

# WHAT IS A PRIVATE COMMUNICATION?: AN ANALYSIS OF THE NEW JERSEY WIRETAP ACT

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## I. Introduction

In his dissent in *Olmstead v. United States*,<sup>1</sup> Justice Brandeis predicted the future of technological communication and privacy problems.<sup>2</sup> Unfortunately, he did not mention the way it should be regulated. Since 1927, both the courts<sup>3</sup> and the legislature have recognized the logic of Justice Brandeis' opinion.<sup>4</sup> Federal and state legislatures have been trying to keep pace with technology, while struggling with the question of what protection certain devices deserve.<sup>5</sup>

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<sup>1</sup> 277 U.S. 438, 474 (1927) (Brandeis, J., dissenting).

<sup>2</sup> *Id.* at 474. In his dissent, Justice Brandeis wrote that:

Ways may some day be developed by which the government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. . . . Can it be that the Constitution affords no protection against such invasions of individual security?

*Id.*

<sup>3</sup> *Katz v. United States*, 389 U.S. 347 (1967) (holding that the Fourth Amendment protects telephone conversations from government interception); *Berger v. New York*, 388 U.S. 41 (1967) (holding that the Fourth Amendment applies to electronic eavesdropping on oral conversation); *State v. Hunt*, 450 A.2d 952 (N.J. 1982) (holding that toll billing records are protected by the New Jersey Constitution).

<sup>4</sup> In 1968, Congress enacted the Wire Interception and Interception of Oral Communications Act, Pub. L. No. 90-351, Title III, § 802, 82 Stat. 112 (codified 18 U.S.C. §§ 2510-2521 (West Supp. 1993) [hereinafter *Federal Wiretap Act*]). The *Federal Wiretap Act* was created to protect wire and oral communications from being intercepted. The *Federal Wiretap Act* provides numerous requirements that must be fulfilled in order to intercept such communication. *Id.*

<sup>5</sup> Jeffery F. Michelland, *Does A Part Equal the Whole: Is the Interception of Paging Device Communications Governed by Title III?*, 7 GEO. MASON U. L. REV. 237, 261 (1984) (suggesting that wire and oral communications as defined under the *Federal Wiretap Act* do not protect certain devices, such as pagers); H.R. REP. NO. 647, 99th Cong., 2d Sess. 61-62 (1986) [hereinafter *House Report*] (allowing the states two years to add electronic communications to their wiretap laws); Sponsor New Jersey Assemblywoman Marion Crecco, Statement to the Assembly, (June 15, 1994) [hereinafter *Sponsor's Statement*]

For several years courts did not require any limitation on the interception of pagers,<sup>6</sup> because they were not oral or wire communications.<sup>7</sup> Pagers were not afforded an expectation of privacy under the Fourth Amendment to the Constitution.<sup>8</sup> In 1986, however, the federal government added electronic communications to the Federal Wiretap Act.<sup>9</sup> Similarly, in 1993, New Jersey added electronic communications to the New Jersey Wiretapping and Electronic Surveillance Control Act<sup>10</sup>. The New Jersey Wiretap Act was further amended in June of 1994.<sup>11</sup> The legislature does not plan to review it again until 1999.<sup>12</sup>

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(noting the need for the addition of electronic communications to N.J. STAT. ANN. § 2A:156A-1 to 34 (1993)).

<sup>6</sup> Interview with Sergeant Gregory Clay, Union County Narcotics Strike Force, Police Expert in the Interception of Electronic Communications, in Union County, New Jersey (Aug. 1994). Pagers, commonly known as beepers, allow someone to receive a message sent through radio waves. Pagers are assigned a capcode so that they can be selectively signalled. *Id.*

<sup>7</sup> Michelland, *supra* note 5, at 261. Michelland examined the need for an amendment to the *Federal Wiretap Act* in order to adequately protect electronic communications. See *Dorsey v. Florida*, 402 So. 2d 1178, 1183-84 (Fla. 1981). *But see* *United States v. Hall*, 488 F.2d 193 (9th Cir. 1973) (protecting pagers, prior to the addition of electronic communications to the *Federal Wiretap Act*, by defining them as wire communication).

<sup>8</sup> *Dorsey*, 402 So. 2d at 1183-84 (holding that there could be no expectation of privacy for communication that could be picked up by an ordinary radio receiver). See also Michelland, *supra* note 5, at 256. The Fourth Amendment provides:

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

U.S. CONST. amend. IV.

<sup>9</sup> S. REP. NO. 99, 99th Cong., 2d Sess. 1 (1986) [hereinafter *Senate Report*]. The *Senate Report* provides: "The bill amends the 1968 law to update and clarify Federal privacy protection and standards in light of the dramatic changes in new computer and telecommunications technologies." *Id.*

<sup>10</sup> N.J. STAT. ANN. § 2A:156A-1 to -34 (West Supp. 1993) [hereinafter *New Jersey Wiretap Act*]. *House Report*, *supra* note 5, at 61. In 1986, the states were given two years to add electronic communications to their wiretap laws. New Jersey law enforcement was unable to intercept pagers for several years because the legislature did not amend the *New Jersey Wiretap Act* to coincide with the *Federal Wiretap Act*. *Sponsor's Statement*, *supra* note 5.

<sup>11</sup> A. 1535, 206th N.J. Leg., 2d Sess. (Mar. 15, 1994) [A. 1535].

<sup>12</sup> N.J. ASSEMBLY JUDICIARY, LAW AND PUBLIC SAFETY COMMITTEE, STATEMENT TO THE ASSEMBLY, (Mar. 21, 1994) [hereinafter *Committee Statement*]. "The committee amended the bill to continue the periodic reauthorization. . . . It [the *New Jersey Wiretap Act*] shall continue until July 1, 1999." *Id.* If the legislature waits until 1999 to

The New Jersey Wiretap Act followed the Federal Wiretap Act in stating that the interception of tone pagers was not protected.<sup>13</sup> Neither statute, however, explicitly defines the type of protection that other types of pagers should be given.<sup>14</sup> After reviewing the 1993 and 1994 amendments of the New Jersey Wiretap Act, this survey will discuss the similarity between the interception of a digital display pager (not alphanumeric) and the use of a pen register<sup>15</sup> with an in-progress trace<sup>16</sup> to demonstrate why digital display pagers do not require a wiretap application for interception.

## II. Legislative History

### A. Passage of the 1993 Amendment to the New Jersey Wiretap Act

On June 15, 1992, New Jersey Assemblywoman Marion Crecco, Republican, 34th District, introduced Assembly Bill 130 (A. 130) in an attempt to amend the New Jersey Wiretap Act.<sup>17</sup> Assemblywoman Crecco's main intent in amending the New Jersey Wiretap Act was to allow for the interception of electronic communications, such as pagers.<sup>18</sup>

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review the *New Jersey Wiretap Act*, once again the legislature will allow technology to advance without them. *Id.*

<sup>13</sup> *New Jersey Wiretap Act*, *supra* note 10, § 2A:156A-2(m)(2).

<sup>14</sup> See *Pagers Seen Cracking Retail; Pagers Enter The Retail Market*, HFD-WKLY. HOME FURNISHINGS NEWSP., May 31, 1993, at 130. There are four types of pagers on the market. They include: digital display, tone-only, tone-voice and alphanumeric. The digital display unit displays numbers only, while the alphanumeric unit displays both numbers and letters. *Id.* The tone-only pager notifies the customer by a tone or vibration, and the tone-voice allows a person to record a message, and transmit the recorded message to the user. *House Report*, *supra* note 5, at 23-24.

<sup>15</sup> *In re An In-Progress Trace*, 386 A.2d 1295, 1300 (N.J. 1978) (citing *United States v. New York Telephone, Co.*, 434 U.S. 159, 166 (1977)). Justice White describes a pen register as a mechanical device that records the numbers dialed on a telephone by monitoring the electrical impulses caused when the dial on the telephone is released. *Id.*

<sup>16</sup> *Id.* at 1297. An in-progress trace "is a method of tracing a phone call to the point of origin. . . ." An in-progress trace records the phone number of the caller calling the tapped phone. For a detailed description, see *State v. Hibbs*, 301 A.2d 789 (N.J. Super. 1972).

<sup>17</sup> A. 130, 205th N.J. Leg., 1st Sess. (June 15, 1992) (codified as N.J. STAT. ANN. § 2A:156A-1 to -34 (West Supp. 1993)) [hereinafter *Sponsor's Proposal*].

<sup>18</sup> *Sponsor's Statement*, *supra* note 5. Assemblywoman Crecco's statement provides: The capacity to intercept electronic communications will be a significant aid to law enforcement authorities in the ongoing battle against organized crime and narcotics traffickers. One of the forms of electronic communication which the amendments include is the digital or voice transmission

Both the New Jersey Senate and the Assembly, for the most part, agreed with the addition of electronic communications.<sup>19</sup> Most of the disagreement centered around law enforcement's ability to obtain stored communications.<sup>20</sup> The sponsor, Assemblywoman Crecco classified investigative or law enforcement officers as those who had the ability to obtain stored communications, upon meeting specific requirements.<sup>21</sup> The Assembly expanded investigative or law enforcement officers to include all governmental entities.<sup>22</sup> This change would have allowed a wider range of law enforcement officials to obtain stored communications.<sup>23</sup>

The Senate, on the other hand, favored stringent regulation of access to stored communications.<sup>24</sup> The Senate's amendments allow access only to law enforcement agencies.<sup>25</sup> Moreover, the only manner in which law enforcement agencies are permitted to obtain stored electronic or wire communications is through a war-

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to a beeper (pager). At the present time, the interception of such transmissions is impermissible. Persons involved in organized crime and narcotics trafficking rely heavily on the use of such beepers (paggers) to conduct their illegal activities. Therefore, the ability to intercept such communications will significantly assist New Jersey law enforcement personnel in the ongoing war against organized crime and drug dealers.

*Id.*

<sup>19</sup> A. 130 and 1587, 205th N.J. Leg., 1st Sess. (Sept. 21, 1992) [hereinafter *Assembly Proposal*]; A. 130 and 1587 205th N.J. Leg., 1st Sess. (Senate Floor Amendments Nov. 9, 1992) [hereinafter *Senate Proposal*].

<sup>20</sup> *New Jersey Wiretap Act*, *supra* note 10, § 2A:156A-27 to -34 (discussing the methods of obtaining and protecting stored communications, such as toll records).

<sup>21</sup> *Sponsor's Proposal*, *supra* note 17, at §§ 23-26, 28.

<sup>22</sup> *Assembly Proposal*, *supra* note 19, § 24. The *Assembly Proposal* states, in part: "A governmental entity may require the disclosure by a provider of wire or electronic communication service of the contents of an electronic communication, that has been in electronic storage in an electronic communication system for more than 180 days. . . ." *Id.* Prior to 180 days, only an investigative or law enforcement officer could obtain this information. *Id.*

<sup>23</sup> Letter from Michael Bozza, Deputy Director, Division of Criminal Justice, to Jeffery S. Blitz, Atlantic County Prosecutor (Apr. 26, 1993) (on file with *Seton Hall Legislative Journal*) (discussing the difference between governmental entities and law enforcement in the *New Jersey Wiretap Act*). Although neither "law enforcement agency" or "governmental entity" is defined, the *New Jersey Wiretap Act* seems to prohibit entities such as legislative investigating committees from obtaining stored communication. *Id.*

<sup>24</sup> *Senate Proposal*, *supra* note 19, §§ 23-25.

<sup>25</sup> *Id.*

rant.<sup>26</sup> Both the sponsor and the Assembly allowed information to be obtained through a subpoena.<sup>27</sup> Therefore, although the 1993 amendment to the New Jersey Wiretap Act allowed law enforcement access to electronic communications, it inhibited their access to stored communications.<sup>28</sup>

### B. *Passage of the 1994 Amendment to the New Jersey Wiretap Act*

On March 15, 1994, Assemblymen Lee A. Solomon, Republican, 6th District and Gary W. Stuhltrager, Republican, 3rd District, introduced Assembly Bill 1535 (A. 1535).<sup>29</sup> As introduced, this bill sought to amend the New Jersey Wiretap Act in one respect. By deleting the time span during which the Act would be in effect, the bill would make the New Jersey Wiretap Act permanent.<sup>30</sup>

The Assembly Judiciary, Law and Public Safety Committee's statement to the Assembly<sup>31</sup> reveals that it disagrees with the sponsors of A. 1535.<sup>32</sup> The Assembly Judiciary, Law and Public Safety Committee's amendment to A. 1535 continued periodic reauthorization.<sup>33</sup> If this amendment were adopted, therefore, the bill would be reviewed again in 1999.<sup>34</sup> Further, the Assembly Judiciary, Law and Public Safety Committee omitted the word "wire" from the portion of the New Jersey Wiretap Act concerning access to stored communication.<sup>35</sup> As mentioned in the committee's

<sup>26</sup> *Id.* § 23(c). Stating that a law enforcement agency can only receive information if the following requirements are fulfilled: "(1) the law enforcement agency has received a warrant; or (2) the law enforcement agency has received the consent of the subscriber or customer to the disclosure." *Id.* Prior to the Senate's amendments, information concerning a subscriber or customer could also be received through a subpoena. *Id.*

<sup>27</sup> *Id.* See also *Sponsor's Proposal*, *supra* note 17, § 23(b),(e); *Assembly Proposal*, *supra* note 22, § 23(b),(e).

<sup>28</sup> See *infra* note 37. There is still a question as to what stored communications refers to.

<sup>29</sup> A. 1535, 206th N.J. Leg., 2d Sess. (Mar. 15, 1994).

<sup>30</sup> *Id.*

<sup>31</sup> *Committee Statement*, *supra* note 12.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *New Jersey Wiretap Act*, *supra* note 10, § 2A:156A-29(b). This section, concerning requirements for access to stored communication is amended as follows:

Except as provided in subsection c. of this section, a provider of [wire or] electronic communication service or remote computing service may disclose a record or other information pertaining to a subscriber or customer of the service to any person other than a governmental entity. This sub-

statement,<sup>36</sup> this amendment prevents everyone, not just governmental entities, from obtaining customers' toll records.<sup>37</sup> On June 2, 1994, the Senate Judiciary Committee, without revision, accepted the amendments made by the Assembly Judiciary, Law and Public Safety Committee.<sup>38</sup> Governor Christine Todd Whitman signed this bill into law on June 28, 1994.<sup>39</sup>

### III. Analysis of the 1993 Additions to the New Jersey Wiretap Act

#### A. Stored Communications

Several new sections were added to the New Jersey Wiretap Act<sup>40</sup> in 1993.<sup>41</sup> These additions are modeled after the Federal Wiretap Act.<sup>42</sup> Apparently, both the state and federal governments realize that, with the numerous recent advances in technology, and especially with the proliferation of computers, regulation of stored communications is necessary.<sup>43</sup>

Significantly, the New Jersey Wiretap Act now requires law enforcement to obtain a warrant to receive stored wire or electronic communications.<sup>44</sup> These additions do not present a notable

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section shall not apply to the contents covered by subsection a. of this section.

*Id.*

<sup>36</sup> *Committee Statement, supra* note 12.

<sup>37</sup> *See Committee Statement, supra* note 12; *New Jersey Wiretap Act, supra* note 10, § 2A:156A-29(b), (c). By preventing wire communication providers from disclosing toll records, the committee seems to be defining "record or other information pertaining to a subscriber or customer" as toll records. This definition creates a question as to whether toll records are the only type of stored communications maintained by wire communication providers, and therefore, the only records law enforcement needs a warrant to obtain. If so, it seems subscriber information (name and address) could be obtained without a warrant. *Id.*

<sup>38</sup> N.J. SENATE JUDICIARY COMMITTEE, STATEMENT TO THE ASSEMBLY, (June 2, 1994).

<sup>39</sup> Phone interview with the Office of Legislative Services, in Trenton, New Jersey (Aug. 23, 1994).

<sup>40</sup> *New Jersey Wiretap Act, supra* note 10.

<sup>41</sup> *Id.* § 2A:156A-27 to -34. These sections concern access to stored communications, back-up preservation of communications requested by law enforcement, cost reimbursement to the providers of stored communications requested by law enforcement, and defenses against suits resulting from the release of stored communications. *Id.*

<sup>42</sup> *See Federal Wiretap Act, supra* note 4, § 2701-2711 (1988).

<sup>43</sup> *Senate Report, supra* note 9, at 1.

<sup>44</sup> *New Jersey Wiretap Act, supra* note 10, § 2A:156A-29. This section requires a law enforcement agency to obtain a warrant in order to seize "contents of electronic com-

change regarding telephone toll records.<sup>45</sup> These amendments could, however, affect other wire communications<sup>46</sup> previously obtained without a warrant. Although this addition concerns many stored electronic communications, such as electronic mail ("E-mail"),<sup>47</sup> there is no expectation of privacy in such things as "electronic bulletin boards."<sup>48</sup> With these additions to the New Jersey Wiretap Act, the New Jersey legislature has recognized the importance of stored communications as they relate to a person's privacy rights, and their use by law enforcement in obtaining criminal convictions.

### B. *Judicial Approval of Interception in Emergencies*

In addition, the New Jersey Wiretap Act extended the section concerning judicial approval of interception without a formal application to emergency situations.<sup>49</sup> These applications have previously been allowed for offenses involving organized crime.<sup>50</sup> The amendment extends approval of applications to situations involving "immediate danger of death or serious bodily injury."<sup>51</sup> As in the past, a formal application must be filed within forty-eight hours after the emergency approval.<sup>52</sup>

Similarly, the section of the New Jersey Wiretap Act defining the types of crimes that may be intercepted has been amended.<sup>53</sup> This section now includes non-emergency interception of commu-

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munication" or "a record or other information pertaining to a subscriber or customer of the service." *Id.*

<sup>45</sup> *State v. Hunt*, 450 A.2d 952, 956 (N.J. 1982). The court held that a subscriber has a reasonable expectation of privacy in his toll billing records and, therefore, a warrant is required to obtain them. The New Jersey courts feel that the phone numbers a person dials are private information between that customer and the telephone company. *Id.*

<sup>46</sup> See generally *supra* note 37. There remains a question as to whether a warrant is required to seize subscriber information (name and address). See *Committee Statement, supra* note 12; *New Jersey Wiretap Act, supra* note 10, § 2A:156A-29(b), (c).

<sup>47</sup> *House Report, supra* note 5, at 22, defines electronic mail as: "[A] service which combines features of the telephone and regular first class mail. Electronic mail can include telex, teletex, facsimile, voice mail and mixed systems that electronically transmit messages." *Id.*

<sup>48</sup> *Senate Report, supra* note 9, at 36.

<sup>49</sup> *New Jersey Wiretap Act, supra* note 10, § 2A:156A-13.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *New Jersey Wiretap Act, supra* note 10, § 2A:156A-8.

nications concerning crimes involving death and serious bodily injury.<sup>54</sup> These amendments make sense when considering the lives at stake, and the assistance interception might provide in saving these lives.

### C. *Requirements for an In-Progress Trace*

Along with the expansion of crimes that could be intercepted, the section of the New Jersey Wiretap Act regarding in-progress traces was amended to assist law enforcement.<sup>55</sup> County prosecutors were previously required to receive permission from the Attorney General to apply for an in-progress trace.<sup>56</sup> This amendment provides that an in-progress trace is still included in an order for the interception of wire communications, but no longer requires the Attorney General's approval.<sup>57</sup> Further, law enforcement personnel can request an in-progress trace based on probable cause without the need for a wiretap application.<sup>58</sup> While law enforcement personnel still carries the burden of probable cause when applying for a warrant to conduct an in-progress trace, it is not necessary to fulfill all the requirements of a wiretap application.<sup>59</sup>

### D. *Exception to the Application for an Order*

To receive an order for the interception of wire, electronic, or oral communications, law enforcement must fulfill numerous requirements in their application to prove probable cause.<sup>60</sup> In the past, the prosecutor had to provide the exact location of the interception or the location of "the particular wire or electronic com-

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<sup>54</sup> N.J. STAT. ANN. § 2C:12-1(b)(1)&(2) (West Supp. 1993). The statute provides, in relevant part: "a. Simple assault. A person is guilty of assault if he: (1) Attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or (2) Negligently causes bodily injury to another with a deadly weapon. . . ." *Id.*

<sup>55</sup> *New Jersey Wiretap Act*, *supra* note 10, § 2A:156A-12(h).

<sup>56</sup> *Id.* By deleting the requirement for the Attorney General's approval, the legislature made it simpler for county prosecutors to obtain an in-progress trace. *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* The *New Jersey Wiretap Act* in relevant part, states: "The obligation of the provider of wire or electronic communication service to conduct an in-progress trace and provide other technical assistance may arise pursuant to court order based on probable cause, under circumstances not involving an interception pursuant to this act." *Id.*

<sup>59</sup> *New Jersey Wiretap Act*, *supra* note 10, § 2A:156A-9 to -12 (stating the requirements for an application).

<sup>60</sup> *Id.*



munications facilities or the particular place where oral communication is to be intercepted.”<sup>61</sup> An exception to the location requirement has been added.<sup>62</sup>

This amendment is logical when considering the location of the telephone lines to be used might be unknown until just before the interception, and the oral conversations the government wants to intercept could be located in several different rooms.<sup>63</sup> However, this amendment presents a problem when the device law enforcement wants to intercept is transportable and intercepted through radio waves, such as a pager. It seems illogical that the government should need to fulfill a location requirement or an exception to it when dealing with a transportable device. Therefore, while trying to assist law enforcement, the New Jersey legislature has presented another question.

#### E. *Electronic Communication - An Entirely Different Ball Game*

On January 28, 1993, when Governor James J. Florio signed the bill amending the New Jersey Wiretap Act, he allowed the interception of such devices as pagers, faxes, and E-mail.<sup>64</sup> These devices fall under the title of electronic communication, which the New Jersey Wiretap Act now encompasses.<sup>65</sup> This addition is simi-

<sup>61</sup> *New Jersey Wiretap Act*, *supra* note 10, § 2A:156A-9(c)(4) [hereinafter *Location Requirement*]. The *Location Requirement* requires law enforcement to state “the character and location of the particular wire or electronic communication facilities involved or the particular place where the oral communications is to be intercepted.” *Id.*

<sup>62</sup> *New Jersey Wiretap Act*, *supra* note 10, § 2A:156A-9(g) [hereinafter *Exception*]. The *Exception* allows an investigative or law enforcement officer to receive an order without the location requirement as long as other requirements under the exception are fulfilled. *Id.*

<sup>63</sup> Memorandum from Michael Bozza, Deputy Director, Division of Criminal Justice, to Robert T. Winter, Director, Division of Criminal Justice, 1-5, at 4 (Oct. 15, 1991) (on file with the *Seton Hall Legislative Journal*).

<sup>64</sup> See Bill Sanderson, *State Expands Law on Wiretaps Includes Faxes, Computer Mail, Cellular Phones*, THE RECORD (Northern N.J.), Jan. 29, 1993, at A3.

<sup>65</sup> *New Jersey Wiretap Act*, *supra* note 10, § 2A:156A-2 defines electronic communication as

any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectric or photo-optical system that affects interstate, intrastate or foreign commerce, but does not include:

- (1) Any wire or oral communication;
- (2) Any communication made through a tone-only paging device; or
- (3) Any communication from a tracking device;. . . .

*Id.*

lar to the Federal Wiretap Act,<sup>66</sup> although the New Jersey legislature did not make an exception for cordless phones.<sup>67</sup>

When the Federal Wiretap Act<sup>68</sup> was enacted in 1986, Congress gave the states two years to amend their wiretap acts.<sup>69</sup> If the acts were not amended, the states would be prevented from intercepting such communication as of October 21, 1988.<sup>70</sup> Therefore, for over four years the New Jersey legislature had not passed any legislation allowing law enforcement in New Jersey to intercept numerous types of communication devices frequently used by organized crime members and drug dealers.<sup>71</sup>

#### IV. *The Pager Problem*

There are several problems in the application of the New Jersey Wiretap Act. One problem is whether it is necessary to prepare a wiretap application when trying to intercept a digital display pager. In the eyes of many, there are at least four types of pagers.<sup>72</sup> However, in the eyes of Congress there seem to be only three.<sup>73</sup> Apparently, Congress and the New Jersey legislature have failed to

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<sup>66</sup> See *Federal Wiretap Act*, *supra* note 4.

<sup>67</sup> See *New Jersey Wiretap Act*, *supra* note 10, § 2A:156A-2(m). *Federal Wiretap Act*, *supra* note 4, § 2510(12)(A). The *Federal Wiretap Act* does not protect communications on cordless phones. New Jersey, on the other hand, protects such communications. The *Federal Wiretap Act*, in relevant part, reads as follows: "electronic communication" means . . . but does not include- (A) the radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit. . . ." *Id.* Congress feels cordless phones should not be regulated for the following reason: "[T]he communications made on some cordless telephones can easily be intercepted with readily available technologies (such as AM radio), it would be inappropriate to make such an interception a criminal offense." *House Report*, *supra* note 5, at 33.

<sup>68</sup> See *Federal Wiretap Act*, *supra* note 4.

<sup>69</sup> See generally *supra* note 10.

<sup>70</sup> See *House Report*, *supra* note 5, at 61. *Sponsor's Statement*, *supra* note 5. Stating, in part: "A provision in the federal statute made the prohibition against intercepting electronic communication applicable to the states as of October 21, 1988. Consequently, since that time, New Jersey law enforcement officers have not been permitted to intercept electronic communications." *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> Robert Gebeloff, *The Beeper Battle Is On*, THE RECORD (Northern N.J.), July 20, 1994, at D-1; See also *supra* note 14.

<sup>73</sup> See *House Report*, *supra* note 5, at 23. The *House Report* states "[t]here are three basic types of paging devices: tone-only, digital, and voice. . . . The digital or display pager permits the user to receive a digital or alphanumeric message on a display screen." *Id.*

recognize the difference between a digital display pager and an alphanumeric pager when defining their protection under both the Federal and New Jersey Wiretap Acts, respectively.<sup>74</sup> In addition, there is disagreement as to whether digital display pagers and alphanumeric pagers are covered by the Federal Wiretap Act, and therefore, by New Jersey's substantially similar act.<sup>75</sup>

This indecision and controversy revolves around the fact that the information received by the interception of digital display pagers is substantially similar to that received by a pen register with an in-progress trace.<sup>76</sup> A warrant is necessary to obtain a pen register with an in-progress trace in New Jersey.<sup>77</sup> Therefore, both wiretap applications and pen registers with an in-progress trace require

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<sup>74</sup> See *supra* note 14. But see *supra* note 6. According to Sergeant Clay, one capcode could control several numbers, one allowing alphanumeric messages and another allowing digital messages. Therefore, if digital display pagers are not protected by the *Federal and New Jersey Wiretap Acts*, law enforcement must determine the types of pages their target receives prior to intercepting the pager. This determination must be made to avoid intercepting an alphanumeric pager without fulfilling the requirements of the *New Jersey Wiretap Act*. This information could be determined from a reliable, confidential informant, the paging company, or technical personnel. If the capcode did control alphanumeric messages, a wiretap application would be prepared. *Id.*

<sup>75</sup> Robert W. Kastenmeier, et al., *Communications Privacy: A Legislative Perspective*, 4 Wis. L. REV. 715, 729-30 (1989) (citing *House Report, supra* note 5, at 24); Memorandum from Theodore B. Olson, Ass't Attorney Gen., Office of Legal Counsel, U.S. Dep't of Justice, to John A. Mintz, Ass't Director, Legal Counsel, Fed. Bureau of Investigation, 1-2 (Jan. 5, 1984)) states:

The interception of display pager signals also falls outside the ambit of the [Federal] Wiretap Act. However, because use of a display pager implicates a reasonable expectation of privacy, governmental interception of messages over such a system requires a search warrant under the fourth amendment.

*Id.* at 729-30.

However, *Jackson v. Florida* interprets the *Federal Wiretap Act* as requiring an application for digital display pagers. The appellate division, however, certified the question as to whether a wiretap application was required to intercept a digital display pager. 636 So. 2d 1372, 1377 (Fla. Dist. Ct. App. 1994).

<sup>76</sup> *In re An In-Progress Trace*, 386 A.2d at 1300. *United States v. Tutino*, 883 F.2d 1125, 1141 (2d Cir. 1994) states:

Unlike telephone wiretaps, duplicate paging devices reveal only numbers, not the content of conversation. In this way they are similar to pen registers. Because it is impossible to tell from the clone beeper whether a conversation even took place, much less the content of any conversation that might have taken place, traditional minimization requirements do not apply.

*Id.*

<sup>77</sup> *Hunt*, 450 A.2d at 956.

a showing of probable cause.<sup>78</sup> An application for the interception of wire, electronic, or oral communication,<sup>79</sup> however, is far more extensive than that of a pen register with an in-progress trace. Further, there are only eight judges in New Jersey with the authority to hear wiretap applications,<sup>80</sup> whereas one judge in every New Jersey county is assigned to hear applications for pen registers.<sup>81</sup>

It seems ironic that both the digital display pager and the in-progress trace record the phone numbers of callers, but that the requirements to obtain the number from a pager are much more stringent.<sup>82</sup> Courts are currently struggling to determine whether Congress meant to include digital display and alphanumeric pagers under the Federal Wiretap Act.<sup>83</sup> Perhaps the New Jersey legislature should be the first to recognize the significant difference between the two types of pagers. By acknowledging this difference, the legislature would allow digital display pagers to be regulated in the same manner as pen registers with an in-progress trace, while affording alphanumeric pagers protection under the New Jersey Wiretap Act.

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<sup>78</sup> See *id.* See also N.J. CONST. art. I, para. 7 which states:

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 warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the papers and things to be seized.

*Id.*

<sup>79</sup> *New Jersey Wiretap Act*, *supra* note 10, § 2A:156A-9 to -12.

<sup>80</sup> Chief Justice Robert N. Wilentz, Directive No. 3-94, 137 N.J.L.J. 62 (May 16, 1994) (order designating the judges who may receive applications for the interception of wire, electronic or oral communication).

<sup>81</sup> *Id.* at 63.

<sup>82</sup> See *United States v. Meriwether*, 917 F.2d 955, 959 (6th Cir. 1990) (holding that the caller has no reasonable expectation of privacy over a phone number sent to a beeper); Steven P. Oates, *Caller ID: Privacy Protector or Privacy Invader?*, 1 U. ILL. L. REV. 219 (1992) (recognizing that New Jersey allows caller ID, thereby denying the caller protection of his phone number). *But see* *People v. Pons*, 509 N.Y.S.2d 450, 453 (Supp. 1986) (recognizing that "monitoring of the telephone pager is more intrusive than the use of a pen register"). Some suggest that by designating numbers to mean a certain thing, digital display pagers can be used for more than transferring phone numbers, and therefore, pagers require greater levels of protection. *Id.* An example would be if a person left their phone number on a digital display pager and followed it with 911. This 911 signal could be a predetermined code meaning call back soon or I have the cocaine. *Id.*

<sup>83</sup> See *Federal Wiretap Act supra* note 4; *Jackson*, 636 So.2d at 1377.

## V. Conclusion

During 1993 and 1994, the New Jersey legislature made significant changes to the New Jersey Wiretap Act.<sup>84</sup> In implementing these changes, New Jersey generally followed the Federal Wiretap Act.<sup>85</sup>

However, neither the New Jersey legislature nor Congress specifically defined the regulation of digital display and alphanumeric pagers. In view of the digital display pager's similarity to the pen register with an in-progress trace, the digital display pager and pen register should be afforded the same type of regulation.

The influx of technological advances in recent years has caused both the New Jersey legislature and Congress to struggle to keep up to date. By not defining their intent, both of these legislative bodies leave prosecutors on the county, state, and federal level searching for logic in the enacted laws. It is a continuous struggle to apply the New Jersey Wiretap Act to new technological advances. Prosecutors often jump through hoops to avoid suppression of intercepted evidence. The legislature's recognition of the difference between an alphanumeric and digital display pager would leave one less hoop for law enforcement personnel to jump through.

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<sup>84</sup> *New Jersey Wiretap Act*, *supra* note 10.

<sup>85</sup> *Id.* The *New Jersey Wiretap Act* puts greater restrictions on access to certain types of devices. For example, the *New Jersey Wiretap Act* protects cordless phone conversations where the *Federal Wiretap Act* does not. *Federal Wiretap Act*, *supra* note 4, § 2510(12)(A).