because it is no longer reasonable to continue the interception. See Note, *Minimization and the Fourth Amendment*, 19 N.Y.L.F. 861, 868-78 (1974).

53. This view is espoused in: Cranwell, *Judicial Fine-Tuning of Electronic Surveillance*, 6 SETON HALL L. REV. 225, 251 (1975); Comment, *supra* note 12, at 97-98; Note, *supra* note 52, at 868-78.

54. 415 U.S. 143 (1974).

55. *Id.* at 155.

would permit wiretap orders to be used as general warrants, the Court specifically noted that the minimization requirement would serve to circumscribe unconstitutional and unlawful intrusions on individual privacy.<sup>56</sup> The Court's reliance on the minimization requirement, therefore, strongly implies that the provision has constitutional underpinnings.<sup>57</sup>

The power of legislative bodies to grant greater protection to individual rights than that minimally afforded by the Constitution creates the possibility that Congress intended to impose a duty on monitoring agents beyond that demanded of them by the fourth amendment.<sup>58</sup> The best argument for this third view of the minimization provision is that Congress included within Title III a number of safeguards beyond those delineated in either *Berger* or *Katz*.<sup>59</sup> Consistent with its concern for individual privacy, Congress could have intended the minimization requirement—also not specifically mentioned in either *Berger* or *Katz*—to impose a stricter duty on monitoring agents than that mandated by the fourth amendment. This argument, while plausible, is not compelling. Congress also enacted Title III to provide law enforcement officials with a necessary tool to fight crime.<sup>60</sup> It is equally plausible, therefore, that the minimization requirement represents nothing more than a codification of the fourth amendment standard of reasonableness in the execution of wiretaps.<sup>61</sup>

In summary, no clear answer exists to the question of which of the

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56. *Id.* at 154. See Note, *supra* note 52, at 875-78.

57. Language in *Katz v. United States*, 389 U.S. 347 (1967), raises a similar inference: [I]t is clear that *this surveillance was so narrowly circumscribed* that a duly authorized magistrate, properly notified of the need for such investigation, specifically informed of the basis on which it was to proceed, and clearly apprised of the precise intrusion it would entail, could constitutionally have authorized, *with appropriate safeguards*, the very limited search and seizure that the Government asserts in fact took place.

*Id.* at 354 (emphasis added).

58. Under the fifth amendment, for example, a witness summoned to appear and testify before a grand jury may not refuse to answer questions on the ground that they are based on evidence obtained from an unlawful search and seizure. See *United States v. Calandra*, 414 U.S. 338 (1974). Under the additional protections afforded by Title III, however, a grand jury witness may refuse to answer questions based on evidence obtained in violation of Title III provisions. See *United States v. Gelbard*, 408 U.S. 41 (1972); 18 U.S.C. § 2515 (1970).

59. For example, § 2516 limits the issuance of interception orders to the investigation of certain crimes and requires that applications must be approved by the Attorney General before submission to a judge for final authorization; also, § 2518(3)(c) requires that interception orders may issue only if normal investigative procedures have failed.

60. S. REP. NO. 1097, 90th Cong., 2d Sess. 66 (1968), *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2112, 2157. "The major purpose of Title III is to combat organized crime." *Id.*

61. See notes 53-56 *supra* and accompanying text.

three views embodies Congress' intent concerning the nature and scope of the minimization requirement. In the absence of a legislative history, the only safe answer is that Congress did not consider the issue at all. It does seem fair to conclude, however, that the duty to minimize is a constitutional duty—the duty to conduct a wiretap in a reasonable manner.<sup>62</sup> But what “reasonableness” entails in the context of electronic surveillance, or whether Congress intended to supplement or supplant the fourth amendment reasonableness standard with a standard affording greater protections for individual privacy, remains a legislative secret.

## II. THE MINIMIZATION DOCTRINE PRIOR TO *SCOTT*

In the absence of legislative guidance, the burden fell upon the courts to give substantive meaning to the minimization provision. The first federal courts to deal with minimization did not directly address the question whether section 2518(5)'s minimization requirement supplemented, codified, or supplanted the fourth amendment in the context of electronic surveillance.<sup>63</sup> With reference to *Berger* and *Katz*<sup>64</sup> and by analogy to physical searches and seizures,<sup>65</sup> the initial decisions invoked traditional fourth amendment concepts of reasonableness to as-

62. See note 53 *supra*.

63. See *United States v. George*, 465 F.2d 772, 774-75 (6th Cir. 1972); *United States v. LaGorga*, 336 F. Supp. 190, 195-97 (W.D. Pa. 1971); *United States v. King*, 335 F. Supp. 523, 540-45 (S.D. Cal. 1971), *rev'd on other grounds*, 478 F.2d 494 (9th Cir. 1973), *cert. denied*, 417 U.S. 920 (1974); *United States v. Leta*, 332 F. Supp. 1357, 1360 (M.D. Pa. 1971), *rev'd on other grounds sub nom.* *United States v. Cerasco*, 467 F.2d 647 (3d Cir. 1972); *United States v. Scott*, 331 F. Supp. 233, 246-49 (D.D.C. 1971), *rev'd*, 504 F.2d 194 (D.C. Cir. 1974). *But see* *United States v. Focarile*, 340 F. Supp. 1033, 1046 (D. Md.) (failure to make any attempt to minimize would obviously be a blatant violation of Title III as well as a probable fourth amendment violation), *aff'd sub nom.* *United States v. Giordano*, 469 F.2d 522 (4th Cir. 1972), *aff'd*, 416 U.S. 505 (1974).

64. See *United States v. George*, 465 F.2d 772, 775 (6th Cir. 1972); *United States v. Focarile*, 340 F. Supp. 1033, 1047 (D. Md.), *aff'd sub nom.* *United States v. Giordano*, 469 F.2d 522 (4th Cir. 1972), *aff'd*, 416 U.S. 505 (1974); *United States v. King*, 335 F. Supp. 523, 541 (S.D. Cal. 1971), *rev'd on other grounds*, 478 F.2d 494 (9th Cir. 1973), *cert. denied*, 417 U.S. 920 (1974); *United States v. Leta*, 332 F. Supp. 1357, 1360 (M.D. Pa. 1971), *rev'd on other grounds sub nom.* *United States v. Cerasco*, 467 F.2d 647 (3d Cir. 1972); *United States v. Scott*, 331 F. Supp. 233, 246, 248 (D.D.C. 1971), *rev'd*, 504 F.2d 194 (D.C. Cir. 1974).

65. See *United States v. Focarile*, 340 F. Supp. 1033, 1047 (D. Md.), *aff'd sub nom.* *United States v. Giordano*, 469 F.2d 522 (4th Cir. 1972), *aff'd*, 416 U.S. 505 (1974); *United States v. LaGorga*, 336 F. Supp. 190, 197 (W.D. Pa. 1971); *United States v. King*, 335 F. Supp. 523, 543-45 (S.D. Cal. 1971), *rev'd on other grounds*, 478 F.2d 494 (9th Cir. 1973), *cert. denied*, 417 U.S. 920 (1974); *United States v. Leta*, 332 F. Supp. 1357, 1360 (M.D. Pa. 1971), *rev'd on other grounds sub nom.* *United States v. Cerasco*, 467 F.2d 647 (3d Cir. 1972).

sess compliance with the minimization requirement.<sup>66</sup> Adoption of fourth amendment reasonableness doctrine, however, did not simplify matters. Troublesome differences between electronic surveillance and conventional physical searches,<sup>67</sup> as well as an uncertain understanding of what minimization meant in fact,<sup>68</sup> complicated the courts' task.

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66. See *United States v. George*, 465 F.2d 772, 774-75 (6th Cir. 1972); *United States v. Focarile*, 340 F. Supp. 1033, 1047 (D. Md.), *aff'd sub nom. United States v. Giordano*, 469 F.2d 522 (4th Cir. 1972), *aff'd*, 416 U.S. 505 (1974); *United States v. LaGorga*, 336 F. Supp. 190, 197 (W.D. Pa. 1971); *United States v. King*, 335 F. Supp. 523, 543-45 (S.D. Cal. 1971), *rev'd on other grounds*, 478 F.2d 494 (9th Cir. 1973), *cert. denied*, 417 U.S. 920 (1974); *United States v. Leta*, 332 F. Supp. 1357, 1360 (M.D. Pa. 1971), *rev'd on other grounds sub nom. United States v. Cerasco*, 467 F.2d 647 (3d Cir. 1972); *United States v. Scott*, 331 F. Supp. 233, 246-49 (D.D.C. 1971), *rev'd* 504 F.2d 194 (D.C. Cir. 1974).

67. See *United States v. James*, 494 F.2d 1007, 1018 (D.C. Cir.), *cert. denied*, 419 U.S. 1020 (1974); *United States v. Focarile*, 340 F. Supp. 1033, 1047 (D. Md.), *aff'd sub nom. United States v. Giordano*, 469 F.2d 522 (4th Cir. 1972), *aff'd*, 416 U.S. 505 (1974). See generally C. FISHMAN, WIRETAPPING AND EAVESDROPPING 6-11 (1978).

68. In *United States v. King*, 335 F. Supp. 523 (S.D. Cal. 1971), *rev'd on other grounds*, 478 F.2d 494 (9th Cir. 1973), *cert. denied*, 417 U.S. 920 (1974), the court appeared to regard minimization as a requirement for each individual, intercepted conversation. Thus, the court held unreasonable the interception of "a conversation between defendant King and an unidentified female named Phyllis which ran from page 1328 to page 1372 in the transcript. The conversation was totally irrelevant except for some two pages right in the middle, in which the conversation turned briefly but pointedly to the conspiracy." *Id.* at 541.

Generally, however, courts evaluate minimization with reference to the entire surveillance period rather than to particular calls. See *United States v. Hinton*, 543 F.2d 1002, 1012 (2d Cir.) (To determine compliance, court must "look to whether the agents devised reasonable means of limiting interception."), *cert. denied*, 429 U.S. 980 (1976); *United States v. Turner*, 528 F.2d 143, 156 (9th Cir.) ("Minimization as a process . . . requires that measures be adopted to reduce the extent of . . . interception to a practical minimum."), *cert. denied*, 423 U.S. 823 (1975); *United States v. Doolittle*, 507 F.2d 1368, 1372 (5th Cir. 1975) ("The procedure testified to by the agents appears a reasonable method for complying with the order of the district court . . . to minimize."); *United States v. Rizzo*, 491 F.2d 215, 217-18 (2d Cir. 1974) ("[T]here is no question that the procedures employed in this case to effect minimization pass muster."); *United States v. Tortorello*, 480 F.2d 764, 784 (2d Cir.) (monitoring agents used "reasonable guidelines"), *cert. denied*, 414 U.S. 866 (1973); *United States v. Dalia*, 426 F. Supp. 862, 870-71 (D.N.J. 1977) ("The facts contained in the affidavits submitted by the government . . . detail the guidelines and procedures established by the supervising attorney and agent in charge"), *aff'd on other grounds*, 575 F.2d 1344 (3d Cir. 1978); *Rodriguez v. State*, 297 So.2d 15, 21 (Fla. 1974) ("What is involved is a procedure.").

Those courts that emphasize the attempt to discern a pattern of nonpertinent communications during the surveillance period also appear to regard minimization as a process rather than an act to be evaluated with respect to each individual call. See notes 81-84 *infra* and accompanying text.

Nevertheless, it is not uncommon to find courts that use the term "minimize" to mean both the actions taken during the surveillance period to comply with the minimization requirement and the noninterception of a particular call in its entirety. See *United States v. Turner*, 528 F.2d 143, 157 (9th Cir.), *cert. denied*, 423 U.S. 823 (1975); *United States v. Scott*, 516 F.2d 751, 755 (D.C. Cir. 1975); *United States v. Aloï*, 449 F. Supp. 698, 728 n.7 (E.D.N.Y. 1977); *People v. Floyd*, 41 N.Y.2d 245, 250, 360 N.E.2d 935, 940, 392 N.Y.S.2d 257, 262 (1976).

Pragmatically, the courts chose a case-by-case approach.<sup>69</sup> In recognition that some innocent communications inevitably will be intercepted however carefully monitoring agents attempt to minimize,<sup>70</sup> courts began to investigate particular facts and circumstances within the knowledge of the monitoring agents during the surveillance period to gauge the reasonableness of their minimization efforts.<sup>71</sup> To systematize this

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69. See, e.g., *United States v. Scott*, 516 F.2d 751, 755 (D.C. Cir.), *rehearing en banc denied*, 522 F.2d 1333 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 917 (1976); *United States v. James*, 494 F.2d 1007, 1018 (D.C. Cir.), *cert. denied*, 419 U.S. 1020 (1974); *United States v. Manfredi*, 488 F.2d 588, 598-99 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974); *United States v. Focarile*, 340 F. Supp. 1033, 1047 (D. Md.), *aff'd sub nom. United States v. Giordano*, 469 F.2d 522 (4th Cir. 1972), *aff'd*, 416 U.S. 505 (1974).

70. The court in *United States v. LaGorga*, 336 F. Supp. 190 (W.D. Pa. 1971), aptly stated that "monitoring agents are not gifted with prescience and cannot be expected to know in advance what direction the conversation will take." *Id.* at 196. See, e.g., *United States v. Scott*, 516 F.2d 751, 754 (D.C. Cir.), *rehearing en banc denied*, 522 F.2d 1333 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 917 (1976); *United States v. Quintana*, 508 F.2d 867, 874-75 (7th Cir. 1975); *United States v. Manfredi*, 488 F.2d 588, 598-99 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974); *United States v. Bynum*, 485 F.2d 490, 500 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 903 (1974); *United States v. Focarile*, 340 F. Supp. 1033, 1046 (D. Md.), *aff'd sub nom. United State v. Giordano*, 469 F.2d 522 (4th Cir. 1972), *aff'd*, 416 U.S. 505 (1974).

71. See *United States v. Abascal*, 564 F.2d 821, 827 (9th Cir. 1977), *cert. denied*, 435 U.S. 942 (1978) (large-scale drug ring; uncertain identities of participants; code words and jargon); *United States v. Hinton*, 543 F.2d 1002, 1012 (2d Cir.), *cert. denied*, 429 U.S. 980 (1976) (coded language; initially innocent calls that later turned to discussions of narcotics); *United States v. Losing*, 539 F.2d 1174, 1180-81 (8th Cir. 1976) (far-flung criminal conspiracy; specialized jargon); *United States v. Chavez*, 533 F.2d 491, 492-94 (9th Cir.) (extensive conspiracy with partially unknown membership; foreign languages; jargon; code words; participants came from many walks of life and included professionals), *cert. denied*, 426 U.S. 911 (1976); *United States v. Turner*, 528 F.2d 143, 157-58 (9th Cir.) (conspiracy among large number of people of largely unknown identity; code and guarded language), *cert. denied*, 423 U.S. 823 (1975); *United States v. Capra*, 501 F.2d 267, 273 (2d Cir. 1974) (excessive background noise at location of tapped phone; code; limited duration of most intercepted calls), *cert. denied*, 420 U.S. 990 (1975); *United States v. Manfredi*, 488 F.2d 588, 599-600 (2d Cir. 1973) (million dollar drug business; numerous narcotics distributors involved; numerous callers; complex, surreptitious calls; authorized purpose of surveillance was to determine nature and scope of conspiracy; calls made at all hours of day and night), *cert. denied*, 417 U.S. 936 (1974); *United States v. Bynum*, 485 F.2d 490, 500 (2d Cir. 1973) (short duration of most calls; massive drug conspiracy; other crimes involved, including murder and robbery), *vacated on other grounds*, 417 U.S. 903 (1974); *United States v. Cox*, 462 F.2d 1293, 1300-01 (8th Cir. 1972) (organized criminal conspiracy; colloquial code), *cert. denied*, 417 U.S. 918 (1974); *United States v. Dalia*, 426 F. Supp. 862, 871-72 (D.N.J. 1977) (target of wiretap legitimately engaged in business of selling salvage and bankruptcy property, but also fenced stolen property), *aff'd on other grounds*, 575 F.2d 1344 (3d Cir. 1978); *United States v. Falcone*, 364 F. Supp. 877, 886 (D.N.J. 1973) (large-scale international narcotics conspiracy; guarded and coded language); *United States v. Curreri*, 363 F. Supp. 430, 437 (D. Md. 1973) (calls that began with innocent conversation became crime-related); *United States v. Sisca*, 361 F. Supp. 735, 744-45 (S.D.N.Y. 1973) (widespread narcotics conspiracy; use of code; large number of participants), *aff'd*, 503 F.2d 1337 (2d Cir.), *cert. denied*, 419 U.S. 1008 (1974); *United States v. Focarile*, 340 F.

process, several courts adopted a three-part categorization of factors relevant to the degree of minimization required in a particular case: (1) the nature and scope of the criminal enterprise under investigation; (2) the government's reasonable expectation of the parties to, and content of, the intercepted conversations; and (3) the degree of judicial supervision exercised during the course of the surveillance.<sup>72</sup>

The first category of factors leads courts to examine the nature and scope of the criminal enterprise under investigation for practical difficulties that hamper a monitoring agent's ability to distinguish between pertinent and nonpertinent communications. When the offense under investigation is a large-scale conspiracy, courts generally allow a greater margin for error in the number of innocent calls intercepted.<sup>73</sup>

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Supp. 1033, 1047-50 (D. Md.) (purpose of wiretap was to determine scope of narcotics conspiracy; some communications used guarded and coded language), *aff'd sub nom.* United States v. Giordano, 469 F.2d 522 (4th Cir. 1972), *aff'd*, 416 U.S. 505 (1974); Spease v. State, 275 Md. 88, 92, 338 A.2d 284, 292 (1975) (tapped phone was central instrument in narcotics distribution; monitoring agents suspected defendant knew of surveillance; code used); People v. Solomon, 75 Misc. 2d 847, 849-50, 348 N.Y.S.2d 673, 676-78 (Sup. Ct. 1973) (purpose of wiretap was to determine scope of conspiracy).

72. See United States v. Hyde, 574 F.2d 856, 869 (5th Cir.), *rehearing en banc denied*, 579 F.2d 643 (5th Cir. 1978); United States v. Clerkley, 556 F.2d 709, 716 (4th Cir. 1977), *cert. denied*, 436 U.S. 930 (1975); United States v. Daly, 535 F.2d 434, 441 (8th Cir. 1976); United States v. Kirk, 534 F.2d 1262, 1274 (8th Cir. 1976); United States v. Vento, 533 F.2d 838, 852-53 (3d Cir. 1976); United States v. Armocida, 515 F.2d 29, 44-45 (3d Cir.), *cert. denied*, 423 U.S. 858 (1975); United States v. Quintana, 508 F.2d 867, 874-75 (7th Cir. 1975).

The District of Columbia Circuit and two federal district courts have employed a four-part categorization first detailed in United States v. James, 494 F.2d 1007, 1019-21, (D.C. Cir.), *cert. denied*, 419 U.S. 1020 (1974): (1) the scope of the criminal enterprise under investigation; (2) the location and operation of the subject telephone; (3) the government's expectation of the content of the intercepted calls; and (4) the supervision by the authorizing judge. *Id.* See United States v. Scott, 516 F.2d 751, 758-60 (D.C. Cir.), *rehearing en banc denied*, 522 F.2d 1333 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 917 (1976); United States v. London, 434 F. Supp. 556, 562-64 (D. Md. 1976), *aff'd sub nom.* United States v. Clerkley, 556 F.2d 709 (4th Cir. 1977); United States v. Picone, 408 F. Supp. 255, 258-60 (D. Kan. 1975). The three-part categorization, first employed in United States v. Quintana, 508 F.2d 867, 874-75 (7th Cir. 1975), derives substantially from the James formulation. See generally C. FISHMAN, *supra* note 67, at 210-32.

73. See, e.g., United States v. Daly, 535 F.2d 434, 441 (8th Cir. 1976); United States v. Vento, 533 F.2d 838, 853 (3d Cir. 1976); United States v. Chavez, 533 F.2d 491, 493-94 (9th Cir.), *cert. denied*, 426 U.S. 911 (1976); United States v. Armocida, 515 F.2d 29, 39 n.12 (3d Cir.), *cert. denied*, 423 U.S. 858 (1975); United States v. James, 494 F.2d 1007, 1019-20 (D.C. Cir.), *cert. denied*, 419 U.S. 1020 (1974); United States v. Manfredi, 488 F.2d 588, 600 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974); United States v. Bynum, 485 F.2d 490, 500-01 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 903 (1974); United States v. Cox, 462 F.2d 1293, 1300-01 (8th Cir. 1972), *cert. denied*, 417 U.S. 918 (1974). Cf. United States v. King, 335 F. Supp. 523, 540-41 (S.D. Cal. 1971) (interception of all calls held unreasonable in narrowly focused investigation), *rev'd on other grounds*, 478 F.2d 494 (9th Cir. 1973), *cert. denied*, 417 U.S. 920 (1974).

Similarly, when the range of offenses under investigation encompasses multiple and diverse crimes, courts tolerate the interception of more calls unrelated to those offenses.<sup>74</sup> Courts also permit the interception of a great many innocent communications when the targets of the investigation use guarded or ambiguous language,<sup>75</sup> codes,<sup>76</sup> aliases,<sup>77</sup> or foreign languages.<sup>78</sup> In addition, if the objective of the wiretap is to determine the scope of a conspiracy and the identity of the coconspirators, courts impose less exacting minimization standards.<sup>79</sup>

The government's reasonable expectations of the parties to, and the content of, intercepted communications form the second category of factors germane to the minimization inquiry. Courts consider the location of the wiretapped telephone to be crucial to this determination.<sup>80</sup> Agents monitoring conversations over telephones located in the suspected headquarters of a criminal operation may reasonably expect that virtually all conversations will be pertinent to their investigation,<sup>81</sup>

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74. See, e.g., *United States v. Vento*, 533 F.2d 838, 862 (3d Cir. 1976); *United States v. Bynum*, 485 F.2d 490, 500-01 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 903 (1974).

75. See, e.g., *United States v. Capra*, 501 F.2d 267, 273-74 (2d Cir. 1974), *cert. denied*, 420 U.S. 990 (1975); *United States v. Bynum*, 485 F.2d 490, 501 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 903 (1974).

76. See, e.g., *United States v. Abascal*, 564 F.2d 821, 827 (9th Cir. 1977), *cert. denied*, 435 U.S. 942 (1978); *United States v. Clerkley*, 556 F.2d 709, 717 n.5 (9th Cir. 1977), *cert. denied*, 436 U.S. 930 (1978).

77. See *United States v. Armocida*, 515 F.2d 29, 54 (3d Cir.), *cert. denied*, 423 U.S. 858 (1975).

78. See *United States v. Chavez*, 533 F.2d 491, 494 (9th Cir.), *cert. denied*, 426 U.S. 911 (1976); *United States v. Quintana*, 508 F.2d 867, 875 (7th Cir. 1975).

79. See, e.g., *United States v. Clerkley*, 556 F.2d 709, 717 (4th Cir. 1977), *cert. denied*, 436 U.S. 930 (1978); *United States v. Daly*, 535 F.2d 434, 441 (8th Cir. 1976); *United States v. Chavez*, 433 F.2d 491, 492 (9th Cir.), *cert. denied*, 426 U.S. 911 (1976); *United States v. Quintana*, 509 F.2d 867, 875 (7th Cir. 1975); *United States v. Manfredi*, 488 F.2d 588, 600 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974); *United States v. Focarile*, 340 F. Supp. 1033, 1047 (D. Md.), *aff'd sub nom. United States v. Giordano*, 469 F.2d 522 (4th Cir. 1972), *aff'd on other grounds*, 416 U.S. 505 (1974); *People v. Solomon*, 75 Misc. 2d 847, 850, 348 N.Y.S.2d 673, 676-77 (Sup. Ct. 1973).

80. See, e.g., *United States v. Scott*, 516 F.2d 751, 758-60 (D.C. Cir.), *rehearing en banc denied*, 522 F.2d 1333 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 917 (1976); *United States v. James*, 494 F.2d 1007, 1019-21 (D.C. Cir.), *cert. denied*, 419 U.S. 1020 (1974); *United States v. London*, 434 F. Supp. 556, 562-64 (D. Md. 1976), *aff'd sub nom. United States v. Clerkley*, 556 F.2d 709 (4th Cir. 1977), *cert. denied*, 426 U.S. 930 (1978); *United States v. Picone*, 408 F. Supp. 255, 258-60 (D. Kan. 1975).

81. See, e.g., *United States v. Clerkley*, 556 F.2d 709, 711, 715-18 (4th Cir. 1977) (defendants' office bugged), *cert. denied*, 436 U.S. 930 (1978); *United States v. James*, 494 F.2d 1007, 1021-23 (D.C. Cir.) (defendant's residential phone used almost exclusively as "business" phone), *cert. denied*, 419 U.S. 1020 (1974); *United States v. Dalia*, 426 F. Supp. 862 (D.N.J. 1977) (defendant's office phone tapped), *aff'd*, 575 F.2d 1344 (3d Cir. 1978).

but the same expectation may be unreasonable when agents monitor a residential or public telephone.<sup>82</sup> Monitoring agents' reasonable expectations also depend on the point during the surveillance period that an interception occurs.<sup>83</sup> At the outset of a surveillance period, monitoring agents may have no basis to believe that any identifiable group of calls or callers will be irrelevant to their investigation, but if a discernible group emerges during the course of the wiretap, courts expect monitoring agents to cease interception of that group.<sup>84</sup> Even if a pattern of nonpertinent calls becomes apparent, however, courts have found it reasonable for monitoring agents to screen the first one or two minutes of each call to verify that the call fits the pattern.<sup>85</sup>

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82. See *United States v. Picone*, 408 F. Supp. 255, 259 (D. Kan. 1975) (minimization efforts reasonable on residential phone); *United States v. LaGorga*, 336 F. Supp. 190, 195-97 (W.D. Pa. 1971) (minimization efforts during surveillance of residential phone unreasonable). But see *United States v. Scott*, 516 F.2d 751, 759 (D.C. Cir.) ("[T]he fact that [telephones] were located in residences does not immunize them from a court ordered interception. The actual use of the telephones is at least as relevant to the question of the level of surveillance which is reasonable as is their physical location."), *rehearing en banc denied*, 522 F.2d 1333 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 917 (1976).

As to public telephones, see *Katz v. United States*, 389 U.S. 347 (1967), in which the Supreme Court approved of the "narrowly circumscribed" manner in which federal agents had conducted electronic surveillance of a public telephone booth, *id.* at 354, but held the search illegal because of the agents' failure to obtain prior judicial authorization. *Id.* at 359.

83. See generally *C. FISHMAN*, *supra* note 67, at 216-21.

84. See *United States v. Daly*, 535 F.2d 434, 441 (8th Cir. 1976); *United States v. Chavez*, 533 F.2d 491, 493-94 n.2 (9th Cir.) (collecting cases), *cert. denied*, 426 U.S. 911 (1976).

If any pattern of innocent communications is evident at the initiation of the surveillance, courts expect monitoring agents to respect it in their minimization efforts. *United States v. James*, 494 F.2d 1007, 1020 (D.C. Cir.), *cert. denied*, 419 U.S. 1020 (1974).

The effort to discover a pattern of innocent communications can, of itself, support a finding that the agents' minimization attempts were reasonable. See *United States v. Hinton*, 543 F.2d 1002, 1012 (2d Cir.), *cert. denied*, 429 U.S. 980 (1976); *United States v. Tortorello*, 480 F.2d 764, 783 (2d Cir.), *cert. denied*, 414 U.S. 866 (1973).

Two courts have found that the interception of all calls was reasonable because the surveillance period was too brief to allow agents to develop patterns of nonpertinent calls. See *United States v. Abascal*, 564 F.2d 821, 827 (9th Cir. 1977), *cert. denied*, 435 U.S. 942 (1978); *United States v. Chavez*, 533 F.2d 491 (9th Cir.), *cert. denied*, 426 U.S. 911 (1976).

85. See *United States v. Losing*, 560 F.2d 906, 909 n.1 (8th Cir.), *cert. denied*, 434 U.S. 1075 (1977); *United States v. Turner*, 528 F.2d 143, 157 (9th Cir.), *cert. denied*, 423 U.S. 823 (1975); *United States v. Scott*, 516 F.2d 751, 757 n.15 (D.C. Cir.), *rehearing en banc denied*, 522 F.2d 1333 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 917 (1976); *United States v. Armocida*, 515 F.2d 29, 45 (3d Cir.), *cert. denied*, 423 U.S. 858 (1975); *United States v. Capra*, 501 F.2d 267, 276 (2d Cir. 1974), *cert. denied*, 420 U.S. 990 (1975).

In *United States v. Hinton*, 543 F.2d 1002, 1012 (2d Cir.), *cert. denied*, 429 U.S. 980 (1976), the court held that the conspirators' use of code justified the agents' interception of the first five minutes of each call. Some courts, in their determination of the reasonableness of the agents' minimi-

The degree of judicial supervision over the execution of the wiretap constitutes the third category of factors critical to the pre-*Scott* application of the minimization requirement. When the judge who authorized the interception order plays an active role in the effort to minimize, courts more likely will find compliance with the minimization requirement.<sup>86</sup> This supervision may take several forms such as detailing minimization procedures in the wiretap order<sup>87</sup> or requiring periodic reports on the progress of the investigation and the need for continued surveillance.<sup>88</sup>

Although the courts generally invoked traditional fourth amendment concepts of reasonableness to determine compliance with the minimization requirement, many—but by no means all<sup>89</sup>—courts indicated

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zation efforts, have employed similar reasoning to disregard all calls of less than two minutes duration. *See* *United States v. Scott*, 516 F.2d 751, 757 (D.C. Cir.), *rehearing en banc denied*, 522 F.2d 1333 (D.C. Cir.), *cert. denied*, 425 U.S. 917 (1976); *United States v. Bynum*, 485 F.2d 490, 500 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 903 (1974).

86. *See* cases cited note 72 *supra*.

87. *United States v. George*, 465 F.2d 772, 774 (6th Cir. 1972).

88. *See* cases cited note 72 *supra*. *See also* *United States v. Bynum*, 485 F.2d 490, 501 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 903 (1974); *United States v. Cox*, 462 F.2d 1293, 1301 (8th Cir. 1972); *United States v. Focarile*, 340 F. Supp. 1033, 1048 (D. Md.), *aff'd sub nom. United States v. Giordano*, 469 F.2d 522 (4th Cir. 1972), *aff'd on other grounds*, 416 U.S. 505 (1974).

89. A significant number of cases make no explicit mention of "good faith." *See* *United States v. Hyde*, 574 F.2d 856 (5th Cir. 1978); *United States v. Losing*, 560 F.2d 906 (8th Cir.), *cert. denied*, 434 U.S. 1075 (1977); *United States v. Daly*, 535 F.2d 434 (8th Cir. 1976); *United States v. Kirk*, 534 F.2d 1262 (8th Cir. 1976); *United States v. Chavez*, 533 F.2d 491 (9th Cir.), *cert. denied*, 426 U.S. 911 (1976); *United States v. Vento*, 533 F.2d 838 (3d Cir. 1976); *United States v. Doolittle*, 507 F.2d 1368 (5th Cir. 1975); *United States v. Rizzo*, 491 F.2d 215 (2d Cir. 1974); *United States v. George*, 465 F.2d 772 (6th Cir. 1972); *United States v. Cox*, 462 F.2d 1293 (8th Cir. 1972), *cert. denied*, 417 U.S. 918 (1974); *United States v. Piccone*, 408 F. Supp. 255 (D. Kan. 1975); *United States v. Sisca*, 361 F. Supp. 735 (S.D.N.Y. 1973), *aff'd*, 503 F.2d 1337 (2d Cir.), *cert. denied*, 419 U.S. 1008 (1974); *United States v. Lanza*, 349 F. Supp. 929 (M.D. Fla. 1972); *United States v. Focarile*, 340 F. Supp. 1033 (D. Md.), *aff'd sub nom. United States v. Giordano*, 469 F.2d 522 (4th Cir. 1972), *aff'd on other grounds*, 416 U.S. 505 (1974); *United States v. LaGorga*, 336 F. Supp. 190 (W.D. Pa. 1971); *United States v. King*, 335 F. Supp. 523 (S.D. Cal. 1971), *rev'd on other grounds*, 478 F.2d 494 (9th Cir. 1973), *cert. denied*, 417 U.S. 920 (1974); *State v. Molinaro*, 117 N.J. Super. 276, 284 A.2d 385 (Essex County Ct. 1971); *People v. Castania*, 73 Misc. 2d 166, 340 N.Y.S.2d 829 (Sup. Ct. 1973); *People v. Holder*, 69 Misc. 2d 863, 331 N.Y.S.2d 557 (Sup. Ct. 1972).

Arguably, the following language from *United States v. Tortorello*, 480 F.2d 764 (2d Cir.), *cert. denied*, 414 U.S. 866 (1973), posits a minimization standard that contains an element of subjective or good-faith reasonableness:

It is clear . . . that a court should not admit evidence derived from an electronic surveillance order unless, after reviewing the monitoring log and hearing the testimony of the monitoring agents, it is left with the conviction that on the whole the agents have

that the presence or absence of good-faith efforts by the monitoring agents to minimize was also relevant to their determinations.<sup>90</sup> These courts either explicitly included "good faith" in the standard for testing compliance with the minimization requirement<sup>91</sup> or explicitly found that the agents made "good faith" efforts to minimize.<sup>92</sup> The precise

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shown a high regard for the right of privacy and have done all they reasonably could to avoid unnecessary intrusion.

*Id.* at 784. No specific reference to good faith or subjective intent can be found in this language, however, and those courts that quote this language with approval do not otherwise mention good faith or subjective intent. See *United States v. James*, 494 F.2d 1007, 1018 (D.C. Cir.), *cert. denied*, 419 U.S. 1020 (1974); *United States v. Dalia*, 426 F. Supp. 868, 870-71 (D.N.J. 1977), *aff'd on other grounds*, 575 F.2d 1344 (3d Cir. 1978). The court in *United States v. Scott*, 516 F.2d 751 (D.C. Cir.), *rehearing en banc denied*, 522 F.2d 133 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 917 (1976), offered its interpretation of this language from *Tortorello*: "While this language indicates that the attitude of the agents is a relevant factor to be considered, we believe that the decisive factor is the second element—the objective reasonableness of the interceptions." *Id.* at 756 n.12.

90. See *United States v. Santora*, 583 F.2d 453, 456 (9th Cir. 1978); *United States v. Hinton*, 543 F.2d 1002, 1012 (2d Cir.), *cert. denied*, 429 U.S. 980 (1976); *United States v. Principe*, 531 F.2d 1132, 1139-41 (2d Cir. 1976), *cert. denied*, 430 U.S. 905 (1977); *United States v. Turner*, 528 F.2d 143, 156 (9th Cir.), *cert. denied*, 423 U.S. 823 (1975); *United States v. Armocida*, 515 F.2d 29, 44 (3d Cir.), *cert. denied*, 423 U.S. 858 (1975); *United State v. Quintana*, 508 F.2d 867, 875 (7th Cir. 1975); *United States v. Capra*, 501 F.2d 267, 276 (2d Cir. 1974), *cert. denied*, 420 U.S. 990 (1975); *United States v. Cirillo*, 499 F.2d 872, 881 (2d Cir. 1974); *United States v. Manfredi*, 488 F.2d 588, 600 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974); *United States v. Bynum*, 435 F.2d 491, 501 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 902 (1974); *United States v. Fino*, 478 F.2d 35, 38 (2d Cir. 1973); *United States v. Aloï*, 449 F. Supp. 698, 729 (E.D.N.Y. 1977); *United States v. Baynes*, 400 F. Supp. 285, 305 (E.D. Pa. 1975); *United States v. Falcone*, 364 F. Supp. 877, 886-87 (D.N.J. 1973); *United States v. Curreri*, 363 F. Supp. 430, 437 (D. Md. 1973); *Rodriguez v. State*, 297 So.2d 15, 21 (Fla. 1974); *Spease v. State*, 275 Md. 88, 95, 338 A.2d 284, 291 (1975); *People v. Floyd*, 41 N.Y.2d 245, 250, 360 N.E.2d 935, 940, 392 N.Y.S.2d 257, 262 (1976).

91. See *United States v. Hinton*, 543 F.2d 1002, 1012 (2d Cir.), *cert. denied*, 429 U.S. 980 (1976); *United States v. Armocida*, 515 F.2d 29, 44 (2d Cir.), *cert. denied*, 423 U.S. 858 (1975); *United States v. Capra*, 501 F.2d 267, 276 (2d Cir. 1974), *cert. denied*, 420 U.S. 990 (1975); *United States v. Manfredi*, 448 F.2d 588, 600 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974); *United States v. Aloï*, 499 F. Supp. 698, 729 (E.D.N.Y. 1977); *United States v. Baynes*, 400 F. Supp. 285, 305 (E.D. Pa. 1975); *United States v. Falcone*, 364 F. Supp. 877, 886-87 (D.N.J. 1973); *Rodriguez v. State*, 297 So.2d 15, 21 (Fla. 1974); *Spease v. State*, 275 Md. 88, 95, 338 A.2d 284, 291 (1975); *People v. Floyd*, 41 N.Y.2d 245, 250, 360 N.E.2d 935, 940, 392 N.Y.S.2d 257, 262 (1976).

92. See *United States v. Santora*, 583 F.2d 453, 456 (9th Cir. 1978); *United States v. Hinton*, 543 F.2d 1002, 1112 (2d Cir.), *cert. denied*, 429 U.S. 980 (1976); *United States v. Turner*, 528 F.2d 143, 156 (9th Cir.), *cert. denied*, 423 U.S. 823 (1975); *United States v. Armocida*, 515 F.2d 29, 44 (3d Cir.), *cert. denied*, 423 U.S. 858 (1975); *United States v. Capra*, 501 F.2d 267, 276 (2d Cir. 1974), *cert. denied*, 420 U.S. 990 (1975); *United States v. Cirillo*, 499 F.2d 872, 881 (2d Cir. 1974); *United States v. Fino*, 478 F.2d 35, 38 (2d Cir. 1973); *United States v. Aloï*, 449 F. Supp. 698, 729 (E.D.N.Y. 1977); *United States v. Baynes*, 400 F. Supp. 285, 305 (E.D. Pa. 1975); *United States v. Falcone*, 364 F. Supp. 877, 886-87 (D.N.J. 1973); *United States v. Curreri*, 363 F. Supp. 430, 437 (D. Md. 1973); *Spease v. State*, 275 Md. 88, 95, 338 A.2d 284, 291 (1975); *People v. Floyd*, 41 N.Y.2d 245, 250, 360 N.E.2d 935, 940, 392 N.Y.S.2d 257, 262 (1976).

role or meaning of good faith in the minimization inquiry, however, never received careful analysis or articulation in the courts.<sup>93</sup>

On one level of analysis, judicial consideration of good faith appears to split the standard of review for minimization into two components—a subjective determination of whether the monitoring agents demonstrated good-faith efforts to minimize the interception of nonpertinent calls and an objective evaluation of whether the agents' efforts were reasonable in light of the facts and circumstances known to them at the time of the interception.<sup>94</sup> This two-part standard thus accords "good faith" an interstitial role in effectuating the protections of Title III and the fourth amendment.<sup>95</sup> A deeper level of analysis, however, suggests that the courts' consideration of good faith is anomalous—a government agent's good faith ordinarily is irrelevant to the constitutional validity of a search and seizure.<sup>96</sup> Moreover, neither minimiza-

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Five cases that explicitly used the term "good faith" do not fit the "standard or finding" categorization. Four of these courts made only passing reference to "good faith," noting only that courts are more willing to find a good-faith attempt to minimize when the authorizing judge requires and reviews regular reports from monitoring agents on the course of the electronic surveillance. *See* *United States v. Clerkley*, 556 F.2d 709, 718 (4th Cir. 1977), *cert. denied*, 436 U.S. 930 (1978); *United States v. Daly*, 535 F.2d 434, 442 (8th Cir. 1976); *United States v. Quintana*, 508 F.2d 867, 875 (7th Cir. 1975); *United States v. Bynum*, 485 F.2d 491, 501 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 903 (1974). In the fifth case, *United States v. Principie*, 531 F.2d 1132 (2d Cir. 1976), *cert. denied*, 430 U.S. 905 (1977), the court considered "good faith" relevant to correct application of the exclusionary rule rather than to the determination of a violation of the minimization requirement.

93. The National Wiretapping Commission, for example, reached only general conclusions. "In dealing with the minimization problem, reviewing courts appear to place much weight on the subjective intention of the officials in trying to effect proper minimization." Zuckerman & Lyons, *Strategies and Tactics in the Prosecution and Defense of Complex Wire-Interception Cases*, in COMMISSION STUDIES, NATIONAL COMMISSION FOR THE REVIEW OF FEDERAL AND STATE LAWS RELATING TO WIRETAPPING AND ELECTRONIC SURVEILLANCE 40 (1976). "Courts are exceedingly interested in the good faith (or lack of good faith) of the monitoring authorities in this area." *Id.* at 49.

94. *See* C. FISHMAN, *supra* note 67, at 205.

95. *Id.* at 230-32. *See also* *United States v. Scott*, 522 F.2d 1333, 1333-34 (D.C. Cir. 1975) (Robinson, J., dissenting from denial of rehearing en banc), *cert. denied*, 425 U.S. 917 (1976).

96. The distinction between subjective and objective factors in search and seizure law differs from that in tort law. In the latter, subjective considerations concern attributes of a specific individual that vary from those of the reasonable, prudent person. *See generally* W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 149-66 (4th ed. 1971). Rather than the actual facts and circumstances within the knowledge of the actor, tort law considers the facts and circumstances that, hypothetically, would have been within the knowledge of the reasonable, prudent person in the identical situation. *Id.* In search and seizure law, however, the facts and circumstances actually known to the specific government agent comprise the elements of objective reasonableness. *See generally* 1 W. LAFAVE, *supra* note 52, at 459-61. If these facts and circumstances would

tion<sup>97</sup> nor good faith seems susceptible to any well-determined or readily applicable definition; rather, each seems to require reference to a standard.<sup>98</sup> Whether those courts which explicitly referred to good faith did, in fact, adopt a dual standard incorporating considerations of both subjective and objective reasonableness deserves further examination.

Although some courts explicitly supplemented their minimization standard with the element of good faith, they nevertheless confined their analyses to facts and circumstances within the monitoring agents' knowledge during the surveillance period; in other words, objective factors.<sup>99</sup> Another court employed the same type of objective analysis

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allow a person of reasonable prudence to conclude that an offense has or is being committed—in the case of arrest—or that the particularized items are in the place detailed—in the case of search—the government agent may either obtain a warrant or, when exigent circumstances are present, act on those facts and circumstances without a warrant. With or without a warrant, the agent acts in an objectively reasonable manner. *See Terry v. Ohio*, 392 U.S. 1, 21-22 (1968); *Draper v. United States* 358 U.S. 307, 313 (1959).

Facts *A*, *B*, and *C* can be hypothesized as the minimum "quantity" of knowledge necessary and sufficient in any given situation to establish objective reasonableness in the law of search and seizure. A reasonable, prudent person in that situation might inevitably be aware of all three facts; yet, if a particular government agent in an identical situation possesses only facts *A* and *C*, his actions cannot be objectively reasonable. Neither the good faith of the government agent nor his subjective intent to act lawfully can, in terms of the hypothetical, substitute for the missing fact, *B*. *See, e.g., Beck v. Ohio*, 379 U.S. 89 (1964). Conversely, if the government agent possesses all three facts, then his actions are objectively reasonable and it is unnecessary to investigate the government agent's subjective intent or good faith. By setting a minimum "quantity" of knowledge in terms of facts and circumstances, the standard of objective reasonableness limits the ability of government agents to act lawfully on the basis of suspicion or hunch, no matter how honestly held. *See Delaware v. Prouse*, 99 S. Ct. 1391, 1396-97 (1979). Thus, reasonableness in search and seizure law is an objective standard that encompasses only facts and circumstances, not subjective intent or good faith. *Id. See Commonwealth v. Painten*, 389 U.S. 560, 561 (1967) (White, J., dissenting from dismissal of certiorari as improvidently granted).

97. *See* note 69 *supra* and accompanying text.

98. *See* note 96 *supra*.

99. *See United States v. Hinton*, 543 F.2d 1002, 1012 (2d Cir.), *cert. denied*, 429 U.S. 980 (1976); *United States v. Armocida*, 515 F.2d 29, 44 (3d Cir.), *cert. denied*, 423 U.S. 858 (1975); *United States v. Capra*, 501 F.2d 267, 276 (2d Cir. 1974), *cert. denied*, 420 U.S. 990 (1975); *United States v. Manfredi*, 488 F.2d 588, 600 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974); *United States v. Baynes*, 400 F. Supp. 285, 305 (E.D. Pa. 1975); *United States v. Falcone*, 364 F. Supp. 877, 886-88 (D.N.J. 1973); *Spease v. State*, 275 Md. 88, 95, 338 A.2d 284, 291 (1975); *People v. Floyd*, 41 N.Y.2d 245, 250, 360 N.E.2d 935, 940, 392 N.Y.S.2d 257, 262 (1976). *See also* notes 71-72 *supra* and accompanying text.

Although the court in *Rodriguez v. State*, 297 So.2d 15, 21 (Fla. 1974), used a minimization standard that incorporated "good faith," the issue in the case concerned the appropriate application of the exclusionary rule to the violation of the minimization requirement.

to conclude that the agents made good-faith efforts to minimize.<sup>100</sup> Each approach, however, actually failed to inquire into the subjective intent of the monitoring agents.<sup>101</sup> Moreover, none of these courts found that the minimization effort was unreasonable solely because of the absence of good faith;<sup>102</sup> in fact, all of these decisions held that the monitoring agents complied with the minimization requirement.<sup>103</sup> For these courts, a finding of good faith followed not from any independent assessment of the agents' intent to minimize, but solely from a finding that the agents made an objectively reasonable effort to comply with the minimization requirement.

Good faith seemed to be more important to the analysis of those courts that held that the interception of nonpertinent conversations during the course of the surveillance period does not vitiate the wiretap so long as a good-faith effort to minimize is apparent.<sup>104</sup> Yet none of

100. See *United States v. Turner*, 528 F.2d 143, 156 (9th Cir.), *cert. denied*, 423 U.S. 823 (1975).

101. Several courts, however, have noted that monitoring agents had been given some instructions on minimization or were aware of the minimization requirement in the authorization order. *United States v. Armocida*, 515 F.2d 29, 44 (3d Cir.), *cert. denied*, 423 U.S. 858 (1975); *United States v. Capra*, 501 F.2d 267, 276 (2d Cir. 1974), *cert. denied*, 420 U.S. 990 (1975); *United States v. Cirillo*, 499 F.2d 872, 881 (2d Cir. 1974); *United States v. Baynes*, 400 F. Supp. 285, 305 (E.D. Pa. 1975); *United States v. Falcone*, 364 F. Supp. 877, 886-88 (D.N.J. 1973); *People v. Floyd*, 41 N.Y.2d 245, 250, 360 N.E.2d 935, 940, 392 N.Y.S.2d 257, 262 (1975).

102. *But see Rodriguez v. State*, 297 So.2d 15, 21 (Fla. 1974). Agents monitored all calls in their entirety over two of the tapped telephones during the surveillance period. Although the court noted that the agents had terminated a tap on a third telephone over which no pertinent conversations were intercepted prior to the end of the surveillance period, it found that the agents made no effort whatsoever to minimize interceptions on the remaining two taps. In the sense that the absence of any attempt to minimize demonstrates a lack of good faith, it might be said that the court found a violation of the minimization requirement, at least in part, from the absence of subjective intent to minimize. The court's language supports this conclusion:

What is involved is a *procedure* toward which the statute is directed and requires reasonable *effort* to minimize interception of non-pertinent communications. The fact that non-pertinent calls were intercepted, or that hindsight shows a better means of meeting the requirement, is irrelevant so long as a good-faith effort was made to comply with the requirement.

*Id.* (emphasis in original).

103. See *United States v. Hinton*, 543 F.2d 1002, 1012 (2d Cir.), *cert. denied*, 429 U.S. 980 (1976); *United States v. Turner*, 528 F.2d 143, 156 (9th Cir.), *cert. denied*, 423 U.S. 823 (1975); *United States v. Armocida*, 515 F.2d 29, 44 (3d Cir.), *cert. denied*, 423 U.S. 858 (1975); *United States v. Capra*, 501 F.2d 267, 276 (2d Cir. 1974), *cert. denied*, 420 U.S. 990 (1975); *United States v. Manfredi*, 488 F.2d 588, 600 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974); *United States v. Baynes*, 400 F. Supp. 285, 305 (E.D. Pa. 1975); *United States v. Falcone*, 364 F. Supp. 877, 886-88 (D.N.J. 1973); *Spease v. State*, 275 Md. 88, 95, 338 A.2d 284, 291 (1975); *People v. Floyd*, 41 N.Y.2d 245, 250, 360 N.E.2d 935, 940, 392 N.Y.S.2d 257, 262 (1976).

104. *United States v. Hinton*, 543 F.2d 1002, 1012 (2d Cir.) ("[W]hile it may fairly be said that

these courts indicated—much less held—that a showing of a good faith is, in itself, sufficient to find compliance with the minimization requirement when an objective evaluation of the agents' conduct does not support this finding.<sup>105</sup> Consistent with the notion that good faith, per se, is insufficient to cure a constitutional or statutory violation,<sup>106</sup> objective reasonableness thus seems to be a condition precedent to the evaluation of monitoring agents' subjective good faith. No court, however, has determined that minimization efforts, otherwise objectively reasonable, were inadequate because monitoring agents failed to act in good faith.<sup>107</sup> Again, it appears that objective factors are dispositive and that

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the agents did not strictly adhere to the minimization instructions, it appears that a good faith attempt was made to limit intrusion into private intimacies.”), *cert. denied*, 429 U.S. 980 (1976); *United States v. Armocida*, 515 F.2d 29, 44 (3d Cir.) (“[W]e believe the monitoring agents exercised their discretion in a good faith effort to minimize, even though it now appears by hindsight that a number of intercepted calls could have been terminated at an earlier time.”), *cert. denied*, 423 U.S. 858 (1975); *United States v. Cirillo*, 499 F.2d 872, 880 n.7 (2d Cir. 1974) (“Even assuming arguendo that some of the conversations completely listened to were in fact nonpertinent, the surveillance would not necessarily have violated the minimization requirement of the statute, assuming a good faith effort had been made to achieve such minimization.”); *United States v. Falcone*, 364 F. Supp. 877, 886-87 (D.N.J. 1973) (“[W]here a good faith reasonable effort has been made to minimize the interceptions, the interception will be valid even though some calls of a non-pertinent nature were monitored.”); *Rodriguez v. State*, 297 So.2d 15, 21 (Fla. 1974) (“The fact that non-pertinent calls were intercepted, or that hindsight shows a better means of meeting the requirement, is irrelevant so long as a good-faith effort was made to comply with the requirement.”).

105. *Cf. United States v. Manfredi*, 488 F.2d 588 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974). This court used the term good faith to state the proper standard to determine compliance with the minimization requirement. *Id.* at 600. Yet, although the agents monitored and recorded all incoming and outgoing calls over the wiretapped telephones in their entirety, irrespective of the identity of the parties to the conversation, the court analyzed the asserted failure to minimize in terms of objective factors and, in fact, concluded that the government had established a prima facie case of compliance with the minimization requirement. *Id.* at 599-600.

106. *See* note 96 *supra*.

107. It appears that only eight courts have held that monitoring agents failed to comply with the minimization requirement. *See United States v. Principie*, 531 F.2d 1132, 1139-41 (2d Cir. 1976), *cert. denied*, 430 U.S. 905 (1977); *United States v. George*, 465 F.2d 772, 775 (6th Cir. 1972); *United States v. Sisca*, 361 F. Supp. 735, 745 (S.D.N.Y. 1973), *aff'd*, 503 F.2d 1337 (2d Cir.), *cert. denied*, 419 U.S. 1008 (1974); *United States v. King*, 335 F. Supp. 523, 543-44 (S.D. Cal. 1971), *rev'd on other grounds*, 478 F.2d 494 (9th Cir. 1973), *cert. denied*, 417 U.S. 920 (1974); *Rodriguez v. State*, 297 So.2d 15, 21 (Fla. 1974); *State v. Molinaro*, 117 N.J. Super. 276, 284, 284 A.2d 385, 394 (Essex County Ct. 1971); *People v. Solomon*, 75 Misc. 2d 847, 850-51, 348 N.Y.S.2d 673, 678 (Sup. Ct. 1973); *People v. Castania*, 73 Misc.2d 166, 172, 340 N.Y.S.2d 829, 835-36 (Sup. Ct. 1973).

Only in *United States v. King* did the court not find a blatant violation of the minimization requirement when the monitoring agents made no attempt to minimize. *Id.* Further, it seems doubtful that the strict approach taken by *King* remains a good law. *See, e.g., United States v. Turner*, 528 F.2d 143, 156 (9th Cir.), *cert. denied*, 423 U.S. 823 (1975); *United States v. Manfredi*, 488 F.2d 588, 600 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974); *United States v. Bynum*, 485

a finding of objective reasonableness implicitly presumes a good-faith effort.

Those courts that utilized the term good faith, but ruled on the minimization issue without an evidentiary hearing<sup>108</sup> or in reliance on statistics and affidavits submitted by the government on the degree of minimization practiced by the monitoring agents,<sup>109</sup> further obscure the actual role of good faith in assessing compliance with the minimization requirement. Because it is unlikely that the government submitted evidence demonstrating the absence of a good-faith effort to minimize, or that a defendant could prove the absence of good faith without an evidentiary hearing, these courts' use of the term good faith is nebulous at best.<sup>110</sup> Courts that shifted the burden of proof to the defendant upon the government's *prima facie* showing of reasonable efforts to minimize also make it difficult to discern the true function of good faith in the minimization inquiry.<sup>111</sup> It is unrealistic to expect defendants to overcome their burden of proof, especially when courts require defendants to show a more effective method of minimization than the monitoring agents employed.<sup>112</sup> In no case in which the burden of proof shifted

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F.2d 491 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 903 (1974). Nevertheless, the court in *King* based its holding on the inadequacy of monitoring agents' efforts to minimize rather than on the absence of good faith. *United States v. King*, 335 F. Supp. 523, 543-44 (S.D. Cal. 1971), *rev'd on other grounds*, 478 F.2d 494 (9th Cir. 1973), *cert. denied*, 417 U.S. 920 (1974).

*See also* note 102 *supra*.

108. *See United States v. Santora*, 583 F.2d 453, 456 (9th Cir. 1978); *United States v. Cirillo*, 499 F.2d 872, 881 (2d Cir. 1974); *United States v. Aloï*, 449 F. Supp. 698, 729 (E.D.N.Y. 1977).

109. *See United States v. Santora*, 583 F.2d 453, 456 (9th Cir. 1978); *United States v. Turner*, 528 F.2d 143, 156 (9th Cir.), *cert. denied*, 423 U.S. 823 (1975); *United States v. Cirillo*, 499 F.2d 872, 881 (2d Cir. 1974); *United States v. Fino*, 478 F.2d 35, 38 (2d Cir. 1973); *United States v. Aloï*, 449 F. Supp. 698, 729 (E.D.N.Y. 1977); *United States v. Curreri*, 363 F. Supp. 430, 437 (D. Md. 1973).

110. An analogous situation exists when defendants attempt to dispute the veracity of affidavits submitted by the government in support of search and arrest warrants. Unless an evidentiary hearing is held, it generally is impossible for defendants to discover misstatements in an affidavit. Without evidentiary hearings on issues other than the veracity of the warrant affidavit, defendants have no realistic opportunity to expose the misstatements of affiants and informants. *See, e.g., United States v. Morris*, 477 F.2d 657, 660 (5th Cir. 1973); *United States v. Harwood*, 470 F.2d 322, 324 n.1 (10th Cir. 1972); *United States v. Upshaw*, 448 F.2d 1218 (5th Cir. 1971).

111. *See United States v. Santora*, 583 F.2d 453, 456 (9th Cir. 1978); *United States v. Turner*, 528 F.2d 143, 156 (9th Cir.), *cert. denied*, 423 U.S. 823 (1975); *United States v. Armocida*, 515 F.2d 29, 44 (3d Cir.), *cert. denied*, 423 U.S. 823 (1975); *United States v. Quintana*, 508 F.2d 867, 875-76 (7th Cir. 1975); *United States v. Cirillo*, 499 F.2d 872, 881 (2d Cir. 1974); *United States v. Manfredi*, 488 F.2d 588, 600 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974); *United States v. Aloï*, 449 F. Supp. 698, 729 (E.D.N.Y. 1977).

112. *See United States v. Armocida*, 515 F.2d 29, 44 (3d Cir.), *cert. denied*, 423 U.S. 823

did a defendant prevail on the minimization issue.<sup>113</sup>

All in all, the plain meaning of the term good faith is the strongest argument for the notion that some courts tested compliance with the minimization requirement against a standard of reasonableness that incorporates both subjective and objective components.<sup>114</sup> Examination of the reasoning in these cases, however, diminishes the force of the argument.<sup>115</sup> Certainly, no serious argument could be made that good faith is totally irrelevant to fourth amendment protections,<sup>116</sup> but good faith or subjective intent does not emerge from the case law as an integral, essential element of the minimization requirement. To the extent that the facts and circumstances peculiar to the case demonstrate reasonable minimization, good faith is implicit in the standard for measuring compliance with the requirement. The courts' primary focus, however, is usually on objective reasonableness as established by facts and circumstances within the knowledge of the monitoring agents during the surveillance period.<sup>117</sup>

### III. *UNITED STATES V. SCOTT*: THE DECISION AND ITS REASONING

Upon its initial consideration of the minimization issue, the district court in *United States v. Scott*<sup>118</sup> granted petitioners' pretrial motion to suppress all conversations intercepted under the wiretap order on the ground that the agents' interception of all calls, only forty percent of which the agents believed to be narcotics-related, established a failure to minimize.<sup>119</sup> The court of appeals reversed, holding that the district court should have engaged in a particularized assessment of the agents' attempts to minimize in light of the purpose of the wiretap and the circumstances surrounding its execution rather than have based its determination on a statistical comparison of the number of narcotics-re-

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(1975); *United States v. Quintana*, 508 F.2d 867, 875-76 (7th Cir. 1975); *United States v. Manfredi*, 488 F.2d 588, 600 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974).

113. See cases cited note 111 *supra*.

114. See notes 91-92 *supra* and accompanying text.

115. See notes 99-113 *supra* and accompanying text.

116. Cf. *Franks v. Delaware*, 438 U.S. 154, 164 (1978) ("In deciding today that, in certain circumstances, a challenge to a warrant's veracity must be permitted, we derive our ground from the language of Warrant Clause itself, which surely takes the affiant's good faith as its premise . . .").

117. See notes 71-72 *supra* and accompanying text.

118. 331 F. Supp. 233 (D.D.C. 1971), *rev'd*, 504 F.2d 194 (D.C. Cir. 1974).

119. *Id.* at 247-48.

lated calls with the total number of calls intercepted.<sup>120</sup> The appellate court directed the district court to reevaluate the motion to suppress in light of *United States v. James*<sup>121</sup> and to accept into evidence the government's call analysis.<sup>122</sup> On remand, the district court rejected the government's call analysis as "an after-the-fact non-validated presentation of counsel"<sup>123</sup> and again ordered suppression of the intercepted conversations.<sup>124</sup> The district court found that the monitoring agents made no attempt to comply with the minimization requirement<sup>125</sup> and held the agents' "admitted knowing and purposeful failure" to attempt even "lip service" compliance rendered the interceptions unreasonable per se.<sup>126</sup> The court of appeals reversed for a second time, again finding that the district court applied an improper standard to measure minimization:

The presence or absence of a good faith attempt to minimize on the part of the agents is undoubtedly one factor to be considered in assessing whether the minimization requirement has been satisfied, but the decision on the suppression motion must ultimately be based on the reasonableness of the actual interceptions and not on whether the agents subjectively intended to minimize their interceptions.<sup>127</sup>

Applying this standard to the facts, the court of appeals then held that the interception and monitoring of all calls was not unreasonable under

120. 504 F.2d 194, 198-99 (D.C. Cir. 1974).

121. 494 F.2d 1007, 1018 (D.C. Cir.), *cert. denied*, 419 U.S. 1020 (1974). The court of appeals in *Scott* had delayed decision on the district court's suppression order pending resolution of *James*. 504 F.2d at 195.

122. *Id.* at 198-99.

123. Joint Appendix to Brief of Petitioners at 38, *United States v. Scott*, 436 U.S. 128 (1978). See also *United States v. Scott*, 516 F.2d 751, 754 (D.C. Cir. 1975) (quoting from the district court's unpublished opinion), *cert. denied*, 425 U.S. 917 (1976).

124. *United States v. Scott*, No. 1088-70 (D.D.C. Nov. 12, 1974) (unpublished opinion), *rev'd*, 516 F.2d 751 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 917 (1976). This unpublished opinion is printed in full in the Joint Appendix to Brief of Petitioners and Brief of the United States at 35-39, *United States v. Scott*, 436 U.S. 128 (1978).

125. Joint Appendix to Brief of Petitioners at 36, *United States v. Scott*, 436 U.S. 128 (1978) ("[M]onitoring agents made no attempt to comply with the minimization order of the Court but listened to and recorded all calls over the Jenkins telephone. They showed no regard for the right of privacy and did nothing to avoid unnecessary intrusion.") (Finding of Fact No. 4). See also *United States v. Scott*, 516 F.2d 751, 756 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 917 (1976).

126. Joint Appendix to Brief of Petitioners at 39, *United States v. Scott*, 436 U.S. 128 (1978) (Conclusion of Law No. 4). See also *United States v. Scott*, 516 F.2d 751, 756 (D.C. Cir. 1975), *cert. denied*, 426 U.S. 917 (1976). The district court stated that the monitoring agents' conduct would have been held "unreasonable even if every intercepted call were narcotic related." *Id.*

127. *United States v. Scott*, 516 F.2d 751, 756 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 917 (1976).

the circumstances in this case.<sup>128</sup>

Before the Supreme Court, petitioners contended that both the fourth amendment and section 2518(5) require courts to employ a two-part analysis to determine compliance with the minimization requirement.<sup>129</sup> To accept into evidence conversations seized under a Title III wiretap order, a court must first establish that the monitoring agents made a good-faith effort to minimize the interception of nonpertinent conversations.<sup>130</sup> Only then should the court evaluate the reasonableness of the agents' minimization efforts in light of the particular facts and circumstances of the case.<sup>131</sup> The Government maintained that the monitoring agents' subjective intent does not render a wiretap either unconstitutional under the fourth amendment or unlawful under Title III.<sup>132</sup> Only after a court determines on the basis of an objective assess-

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128. 516 F.2d at 755-56, 760. The court of appeals arrived at this holding in two ways. First, it accepted the government's call analysis as an accurate characterization of the interceptions and concluded that the agents had intercepted no conversations that they clearly would not have intercepted had they made reasonable attempts at minimization. *Id.* at 758. Second, the court applied the *James* test to the facts and determined that total interception was not unreasonable under the circumstances of the case. *Id.* at 758-60.

The court of appeals did not rule that the district court's fourth finding of fact, *see* note 125 *supra*, was clear error. Indeed, it is arguable that the court of appeals accepted this finding, but read it only to mean that all calls had been intercepted and monitored in their entirety. Support for this argument can be found in the appellate court's less than careful use of the term minimize. *See* note 68 *supra*. It is clear, looking at the decision as a whole, that the court of appeals regarded minimization as a procedure to be developed and applied by the monitoring agents during execution of the wiretap. *See* *United States v. Scott*, 516 F.2d 751, 754-55, 758-60 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 917 (1976). Nevertheless, the court of appeals also used the term "minimize" as a synonym for "terminate." "To hold that the monitoring agents must make a determination whether to minimize in the course of each individual conversation would be an open invitation to criminals to escape detection." *Id.* at 754. It seems reasonable, therefore, to read the court's statement that, "Throughout these proceedings the Government has conceded that its agents did not minimize the interception of any conversations," *id.* at 755, to mean only that the government conceded that all calls were intercepted in their entirety. The district court also was not rigorous in its use of the term minimize. *See* Brief of the United States at 37 n.25 ("The [district] court consistently used the term 'minimization' as a synonym for non-interception . . . , although the concepts are in fact quite different."). It is thus conceivable that the court of appeals accepted this finding of fact in the narrowest sense factually possible, but rejected the conclusion that total interception violates the minimization requirement as a matter of law.

129. *United States v. Scott*, 436 U.S. 128, 135, 138 (1978).

130. *Id.* at 135.

131. *Id.*

132. *Id.* at 136. The Government also argued that even if the Court found that the agents had violated the minimization requirement, Title III mandates suppression of only those conversations unlawfully intercepted rather than suppression of all conversations intercepted during the surveillance period. *Id.* at 135-36 n.10. In addition, the Government contended that petitioner Scott did not have standing to raise a minimization challenge to those conversations to which he was not a

ment of the agents' conduct that a constitutional or statutory violation has occurred does the agents' subjective intent become relevant; namely, when the court fashions a remedy appropriate to the violation in light of the deterrent purposes of the fourth amendment.<sup>133</sup>

Persuaded by the Government's position, the Court first rejected petitioner's argument that the agents' subjective intent alone could make the execution of a wiretap unconstitutional.<sup>134</sup> The majority<sup>135</sup> held that any search and seizure, including electronic surveillance, complies with the fourth amendment so long as the facts and circumstances at the time of the action satisfy the standard of objective reasonableness.<sup>136</sup> The Court then summarily dismissed petitioners' second argument that the agents' admitted failure to make good-faith efforts at minimization establishes a violation Title III.<sup>137</sup> Quoting from Title III's legislative history, the majority concluded that Congress did not intend the statute to press beyond general search and seizure doc-

party. *Id.* Finally, the Government maintained that the record did not support the district court's finding that the agents subjectively intended to violate either Title III or the fourth amendment. *Id.* at 136-37 n.11. Because of the manner in which the Court disposed of the case, it did not reach these issues. *Id.* at 136 nn.10 & 11.

133. *Id.* at 135-36.

134. *Id.* at 137-38.

135. Justice Brennan dissented and filed a separate opinion in which Justice Marshall joined. *Id.* at 143 (Brennan, J., dissenting).

136. *Id.* at 137-38. Although the Court conceded that it had not explicitly addressed in prior decisions the relevance of a government agent's subjective intent to the lawfulness of a search and seizure, it failed to devote much analysis to the issue. The majority rested its conclusion on two cases, *Terry v. Ohio*, 392 U.S. 1 (1968), and *United States v. Robinson*, 414 U.S. 218 (1973). *Terry*, which established the stop-and-frisk encounter between police and citizens as a search and seizure within the purview of the fourth amendment, contains the following language quoted with approval by the Court in *Scott*: "[I]t is imperative that the facts be judged against an objective standard; would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate." 436 U.S. at 137 (quoting *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968)). In *Robinson* defendant claimed that the police officer who made a search incident to defendant's lawful arrest did not actually believe that defendant was armed; thus, the officer's "motivation for the search did not coincide with the legal justification for the search-incident-to-arrest exception." *Id.* at 138 (citing *United States v. Robinson*, 414 U.S. 218, 236 (1973)). The *Robinson* Court rejected this attempt to import subjective considerations into the analysis of the legality of the search. 414 U.S. at 236.

The dissent in *Scott* was unimpressed with the majority's analysis on this issue. "None of the cases discussed [in the majority's opinion] deciding the reasonableness under the Fourth Amendment of searches and seizures deals with the discrete problems of wire interceptions or addresses the construction of the minimization requirement of § 2518(5)." 436 U.S. at 146 (Brennan, J., dissenting). See text accompanying notes 164-68 *infra*.

137. 436 U.S. at 138-39.

138. *Id.* at 139.

trine.<sup>138</sup> More importantly, the Court construed Congress' use of the verb "conducted" in section 2518(5) to mean that only monitoring agents' actions—not motives—are relevant to determining compliance with the minimization requirement.<sup>139</sup>

In its own evaluation of the interceptions in *Scott*, the Court disregarded all wrong numbers, calls of less than ninety-seconds duration, and "ambiguous" calls,<sup>140</sup> because they did not enable the monitoring agents to develop a pattern of nonpertinent calls.<sup>141</sup> Along with the

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139. The majority asserted that the legislative history of Title III dispels "any lingering doubt" over the role of good faith or subjective intent in the minimization inquiry. *Id.* To sustain its assertion, however, the majority erroneously referred to the legislative history of § 2515, which prohibits the use of evidence derived from electronic surveillance in violation of Title III, rather than to that of § 2518(5), which contains the minimization requirement. As discussed earlier, the legislative history of Title III provides no clear answer to the question of Congress' intent concerning the minimization provision. See notes 39-65 *supra* and accompanying text.

140. 436 U.S. at 139. Totally at odds with this construction of the statute, Justice Brennan accused the majority of reducing the minimization requirement to a mere "precatory suggestion." *Id.* at 145-46 (Brennan, J., dissenting). See notes 156-58 *infra* and accompanying text. Statutory interpretation, in fact, is at the crux of the dissent's differences with the majority. To the dissenters, minimization is a "congressionally imposed duty" that supplements to the protections of the fourth amendment. 436 U.S. at 145-46 (Brennan, J., dissenting). See notes 37-62 *supra* and accompanying text. Thus, the basic premise of Title III, the "unambiguous congressional purpose" as revealed in the legislative history and the language of the minimization requirement—not "general Fourth Amendment principles"—all provide the applicable precedent for establishing the test for compliance with § 2518(5). 436 U.S. at 145-46 (Brennan, J., dissenting). Because a good-faith effort to minimize is congressionally rather than constitutionally mandated, the dissenters would depart from conventional search and seizure doctrine, see note 90 *supra*, to argue that good faith is an additional requirement rather than a substitute for objective reasonableness analysis. Justice Brennan, however, failed to elaborate the manner in which good faith would afford protection to reasonable expectations of privacy beyond that ensured by objective-reasonableness. In the context of searches incident to arrests on administrative warrants, Justice Brennan remarked on the judicial difficulty in coping with good faith. "The remedy is not to invite fruitless litigation into the purity of official motives, or the specific direction of official purposes. One may always assume that the officers are zealous to perform their duty." *Abel v. United States*, 362 U.S. 217, 254 (1960) (Brennan, J., dissenting). If by "good-faith effort to minimize" Justice Brennan meant only that the government must demonstrate procedures and steps taken to minimize, it is unnecessary to resort to subjective investigations of good faith. See notes 153-74 *infra* and accompanying text.

141. 436 U.S. at 141-42. "A large number [of calls] were ambiguous in nature, making characterization virtually impossible until the completion of these calls. And some of the nonpertinent conversations were one-time conversations." *Id.* at 142. Without endorsing the categorization employed by lower courts, see notes 71-72 *supra* and accompanying text, the majority posited several factors that courts could consider in evaluating monitoring agents' attempts to minimize: (1) the location and use of the subject telephone; (2) the nature, scope, and participants of the criminal enterprise under investigation; and (3) the likelihood that a pattern of nonpertinent calls can be developed by monitoring agents. 436 U.S. at 140-41. These factors are similar, if not identical, to those employed by lower courts. See notes 71-88 *supra* and accompanying text.

calls originally characterized by monitoring agents as narcotics-related, the Court thus reduced the number of potentially unreasonable interceptions to seven conversations between one of the petitioners and her mother.<sup>142</sup> The Court, however, also found these interceptions reasonable under the circumstances.<sup>143</sup>

Notably absent from the majority's reasoning is any consideration of the district court's fourth finding of fact: "[M]onitoring agents made no attempt to comply with the minimization order of the Court but listened to and recorded all calls over the Jenkins telephone. They showed no regard for the right of privacy and did nothing to avoid unnecessary intrusion."<sup>144</sup> The omission is surprising because this finding was crucial to petitioners' argument.<sup>145</sup> In essence, petitioners contended that it would be idle for a court to consider the reasonableness of minimization until it first determines that the monitoring agents, in fact, made at least some attempts to minimize during the course of the wiretap.<sup>146</sup> Although a court might determine in retrospect that the monitoring agents reasonably could have intercepted all calls in their entirety, it would be a nonsequitur to conclude from postinterception analysis that the monitoring agents did make reasonable efforts to minimize; the agents could have expended no efforts at all.<sup>147</sup> Petitioners thus concluded that the lack of any effort to minimize never can be reasonable—even if every intercepted call turned out to be relevant to the authorized purpose of the wiretap<sup>148</sup>—and urged acceptance of the full and literal meaning of the district court's finding that the absence of any effort to minimize is dispositive of the issue of whether section 2518(5) has been violated.<sup>149</sup>

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142. 436 U.S. at 142.

143. *Id.* at 142-43. The Court found that four of the seven calls were intercepted at the very beginning of the wiretap. Not only were these calls of relatively short duration, but two of the four calls, as well as the three later interceptions, indicated that the mother had some knowledge of the conspiracy. *Id.*

144. Joint Appendix to Brief of Petitioners at 36, *United States v. Scott*, 436 U.S. 128 (1978). *See also* 436 U.S. at 144.

145. *See* Brief of Petitioners at 25, 27, 29-33; Reply Brief of Petitioners at 1-7.

146. 436 U.S. at 135. *See* Reply Brief of Petitioners at 1-7.

147. The Government made the same argument to show that the interception of all calls in their entirety does not establish that the agents made no attempt to minimize. Brief of the United States at 36.

148. Reply Brief of Petitioners at 3-7. *See also* Brief of Amicus Curiae at 32-38.

149. Reply Brief of Petitioners at 1-7. *See also* Brief of Amicus Curiae at 38-42.

Justice Brennan in dissent also relied heavily on the district court's findings, which, he asserted,

The uncertain status of the district court's fourth finding of fact makes it difficult to conclusively analyze the majority's reasoning. Like the court of appeals, the majority might have regarded this finding as a mixed conclusion of fact and law.<sup>150</sup> The Court apparently accepted only one factual element from the district court's findings—that the monitoring agents in *Scott* had intercepted all calls in their entirety throughout the surveillance period.<sup>151</sup> Perhaps it is this construction of the findings that caused—or allowed—the majority to misconstrue petitioner's argument and focus on whether a monitoring agent's subjective intent is relevant to assessing compliance with the minimization requirement.

Although petitioners were less than careful in their use of language,<sup>152</sup> the essential thrust of their argument was before the Court: "Petitioners do not allege the agents were predisposed or intended to violate the statute, but rather that no effort was made to comply with its minimization requirements."<sup>153</sup> Regardless of whether the correct standard for evaluating minimization is solely objective or includes subjective considerations, the total absence of efforts to minimize does

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"were not challenged here or in the Court of Appeals." 436 U.S. at 144. *But see* note 132 *supra*. *See also* notes 156-58 *infra* and accompanying text.

Lower courts also read *Scott* to mean that the monitoring agents made no attempt to minimize. *See, e.g.*, *United States v. Tortorello*, 480 F.2d 764, 784 (2d Cir.), *cert. denied*, 414 U.S. 866 (1973); *United States v. Leta*, 332 F. Supp. 1357, 1360 n.4 (M.D. Pa. 1971).

150. *See* note 132 *supra*.

151. *See* notes 155-58 *infra* and accompanying text.

The majority's only reference to the monitoring agents' efforts to minimize is, at best, cryptic: [Petitioners] urge that it is only after an assessment is made of the agents' good-faith efforts, and presumably a determination that the agents did make such efforts, that one turns to the question of whether those efforts were reasonable under the circumstances. . . . Thus, argue petitioners, Agent Ceuper's testimony, which is basically a concession that the Government made no efforts which resulted in the noninterception of any call, is dispositive of the matter.

436 U.S. at 135 (citation omitted). *See also id.* at 133 n.7. The Government contended in its brief that Agent Cooper's testimony, when read in the context of the entire transcript, meant only that all calls were intercepted rather than that no efforts had been made to minimize. Brief of the United States at 35-38. In response, petitioners asserted that the district court found the monitoring agents' failure "to be more than just a matter of recording all calls." Reply Brief of Petitioners at 1 & n.1.

152. *See* Brief of Petitioners at 23 (the intentions of the monitoring agents must be considered in testing compliance with § 2518(5)); Reply Brief of Petitioners at 3 n.4 ("[A] correct analysis requires subjective inquiry into what the agents reasonably believed and how they acted on their reasonable beliefs."). Petitioners also did not carefully respect the distinction between search and seizure law and tort law on the meaning of "subjective." *Id.*

153. Reply Brief of Petitioners at 6.

not permit the conclusion that the agents "conducted [the wiretap] in such a way as to minimize the interception of communications not otherwise subject to interception."<sup>154</sup> Petitioners' unfortunate choice of language, however, focused the majority's attention on a red herring. Use of the term good faith diverted the majority's attention away from the real issue—whether the absence of any effort to minimize necessarily violates the minimization provision or the fourth amendment—to the question of whether a monitoring agent's subjective intent or good faith is relevant to the determination. As the majority itself stated, the word "conducted" refers to the agents' actions, not motives.<sup>155</sup>

If, indeed, the Court accepted the district court's finding that the monitoring agents in *Scott* made no effort to comply with the minimization order, it has created a loophole in the statute; a reviewing court could determine that the interception of all calls in their entirety was reasonable, even though the monitoring agents conducted the wiretap with no effort whatsoever to minimize.<sup>156</sup> The majority, however, indicated that total interception, even at the outset of the surveillance period, would be reasonable only in some circumstances.<sup>157</sup> Further, the elimination of subjective considerations from the standard of review for minimization does not compel the conclusion that monitoring agents need make no efforts to minimize. Minimization is an action, not an intention. A court, therefore, need not depart from a standard of objective reasonableness to find that monitoring agents did act to minimize. That *Scott* can be read to cast doubt on the necessity for courts to make a finding of minimization before accepting into evidence intercepted conversations stems largely from the majority's fail-

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154. 18 U.S.C. § 2518(5) (1976).

155. 436 U.S. at 139.

156. Justice Brennan, in dissent, read the majority opinion as creating this loophole. In his view, the majority would permit a "*post hoc* reconstruction offered by the Government of what would have been reasonable assumptions on the part of the agents had they attempted to comply with the statute" to establish the reasonableness of the agents' actions regardless of whether they at all attempted to minimize. 436 U.S. at 145 (Brennan, J., dissenting).

See Brief of Petitioners at 19-29; Reply Brief of Petitioners at 1-7; 53 TUL. L. REV. 264, 270-71 (1978).

157. 436 U.S. at 141.

During the early stages of surveillance the agents *may be forced* to intercept all calls to establish categories of nonpertinent calls which will not be intercepted thereafter. Interception of those same types of calls might be unreasonable later on, however, once the nonpertinent categories have been established . . . .

*Id.* (emphasis added).

ure to address explicitly the district court's fourth finding of fact.<sup>158</sup>

Nevertheless, the Court's failure to address adequately this finding gives rise to another troublesome concern about the majority's opinion. The objective reasonableness standard in fourth amendment doctrine operates, in part, to guide law enforcement officials in the execution of searches and seizures. Because the lawfulness of a search or seizure is measured in terms of facts and circumstances, the objective standard outlines the type of situation in which an agent may act lawfully.<sup>159</sup> Thus in *Terry v. Ohio*,<sup>160</sup> the Court not only articulated the standard of review to be employed by courts in evaluating the legality of a stop and frisk, but also informed police officers that they must have some combination of facts and circumstances rising to the level of reasonable, articulable suspicion before they may legitimately conduct a stop and frisk.<sup>161</sup> Although the Court obviously could not provide rigid, universally applicable rules, its articulation of the objective standard does act to guide and limit the officer in the field and thus performs an important prophylactic function.<sup>162</sup> The covert nature of electronic surveillance and the cumulative discretion exercised by monitoring agents in its execution magnify the need for the type of general ground rules that a standard of objective reasonableness can provide.<sup>163</sup> In *Scott*, how-

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158. Because Justice Brennan in dissent clearly regarded the district court's findings as unchallenged, 436 U.S. at 144, it is difficult to understand why the majority did not use the opportunity to respond to this point. In addition, petitioners conceded that the court of appeals had overturned the district court's findings, but argued that the court of appeals erred in this regard absent a finding that the district court was clearly erroneous. Brief of Petitioners at 27.

159. The Court recently reaffirmed the illegality of seizures made by government agents who lack an objectively reasonable basis of facts and circumstances to conduct the search. See *Brown v. Texas*, 99 S. Ct. 2637 (1979); *Delaware v. Prouse*, 99 S. Ct. 1391 (1979).

160. 392 U.S. 1 (1968).

161. *Id.* See *Delaware v. Prouse*, 99 S. Ct. 1391 (1979).

162. The deterrent purpose of the exclusionary rule, the general remedy for fourth amendment and Title III violations, also performs this prophylactic function. See *United States v. Janis*, 428 U.S. 433, 446 (1976); *Stone v. Powell*, 428 U.S. 465, 485-86 (1976). See generally 1 W. LAFAVE, *supra* note 52, at 17-20.

163. In addition, the need for prophylactic guidelines in electronic surveillance exists because "the cases show a strong inclination [on the part of the courts] to find pertinent any conversation that has any conceivable connection to the investigation, no matter how remote." Comment, *Post-Authorization Problems in the Use of Wiretaps: Minimization, Amendment, Sealing, and Inventories*, 61 CORNELL L. REV. 92, 108-09 (1975). As summarized for the National Wiretapping Commission:

Minimization arguments have not met with great success. Courts have generally gone far to accommodate the perspective of the monitoring officer during the tap and the reasonableness of the perceived need to overhear communications in much the same way that courts have given great weight to the claimed need of law enforcement authorities to

ever, the Court failed to avail itself of the opportunity to utilize the prophylactic aspect of the objective reasonableness standard.<sup>164</sup> The Court, by characterizing the issue in *Scott* as the role of good faith in the minimization standard, left unclear whether monitoring agents must manifest some effort at minimization even if the interception of all calls in their entirety is "reasonable" under the circumstances, however defined.

Had the majority examined the differences between conventional search and seizure and electronic surveillance,<sup>165</sup> the importance of clarifying the requirements of section 2518(5) would have been more apparent. In either form, a government officer may inadvertently or improperly seize items not specified in the warrant, but in the conventional search, proper particularization of the items to be seized<sup>166</sup> and the tangible, recognizable nature of those items reduces both the margin for error and the officer's discretion. The execution of a wiretap order is much less certain. Nonpertinent conversations inevitably will be intercepted,<sup>167</sup> and plainly, particularization of the type of conversation to be seized through a wiretap is far more difficult than particularization of tangible items to be seized during a conventional search. Recognition of nonpertinent conversations during the course of a wiretap makes the task of seizing only those items named in the warrant even more difficult.<sup>168</sup> Moreover, execution of a warrant is, in a sense, only a "single" intrusion into a person's reasonable expectation of privacy, but the execution of a wiretap entails an invasion of privacy each time a conversation is intercepted. Nor can an improperly seized con-

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resort to wire interception as opposed to normal investigative techniques in the first place.

Zuckerman & Lyons, *Strategy and Tactics in the Prosecution and Defense of Complex Wire-Interception Cases*, in COMMISSION STUDIES, NATIONAL COMMISSION FOR THE REVIEW OF FEDERAL AND STATE LAWS RELATING TO WIRETAPPING AND ELECTRONIC SURVEILLANCE 49 (1976).

The danger posed by this phenomenon, and thus the particular need for prophylactic rules in the use of electronic surveillance, is described by Professor Amsterdam in his discussion of police discretion under the fourth amendment:

What it means in practice is that appellate courts defer to trial courts and trial courts defer to the police . . . . If there are no fairly clear rules telling the policeman what he may and may not do, courts are seldom going to say that what he did was unreasonable.

Amsterdam, *Perspectives On The Fourth Amendment*, 58 MINN. L. REV. 349, 394 (1974).

164. See notes 156-58 *supra* and accompanying text.

165. See note 67 *supra* and accompanying text.

166. See text accompanying notes 48-50 *supra*.

167. See 70 *supra* and accompanying text.

168. *Id.*

versation be restored to the exclusive domain of its participants as can an improperly seized tangible item be returned to its owner.<sup>169</sup>

These differences enhance the need in electronic surveillance for prophylactic rules to perform the dual function of guiding the conduct of monitoring agents and limiting the intrusion into reasonable expectations of privacy. Such rules would be entirely consistent with the purpose of Title III.<sup>170</sup> Had the Court responded to petitioners' argument that section 2518(5) requires the demonstration of some effort to minimize prior to an evaluation of the reasonableness of the interceptions, prophylactic standards might have emerged.<sup>171</sup> Instead, the majority contented itself with disposing of the specter of "good faith."

Unquestionably, the Court correctly rejected any attempt to introduce subjective considerations into the analysis of minimization. Given the multiplicity of occasions in which monitoring agents must exercise discretion and the typical need for several monitoring agents to execute a wiretap, judicial inquiry into subjective intent could lead to a hopeless tangle.<sup>172</sup> The *Scott* Court, however, had only to look outside fourth amendment doctrine to its own imposition of prophylactic guidelines in *Miranda v. Arizona*<sup>173</sup> to demonstrate the irrelevance of

169. As stated by one court, "A conversation once seized can never truly be given back as can a physical object. The right of privacy protected by the Fourth Amendment has been more invaded where a conversation which can never be returned has been seized." *United States v. Focarile*, 340 F. Supp. 1033, 1047 (D. Md.), *aff'd sub nom. United States v. Giordano*, 469 F.2d 522 (4th Cir. 1972), *aff'd*, 416 U.S. 505 (1974).

170. "Title III has as its dual purpose (1) protecting the privacy of wire and oral communications, and (2) delineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized." S. REP. NO. 1097, 90th Cong., 2d Sess. 66 (1968), *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2153.

171. C. FISHMAN, *supra* note 67, at 232-40, proposes a set of instructions that detail procedures by which monitoring agents should conduct wiretaps. Although the Court need not have promulgated such detailed guidelines, Fishman demonstrates that workable rules can be devised without unduly hampering law enforcement.

172. *See Massachusetts v. Painten*, 389 U.S. 560, 565 (1968) (White, J., dissenting from dismissal of certiorari as improvidently granted):

We might wish that policemen would not act with impure plots in mind, but I do not believe that wish a sufficient basis for excluding, in the supposed service of the Fourth Amendment, probative evidence obtained by actions—if not thoughts—entirely in accord with the Fourth Amendment and all other constitutional requirements. In addition, sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources.

*Id.* *See also* Brief of the United States at 30, *United States v. Scott*, 436 U.S. 128 (1978).

173. 384 U.S. 436 (1966). To protect fifth amendment rights against self-incrimination and sixth amendment rights to counsel, the Court established a set of prophylactic warnings to be given all persons prior to custodial interrogation. *Id.* at 467-79.

subjective intent. Because inquiry into the subjective intent or good faith of police officers is not necessary to establish a violation of a person's *Miranda* rights,<sup>174</sup> the Court could have announced prophylactic guidelines for the conduct of minimization without compromising its insistence on a standard of objective reasonableness.<sup>175</sup>

#### IV. CONCLUSION: MINIMIZATION POST-*SCOTT*

Two conclusions clearly emerge from *Scott*: first, the standard of reasonableness by which to measure compliance with section 2518(5) incorporates only the facts and circumstances known to monitoring agents at the time of the surveillance, not the agents' subjective intent or good faith;<sup>176</sup> second, the objective factor analysis employed by the lower courts prior to *Scott* is the correct approach to determining whether monitoring agents have complied with the minimization requirement.<sup>177</sup>

Unfortunately, a troubling uncertainty also emerges. The *Scott* Court's failure to address explicitly the district court's findings of fact leaves open the possibility that courts will find reasonable the interception of all calls in cases in which monitoring agents utterly fail to attempt minimization.<sup>178</sup> That the lower court decisions in *Scott* have been read to mean that the monitoring agents made no attempts to minimize<sup>179</sup> enhances the likelihood that this is how the Court's opinion will be interpreted.

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174. The *Miranda* Court did not absolutely require police officers to use the Court's precise language in extending warnings, but did require the prosecution to demonstrate that the warnings given were at least as effective as those promulgated in *Miranda*. *Id.* at 467. Thus, what controls the issue of a *Miranda* rights violation is the extension of warnings that conform to the letter and spirit of *Miranda*, not the intentions of those who administer the warnings. See, e.g., *United States v. Floyd*, 496 F.2d 982 (2d Cir. 1974); *United States ex rel. Williams v. Twomey*, 467 F.2d 1248 (7th Cir. 1972); *United States v. Lamia*, 429 F.2d 373 (2d Cir.), *cert. denied*, 400 U.S. 907 (1970). See also *Townsend v. Sain*, 372 U.S. 293, 308-09 (interrogator's lack of bad faith does not validate an involuntary confession). But see *White, Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581 (1979).

175. The "inherently compelling pressures" of custodial interrogation, in the opinion of the Court, mandated the *Miranda* prophylactic rules. *Miranda v. Arizona*, 384 U.S. 436, 467 (1966). Similarly, an inherent characteristic of electronic surveillance—the inevitability that some innocent conversations will be overheard—argues for prophylactic minimization standards. See note 70 *supra* and accompanying text.

176. See notes 135-38 *supra* and accompanying text.

177. See notes 141-42 *supra* and accompanying text.

178. See note 156 *supra* and accompanying text.

179. See note 149 *supra*.

Nevertheless, the elimination of subjective considerations from the standard of reasonableness does not mean that courts cannot first establish that monitoring agents, in fact, attempted to minimize before they evaluate the reasonableness of those efforts. Nothing in *Scott* disturbs those decisions that found patent violations of the minimization requirement because of the absence of efforts to minimize.<sup>180</sup> An absolute failure to attempt minimization would be a violation of section 2518(5) whether the proper standard includes subjective or solely objective considerations.<sup>181</sup> The Court can be faulted for incomplete analysis, but the majority did not state that monitoring agents need make no efforts to minimize. Still, the uncertainty generated by the majority's reasoning is disappointing, if not threatening, to "the right most valued by civilized men"—the right to privacy.<sup>182</sup>

Minimization post-*Scott* remains a difficult problem for both monitoring agents and courts. That *Scott* does little to alleviate this difficulty does not obviate the fact that courts can effect minimization more directly than by after-the-fact determinations of reasonableness. Authorization orders can include expansive minimization guidelines and practices rather than merely incorporate the enigmatic language of section 2518(5).<sup>183</sup> More exacting judicial supervision during the surveillance period also would help insure compliance with the minimization requirement.<sup>184</sup> Perhaps the uncertainty arising out of *Scott* will prompt courts to take these affirmative steps.

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180. See note 107 *supra*.

181. See text accompanying notes 154-55 *supra*.

182. See note 2 *supra*.

183. The minimization order in *Scott*, for example, merely recited the statutory language of § 2518(5). 436 U.S. at 131-32, 132 n.3.

184. The District of Columbia Court of Appeals, for example, now requires courts issuing wiretap orders to include a provision that mandates periodic reports to the supervising judge. Moreover, these reports must specifically include statements on what attempts the monitoring agents have made to minimize. *United States v. Scott*, 516 F.2d 751, 759-60 (D.C. Cir. 1975). See text accompanying notes 86-88 *supra*.

