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## First in Write: Press Rights Prevail Over Privacy Interests in *Bartnicki v. Vopper*

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## I. INTRODUCTION

In *Bartnicki v. Vopper*,<sup>1</sup> the Supreme Court faced a direct “conflict between interests of the highest order:” the freedoms of expression secured by the First Amendment and the right to privacy.<sup>2</sup> Specifically, the Court considered the question of whether the First Amendment shields the press from liability under the federal Wiretapping Act<sup>3</sup> for disclosing an illegally intercepted communication received from an outside source.<sup>4</sup> A divided Court held the Wiretapping Act unconstitutional as applied to the facts of the case.<sup>5</sup> Though termed “narrow,” the Court’s holding has broad implications.<sup>6</sup> The headline could read “First In Write: Press Rights Prevail Over Privacy Interests.”

The Supreme Court presents two significant statements in *Bartnicki*. First, confronted with a direct conflict between privacy and First Amendment concerns, the Court once again declares the First Amendment interests first and foremost in importance.<sup>7</sup> Second, because both sides argue core purposes of the First Amendment, pitting the press freedom to inform the public on matters of public concern against the individual freedom not to speak,<sup>8</sup> the Court’s holding implicitly, if not explicitly, acknowledges a hierarchy of interests within the First Amendment itself. Thus, in the aftermath of the *Bartnicki* decision, freedom of the press triumphs over both freedom of speech and the right to privacy.

The Supreme Court has repeatedly asserted that the First Amendment does not subject enforcement of a general law against the press to stricter scrutiny than enforcement of the same law against other individuals or entities.<sup>9</sup> Yet the Court’s decision in *Bartnicki* intimates otherwise. This

1. 532 U.S. 514 (2001).

2. *Id.* at 518.

3. Wire and Electronic Communications Interception and Oral Communications Act, 18 U.S.C. §§ 2510–2520 (1994).

4. *Bartnicki*, 532 U.S. at 517.

5. *Id.* at 535.

6. *Id.* at 517.

7. *See Id.* at 535.

8. *Id.* at 519–20; *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 559 (1985) (holding that the right not to speak serves the same functions as the First Amendment’s affirmative aspects) (citing *Estate of Hemingway v. Random House, Inc.*, 244 N.E.2d 250,255 (N.Y. 1968)).

9. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 670 (1991) (asserting that the First Amendment does not protect the press from breaking laws of general applicability). *But see Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986) (distinguishing speech of

article explores the *Bartnicki* holding and argues that the Court's decision implicitly applies stricter scrutiny to the Wiretapping Act as regards the press than as regards others. Part II examines the law prior to *Bartnicki*, both in terms of the First Amendment and the federal wiretapping statute. Part III illuminates the *Bartnicki* decision. Part IV presents an analysis of the *Bartnicki* opinion, focusing on the Court's reasoning and the implications of the holding. Part V demonstrates why the holding subjects Title III to stricter scrutiny when the press is involved. Finally, Part VI concludes that in the aftermath of *Bartnicki*, protection of privacy interests is increasingly dependent upon journalistic ethics.

## II. INTERESTS OF THE HIGHEST ORDER: THE LAW BEFORE *BARTNICKI*

In order to assess the significance of the Court's holding, we must examine the law prior to *Bartnicki*. Since the *Bartnicki* Court concludes that application of the federal Wiretapping Act to the facts of the case violated the First Amendment, it is imperative to understand both the statute (hereinafter Title III) and the relevant First Amendment law. This part begins by addressing the First Amendment concerns raised in *Bartnicki*. Then the focus shifts to the sphere of privacy and the protections afforded under Title III. Finally, this part examines the legal interplay between these two "interests of the highest order."<sup>10</sup>

### A. *The First Amendment*

The First Amendment mandates that "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."<sup>11</sup> Political speech is afforded the broadest protection under the First Amendment because the overriding concern at its inception was ensuring the "free discussion of governmental affairs" essential to democracy.<sup>12</sup> Curtailing this exchange of ideas is thus an inappropriate "means for averting a relatively trivial harm to

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media and non-media defendants in a defamation action); *Curtis Publ'g v. Butts*, 388 U.S. 130, 150 (1967) (holding that a newspaper publisher has no special immunity from laws of general applicability to invade rights of others).

10. See *Bartnicki*, 532 U.S. at 518 (referring to freedom of the press and privacy issues).

11. U.S. CONST. amend. I.

12. *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (citing *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

society.”<sup>13</sup> Accordingly, the courts have declared laws that abridge the freedoms of speech or of the press unconstitutional unless they have concluded that proper justification exists for their enactment.<sup>14</sup>

Generally, where the courts have found laws content neutral with only minimal effects on First Amendment freedoms, they have upheld the laws.<sup>15</sup> Content-neutral laws of general applicability “do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news.”<sup>16</sup> The government can justify incidental restrictions on First Amendment freedoms by showing a sufficiently important interest exists to regulate a “nonspeech” element.<sup>17</sup> The test, first enunciated in *United States v. O’Brien*,<sup>18</sup> is satisfied as long as the law

is within the constitutional power of the Government; if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.<sup>19</sup>

However, the courts have been reluctant to uphold laws directly abridging First Amendment freedoms, especially when issues of public concern are involved. In *Smith v. Daily Mail Publishing Co.*,<sup>20</sup> the Supreme Court reviewed recent decisions and declared, “state action to punish the

13. *Whitney v. California*, 274 U.S. 357, 377 (1927).

14. *Id.* Traditionally, courts have applied two levels of scrutiny in determining whether proper justification exists for legislative action abridging these freedoms; intermediate or strict. The standard of review chosen has generally been based on whether or not the law is content based, preferring the tougher standard when content discrimination is present. Where the courts have deemed laws content neutral, they have generally applied intermediate scrutiny. Thus, two distinct lines of cases have emerged, both of which are implicated in *Bartnicki*.

15. If a law discriminates based on content it is subject to strict scrutiny. *See United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 813 (2000) (holding that “a content-based speech restriction . . . can stand only if it satisfies strict scrutiny”) (citing *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989)). Both *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97 (1979), and *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), discussed in the immediately following paragraphs, involved content-based restrictions.

16. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991).

17. *United States v. O’Brien*, 391 U.S. 367, 376 (1968).

18. *Id.* at 377.

19. *Id.*

20. 443 U.S. 97 (1979).

publication of truthful information seldom can satisfy constitutional standards.”<sup>21</sup> Ultimately, the *Daily Mail* Court held a state statute prohibiting the publication of a juvenile offender’s name unconstitutional as applied by declaring the state’s interest in protecting the child’s anonymity insufficient when weighed against the First Amendment.<sup>22</sup> The Court concluded that when the press lawfully obtains truthful information about a matter of public significance, publication of such information is constitutional “absent . . . a state interest of the highest order.”<sup>23</sup>

The general rule of *Daily Mail*, commonly referred to as the “*Daily Mail* principle,”<sup>24</sup> is now a cornerstone of First Amendment law protecting freedom of the press. In fact, the Court reiterated the principle in *Florida Star*.<sup>25</sup> In *Florida Star*, the Court declared a Florida statute making it unlawful to publish the name of a sexual assault victim unconstitutional as applied.<sup>26</sup> The Court reasoned that the information was lawfully obtained and the privacy and safety interests asserted by the state were outweighed by the freedoms secured under the First Amendment.<sup>27</sup> Quoting directly from *Daily Mail*, the Court cemented the principle: “[I]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.”<sup>28</sup> But, in footnote eight of *Florida Star*, the Court specifically reserved the question as to whether the press may publish the same information when acquired unlawfully.<sup>29</sup>

### B. *The Sphere of Privacy: Title III’s Role*

Although the United States Constitution does not explicitly establish an individual right to privacy, the Bill of Rights implies that an individual sphere of privacy exists that the government may not intrude upon.<sup>30</sup> Both the legislature and the judiciary have recognized this resulting right,

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21. *Id.* at 102.

22. *Id.* at 104.

23. *Id.* at 103.

24. *Florida Star v. B.J.F.*, 491 U.S. 524, 535 (1989).

25. *Id.*

26. *Id.* at 541.

27. *Id.* at 540–541.

28. *Id.* at 533 (quoting *Smith v. Daily Mail Publ’g Co.* 443 U.S. 97, 103 (1979)).

29. *Florida Star*, 491 U.S. at 535 n.8.

30. Eugene J. Yannon, *Privacy Law*, 34 Md. B.J. 24, 27 Dec. (2001).

described by Warren and Brandeis as the “right to be let alone,”<sup>31</sup> as an important, if not fundamental, interest.<sup>32</sup> The scope of this right, though, is unclear, particularly in light of technological advances that make invasions of privacy easier.<sup>33</sup>

Title III protects the individual’s sphere of privacy by making it illegal to intercept, use, or disclose the communications of any person except under specified circumstances.<sup>34</sup> Protecting privacy was an overriding congressional concern in enacting Title III of the Omnibus Crime Control and Safe Streets Act of 1968.<sup>35</sup> The legislature made specific findings that technological advances in surveillance techniques increased the danger that private communications “may be open to possible wrongful use and public disclosure by . . . unauthorized private parties.”<sup>36</sup> To ensure privacy in communications, Congress deemed it imperative to “strick[e] at all aspects of the problem . . . .”<sup>37</sup> Accordingly, Title III provides a uniform basis for protecting the privacy interest and broadly prohibits the interception, use, and disclosure of private communications.<sup>38</sup>

In pertinent part, Title III provides:

- (1) Except as otherwise specifically provided in this chapter any person who –
  - (a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication; [or]. . . .
  - (c) intentionally discloses or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral or electronic communication in violation of this subsection; [or]

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31. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

32. See generally Yannon, *supra* note 30, at 28–29.

33. *Id.* at 26.

34. 18 U.S.C. §§ 2510–2520 (1994).

35. S. REP. NO. 1097 (1968); *reprinted in* 1968 U.S.C.C.A.N. 2112.

36. S. REP. NO. 99-541, at \*3 (1986); *reprinted in* 1986 U.S.C.C.A.N. 3555, 3557; see also Brief for Petitioners Bartnicki and Kane, *Bartnicki v. Vopper*, 532 U.S. 514 (2001) (No. 99-1687, 99-1728); 2000 WL 1280378, at \*17.

37. S. REP. NO. 1097 (1968); *reprinted in* 1968 U.S.C.C.A.N. 2112, 2156; Petitioner’s Brief, Brief for the United States, *Bartnicki v. Vopper*, 532 U.S. 514 (2001) (No. 99-1687, 99-1728); 2000 WL 1344079, at \*9.

38. Petitioner’s Brief, Brief for the United States, *Bartnicki v. Vopper*, 532 U.S. 514 (2001) (No. 99-1687, 99-1728); 2000 WL 1344079, at \*5.

(d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; . . . shall be punished. . . .<sup>39</sup>

Title III imposes both civil and criminal penalties on any person in violation of the statute.<sup>40</sup> Further, it establishes a private cause of action for any person whose communication has been intercepted, used, or disclosed.<sup>41</sup>

### C. *The Interface Between the First Amendment and Title III*

Title III broadly protects the individual's "right to be let alone"<sup>42</sup> from interference in private communications. In doing so, it implicates the First Amendment in two critical ways. First, by augmenting the freedom to speak privately, Title III protects the First Amendment freedoms of speech and expression. In this sense, the statute directly fosters First Amendment goals: "privacy of communications is vital to our society" because it allows for the "free interchange of ideas and information."<sup>43</sup> By prohibiting the interception, use, and disclosure of private communications, Title III reinforces the First Amendment right not to speak, "which serves the same ultimate end as freedom of speech in its affirmative aspect."<sup>44</sup>

Second, and ironically, Title III's use and disclosure provisions have a potentially chilling effect on the freedoms of speech and the press because they can function like a prior restraint. It is beyond dispute that prior restraints pose the greatest threat to First Amendment freedoms.<sup>45</sup> Where disclosures about issues of public importance are involved, the concern is heightened since enforcement of Title III stands to directly conflict with the

39. § 2511(1)(a), (c), (d).

40. § 2511(4)–(5).

41. § 2520(a). The statute does not provide a private cause of action for "obtaining" illegally intercepted communications. §§ 2510–2520.

42. Warren & Brandeis, *supra* note 31.

43. *United States v. Cianfrani*, 573 F.2d 835, 856 (3d Cir. 1978).

44. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985) (citing *Estate of Hemingway v. Random House, Inc.*, 244 N.E.2d 250, 255 (N.Y. 1968)).

45. *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (holding publication of information of great public concern more important than preserving secrecy that might affect national security in light of the basic rule against prior restraints).



First Amendment's mandate.<sup>46</sup> Enforcement of these provisions against the press thus inherently raises First Amendment concerns.

"It is beyond question that the First Amendment would not protect the media [or other] defendants from liability . . . [for violating] the interception or procurement prongs of Title III."<sup>47</sup> Title III's interception provision is clearly constitutional.<sup>48</sup> Both the press and non-media defendants, however, have challenged the use and disclosure provisions on First Amendment grounds.<sup>49</sup> Where no significant First Amendment concerns have been raised, the use and disclosure provisions have been uniformly upheld.<sup>50</sup> But, when the disclosures involved matters of public significance, the courts have been inconsistent in their reasoning and conclusions.<sup>51</sup>

Two circuit court cases illustrate the confusion. Both circuit courts overturned the holding and rationale of the district court below and both were seeking certiorari from the Supreme Court at the time *Bartnicki* was decided. In *Peavy v. WFAA-TV*,<sup>52</sup> the Fifth Circuit was presented with a "first impression"<sup>53</sup> conflict between the right to privacy arising under Title III and

46. See, e.g., *id.*

47. *Peavy v. Harman*, 37 F. Supp. 2d 495, 516 (N.D. Tex. 1999) *aff'd in part, vacated in part, rev'd in part by*, *Peavy v. WFAA-TV, Inc.*, 221 F.3d 158 (5th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001).

48. Congressional authority to regulate interstate communications stems from the Commerce Clause and is generally subject to rational basis review; prohibiting interception of private communications is a legitimate state end that is directly advanced by the statute. *Boehner v. McDermott*, 191 F.3d 463, 477 (D.C. Cir. 1999), *vacated on other grounds by* 532 U.S. 1050 (2001).

49. Case law is sparse in this area. Kristine Cordier Karnezis, Annotation, *Construction and Application of Provision of Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C.A. § 2520) Authorizing Civil Cause of Action by Person Whose Wire, Oral, or Electronic Communication is Intercepted, Disclosed, or Used in Violation of Act*, 164 A.L.R. Fed. 139 (2000) (providing an overview of the application of Title III's use and disclosure history).

50. See *id.*

51. See *id.*

52. 221 F.3d 158 (5th Cir. 2000). In an earlier case, *Natoli v. Sullivan*, a New York court determined that a college newspaper could be held liable under Title III for disclosing the transcript of a telephone conversation recorded in violation of the statute even if it had played no role in the illegal interception and the information was of public concern. 606 N.Y.S.2d 504, 507 (Sup. Ct. 1993). The court noted however, that any republication of the transcript by another media source would not violate the statute as the information was then in the public realm and thus did not constitute disclosure. *Id.* at 509.

53. *Peavy*, 37 F. Supp. 2d at 516.

the “right of a free press to publish truthful and newsworthy information.”<sup>54</sup> The question presented was whether the media defendants could be held liable under Title III for using and disclosing information of public interest that they had obtained from a known third party.<sup>55</sup> Although the media defendants knew or had reason to know that the information was initially obtained in violation of Title III, they did not make the interceptions themselves.<sup>56</sup>

After an extensive analysis of applicable law, the Fifth Circuit determined that intermediate scrutiny was the proper standard of review and found that Title III’s use and disclosure provisions survived the constitutional challenge.<sup>57</sup> The court reasoned that Title III is a content-neutral law of general applicability designed to serve the important government interest of privacy in communications and does not burden substantially more speech than necessary in furthering the government’s ends.<sup>58</sup> The case was remanded, in part to determine issues of fact pertaining to the level of media “participation” in the interceptions.<sup>59</sup>

In *Boehner v. McDermott*,<sup>60</sup> the District of Columbia Circuit also confronted a direct clash between Title III’s disclosure provision and the First Amendment. In a highly publicized case involving the disclosure and subsequent publication of Speaker of the House Newt Gingrich’s illegally

54. *Id.* at 515. The trial court distinguished the statutory right to privacy arising under Title III from the “constitutional right . . . ‘to be let alone’ from *government* intrusion into personal and intimate decisions and beliefs.” *Id.* at 517. Applying strict scrutiny, the court held Title III unconstitutional as applied to the media defendants who had published truthful information that had been acquired by a third party in violation of the statute. *Id.* The court reasoned “that the information provided to the media involved matters of public significance” and the information was “lawfully obtained by the media.” *Id.* Thus, the trial court found the media’s use and disclosure of the information protected under the First Amendment absent a “state interest of the highest order.” *Peavy*, 37 F. Supp. 2d at 517. The statutory privacy interests violated here, the court explained, could be protected by imposing liability under Title III to the known third party who disclosed the information to the press. *Peavy v. Harman*, 37 F. Supp. 2d 495, 526 (N.D. Tex. 1999). This is ultimately what the Supreme Court held in *Bartnicki*. See discussion *infra* Part III.B.

55. *Peavy*, 221 F.3d at 180.

56. *Id.*

57. *Id.*

58. *Id.* at 193. The court overturned the lower court’s determination that Title III was unconstitutional as applied as well as its use of strict scrutiny as the standard of review. *Id.* at 194. The *Bartnicki* dissent essentially agreed with this court’s reasoning. See discussion *infra* Part III.D.

59. *Peavy*, 221 F.3d at 194.

60. 191 F.3d 463 (D.C. Cir. 1999).

intercepted cellular phone conversation, the circuit court found that it was the defendant's conduct that gave rise to liability under Title III.<sup>61</sup> Even assuming some speech element was present, the court concluded that the less exacting "O'Brien framework [was] the proper mode of . . . analysis."<sup>62</sup> Applying the O'Brien test, the court concluded Title III was constitutional as applied to the non-media defendant who had not himself intercepted the conversation but knew it was illegally obtained when he provided it to the press.<sup>63</sup> The court, though, distinguished the non-media defendant from the press, indicating that "[w]hether the statute would be constitutional as applied to a newspaper who published excerpts from the tape—who, in other words, engaged in speech—thus raises issues not before us."<sup>64</sup>

When considering the clash between Title III's use and disclosure provisions and the First Amendment, the courts were clearly struggling to find the proper standard of review. Given the importance of these "interests of the highest order," it is not surprising that the Supreme Court granted certiorari in *Bartnicki* to resolve the conflict.<sup>65</sup>

### III. *BARTNICKI V. VOPPER*

In *Bartnicki v. Vopper*, the Supreme Court was presented with the issue left unresolved in *Florida Star*, namely the scope of constitutional protection afforded to speech that discloses truthful information of public importance

61. *Id.* at 467.

62. *Id.* The District of Columbia Circuit rejected the lower court's application of the *Daily Mail* principle as well as the finding that the provision violated the First Amendment. *Id.* at 476. The circuit court found the *Daily Mail* and *Florida Star* line of cases inapplicable since the defendant was well aware of the illegality of the tapes when he took possession of them. *Id.*

63. *Boehner*, 191 F.3d at 477–78.

64. *Id.* The court noted that the defendant did not "stand in the shoes of the 'newspaper' in *Florida Star*" and that the defendant's disclosure to the press was not the equivalent of the newspaper's publication. *Id.* at 472. The dissent objected vehemently to this distinction, explaining that "First Amendment protections . . . extend to those who speak and those who write, whether they be press barons, members of Congress, or other sources." *Id.* at 484 (Sentelle, C.J., dissenting). The media was not sued in this case. Karen N. Fredericksen, *The Supreme Court, the Press, and Illegally Recorded Cellular Telephone Calls*, HUM. RTS., Fall 2001, at 17, 19 (2001).

65. *Bartnicki v. Vopper*, 532 U.S. 514 (2001). The Supreme Court let the *Peavy* decision stand in the aftermath of *Bartnicki*. *Peavy*, 221 F.3d at 158. At the same time it rendered the *Bartnicki* decision, the Supreme Court vacated and remanded the *Boehner* decision. *Boehner v. McDermott*, 191 F.3d 463 (D.C. Cir. 1999), *cert. granted, vacated, and remanded*, 121 S. Ct. 2190 (2001). See discussion *infra* Part IV.B.2.

“unlawfully obtained.”<sup>66</sup> The actual question the Court considered is a narrower version of *Florida Star*’s footnote eight:<sup>67</sup> “Where the punished publisher of information has obtained the information in question in a manner lawful in itself but from a source who has obtained it unlawfully, may the government punish the ensuing publication of that information based on the defect in a chain?”<sup>68</sup> A divided Supreme Court answered “no!”<sup>69</sup>

#### A. *The Facts*

The facts giving rise to this issue of first impression occurred in the contentious context of local union negotiations.<sup>70</sup> Petitioner Bartnicki, the chief negotiator for the local school board, called petitioner Kane, president of the local union, from her cellular telephone.<sup>71</sup> They engaged in a lengthy conversation about a proposed strike.<sup>72</sup> The call was intercepted and recorded by an unidentified person who then anonymously placed the tape in the mailbox of Jack Yocum, head of a local taxpayers organization.<sup>73</sup> Yocum recognized the voices on the tape and knowing or having reason to know it was illegally obtained, played the tape for the school board.<sup>74</sup> He also delivered it to respondent Vopper, a radio commentator known for his criticism of the union.<sup>75</sup>

The unknown source initially made and disclosed the recording in violation of Title III.<sup>76</sup> The recording contained unsettling remarks made by Kane concerning the school board’s intransigence: “If they’re not gonna move for three percent, we’re gonna have to go to their, their homes . . . To blow off their front porches, we’ll have to do some work on some of those

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66. *Bartnicki*, 532 U.S. at 529. The question was also reserved in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 837 (1978).

67. *Bartnicki*, 532 U.S. at 529 (construing the issue narrowly “consistent with [the] Court’s repeated refusal to answer categorically whether truthful publication may ever be punished consistent with the First Amendment.”).

68. *Id.* at 528 (quoting Justice Sentelle’s dissent in *Boehner*, 191 F.3d at 484–85).

69. *Id.* at 535.

70. *Id.* at 518.

71. *Id.*

72. *Bartnicki*, 532 U.S. at 518.

73. *Id.* at 518–19.

74. *Id.* at 519.

75. *Id.*

76. *Id.* at 523.

guys.”<sup>77</sup> Though Vopper knew or had reason to know that the conversation had been illegally intercepted, he played excerpts from the tape on his public affairs show.<sup>78</sup> Subsequently, Vopper and other media sources repeatedly rebroadcast the contents of the tapes.<sup>79</sup>

Bartnicki and Kane filed suit in the United States District Court for the Middle District of Pennsylvania against Yocum, Vopper, and the radio stations, alleging violations of Title III’s use and disclosure provisions and a similar state statute.<sup>80</sup> The District Court denied cross-motions for summary judgment and then certified two questions for interlocutory appeal to the Third Circuit.<sup>81</sup> First, whether imposing liability on the media defendants for using and disclosing the contents of the illegally intercepted tape violates the First Amendment, and second, whether imposing liability on Yocum for disclosing the tape to the media violates the First Amendment.<sup>82</sup>

When the Third Circuit Court of Appeals granted review the United States intervened to defend Title III pursuant to statutory right.<sup>83</sup> The Third Circuit upheld the lower court’s denial of summary judgment in the Yocum case, but reversed the denial as to the media defendants.<sup>84</sup> The Third Circuit Court of Appeals reasoned that the wiretapping statutes were content neutral and thus subject to intermediate scrutiny.<sup>85</sup> But the court determined that both the state and federal statutes “fail the test of intermediate scrutiny and may not constitutionally be applied to penalize the use or disclosure of illegally intercepted information where there is no allegation that the defendants participated in or encouraged that interception.”<sup>86</sup> The court remanded the case with instructions to grant the media’s motion for summary judgment.<sup>87</sup> The Third Circuit denied the petitioners’ ensuing motions for rehearing and the Supreme Court granted certiorari.<sup>88</sup>

77. *Bartnicki*, 532 U.S. at 518–19.

78. *Id.* at 519.

79. *Id.*; see discussion *infra* note 52.

80. *Id.* at 514, 519; see discussion *infra* note 52.

81. The questions were certified pursuant to 28 U.S.C. § 1292(b). *Bartnicki*, 532 U.S. at 521.

82. *Id.*

83. See 28 U.S.C. § 2403(a) (2000) (allowing the government to intervene in any action “wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question.”).

84. *Bartnicki v. Vopper*, 200 F.3d 109, 129 (3d Cir. 1999).

85. *Id.* at 123.

86. *Id.* at 129.

87. *Id.*

88. *Bartnicki v. Vopper*, 532 U.S. 514, 522 (2001).

### B. *The Opinion*<sup>89</sup>

At the outset, the Court acknowledges this case presents a “conflict between interests of the highest order—on the one hand, the interest in the full and free dissemination of information concerning public issues—and on the other hand, the interest in individual privacy, and more specifically, in fostering private speech.”<sup>90</sup> Carefully considering the interests at stake, the Court is “firmly convinced” that the First Amendment affords protection to the respondents’ disclosures.<sup>91</sup> Thus, the question before the Court is whether holding the respondents liable under Title III violates the First Amendment.<sup>92</sup>

Before addressing this constitutional question, the Court makes three critical assumptions.<sup>93</sup> First, the respondents played no role in the interception itself and had no knowledge that it was being made.<sup>94</sup> Second, though the interception was made in violation of Title III, the respondents lawfully received the information.<sup>95</sup> Third, the intercepted conversation involved “a matter of public concern” and the disclosed statements were “newsworthy.”<sup>96</sup>

Turning to the constitutional issue, the Court deems Title III a content-neutral statute.<sup>97</sup> Though characterizing the use provision as a regulation of conduct, the Court finds the disclosure provision a “regulation of pure speech,” analogizing it to the delivery of a pamphlet or a handbill.<sup>98</sup> Citing the *Daily Mail* principle as well as the primacy of the basic rule against prior

89. Justices O’Connor, Kennedy, Souter, Ginsberg, and Breyer joined in the opinion, written by Justice Stevens. *Id.* at 516. Justice Breyer authored the concurring opinion, joined by Justice O’Connor. *Id.* Chief Justice Rehnquist drafted the dissenting opinion, joined by Justices Scalia and Thomas. *Id.*

90. *Id.* at 518.

91. *Bartnicki*, 532 U.S. at 518.

92. *Id.* at 525. The Court draws “no distinction between the media respondents and Yocum” in this regard. *Id.* at n.8.

93. *Id.* at 525.

94. *Id.*

95. *Bartnicki*, 532 U.S. at 525.

96. *Id.*

97. The Court reasoned that the communications are singled out because they are intercepted; the statute thus distinguishes them “by virtue of the source, rather than the subject matter.” *Id.* at 526.

98. *Id.* at 526.

restraints on publication, the Court concludes that strict scrutiny must be applied.<sup>99</sup>

The Court identifies two government interests supporting Title III: the interest in deterring interceptions and “the interest in minimizing the harm to persons whose conversations have been illegally intercepted.”<sup>100</sup> The Court assumes that these interests justify the disclosure provision when applied to an “interceptor’s own use” or disclosure of information.<sup>101</sup> But, the Court asserts it does not follow that “punishing disclosures of lawfully obtained information of public interest by one not involved in the initial illegality is an acceptable means of serving” the same ends.<sup>102</sup>

The Court quickly dismisses the government’s deterrence interest as “plainly insufficient” to prohibit the disclosure of “public information” since the government can better serve this interest by increasing the penalties on interception itself.<sup>103</sup> It finds the second interest, minimizing harm, considerably stronger since the disclosure of illegally intercepted private communications could serve to inhibit private speech that is essential to the functioning of a democratic society.<sup>104</sup> The Court acknowledges that the disclosure can be more invasive of privacy than the initial interception itself, yet concludes that where sanctions on the publication of truthful information of public concern are involved, privacy must “give way.”<sup>105</sup>

The Court cites its opinion in *New York Times v. Sullivan*, reaffirming the “general proposition that freedom of expression upon public questions is secured by the First Amendment.”<sup>106</sup> Recognizing that “neither factual error nor defamatory content, nor a combination of the two, sufficed to remove the First Amendment shield from criticism of official conduct,”<sup>107</sup> the Court uses “parallel reasoning” and holds Title III unconstitutional as applied to the facts of the case.<sup>108</sup>

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99. *Id.* at 527–28 (referring to *New York Times Co. v. United States*, 403 U.S. 713 (1971), where the Court deemed the public’s right to know superior to privacy interests).

100. *Bartnicki*, 532 U.S. at 529.

101. *Id.*

102. *Id.*

103. *Id.* at 532.

104. *Id.* at 532–33.

105. *Bartnicki*, 532 U.S. at 534.

106. *Id.* (citing 376 U.S. 254, 269 (1964)).

107. *Bartnicki*, 532 U.S. at 535 (citing *Bridges v. California*, 314 U.S. 252, 273 (1941)).

108. *Id.*

### C. *The Concurring Opinion*

Asserting that the decision does not afford “a significantly broader constitutional immunity for the media,” the concurring Justices stress the narrowness of the Court’s holding.<sup>109</sup> Where competing constitutional interests are at stake, the concurring Justices find the standard of strict scrutiny inapplicable, preferring a balancing approach.<sup>110</sup> Balancing the competing right to privacy with the First Amendment, given the specific facts of this case, the concurring Justices nevertheless find Title III unconstitutional as applied.<sup>111</sup>

The concurring Justices stress that Title III’s direct restriction on speech is necessary.<sup>112</sup> Since the threat of widespread dissemination creates a powerful disincentive to speak, the government has a substantial interest in broadly prohibiting the interception of private communications.<sup>113</sup> Nevertheless, the concurrence concludes that Title III’s disclosure provision disproportionately burdens freedom of the press under the specific facts of the case.<sup>114</sup>

Wary of creating a public interest exception to the statute,<sup>115</sup> the concurring Justices emphasize that the petitioners “had little or no *legitimate* interest in maintaining the privacy of the particular conversation.”<sup>116</sup> The petitioners were contemplating a wrongful act that might have threatened the safety of others.<sup>117</sup> Moreover, having voluntarily engaged in a public controversy, the petitioners were “limited public figures.”<sup>118</sup> The concurrence stresses that they thus had a more limited interest in privacy than persons discussing purely personal matters “and the public interest in defeating those expectations is unusually high.”<sup>119</sup>

109. *Id.* at 536 (Breyer, J., concurring).

110. *Id.* (Breyer, J., concurring).

111. *Id.* at 541 (Breyer, J., concurring).

112. *Id.* at 537 (Breyer, J., concurring).

113. *Id.* (Breyer, J., concurring).

114. *Id.* at 538 (Breyer, J., concurring). Justice Breyer fears a broad reading of the case will inhibit legislatures from flexibly responding to advancing technology that threatens privacy. *Id.* at 541 (Breyer, J., concurring). He also urges legislatures to encourage privacy-protecting technology. *Bartnicki*, 532 U.S. at 541 (Breyer, J., concurring).

115. *Id.* at 540 (Breyer, J., concurring).

116. *Id.* at 539 (Breyer, J., concurring).

117. *Id.* (Breyer, J., concurring).

118. *Id.* (Breyer, J., concurring).

119. *Bartnicki v. Vopper*, 532 U.S. 514, 540 (2001) (Breyer, J., concurring).



#### D. *The Dissenting Opinion*

The dissenting Justices fear that the Court's opinion diminishes the purposes of the First Amendment by inhibiting the speech of millions of Americans, particularly in light of advancing technology.<sup>120</sup> Finding "scant support, either in precedent or reason" to apply strict scrutiny, the dissent would apply the *O'Brien* test to Title III since it is a content-neutral law of general applicability that serves to foster both the right to privacy and freedom of speech.<sup>121</sup> The dissent distinguishes the *Daily Mail* line of cases because the laws they implicated regulated the content or subject matter of speech.<sup>122</sup> Moreover, the dissent argues that unlike the laws under scrutiny in the *Daily Mail* line, Title III's disclosure provision does not inhibit publication of information already in the public domain.<sup>123</sup> The dissent focuses heavily on the statute's scienter requirement and argues that Title III does not operate as a prior restraint.<sup>124</sup>

Deeming the disclosure provision critical to achieving the government's goals, the dissent thus finds Title III not only content-neutral, but narrowly tailored to prohibit the disclosure of illegally intercepted conversations.<sup>125</sup> Stressing that the First Amendment also protects the right not to speak, the dissent contends that "[t]he Constitution should not protect the involuntary broadcast of personal conversations" even when the conversants are public figures discussing public matters.<sup>126</sup> The dissent affords a sphere of privacy to public persons which encompasses the "right to have a private conversation without fear of it being intentionally intercepted and knowingly disclosed."<sup>127</sup> Finding it unfortunate that the Court subordinates this right to

120. *Id.* at 542 (Rehnquist, C.J., dissenting).

121. *Id.* at 544 (Rehnquist, C.J., dissenting).

122. *Id.* (Rehnquist, C.J., dissenting).

123. *Id.* at 546-47 (Rehnquist, C.J., dissenting). The dissent distinguishes *Daily Mail* from the case at bar on three grounds: first, the information there was lawfully obtained from the government itself whereas here, the private conversations have been intentionally kept out of the public domain; second, the information in those cases was available to the public before the media disclosed it; and third, the fear of resulting self-censorship was greater in the *Daily Mail* line because Title III provides a scienter requirement and no duty is imposed on the media to inquire into the source so there is no liability for negligent disclosures. *Bartnicki*, 532 U.S. at 546-47 (Rehnquist, C.J., dissenting).

124. *Id.* at 547 (Rehnquist, C.J., dissenting).

125. *Id.* at 548 (Rehnquist, C.J., dissenting).

126. *Id.* at 554 (Rehnquist, C.J., dissenting).

127. *Id.* at 555 (Rehnquist, C.J., dissenting).

privacy to the freedom of the press, the dissent would hold the statute constitutional as applied to the facts of the case.<sup>128</sup>

#### IV. ANALYSIS OF THE *BARTNICKI* DECISION

The rule of *Bartnicki* is seemingly clear: absent an “interest of the highest order,” the First Amendment affords the press the right to publish a public figure’s illegally intercepted “speech” on matters of public concern as long as it did not participate in the initial interception.<sup>129</sup> Prior to *Bartnicki*, the *Daily Mail* principle required courts to make two determinations when publishing truthful information.<sup>130</sup> “[F]irst, whether the information was lawfully acquired, and second, whether [the publication] addressed a matter of public concern.”<sup>131</sup> *Bartnicki* shifts the focus exclusively to the second question.<sup>132</sup> It now appears that the only factor limiting the press’s ability to publish truthful information is whether it addresses a matter of public concern.<sup>133</sup> This section begins by considering the Court’s reasoning. It then addresses the ambiguities and likely impact of the decision, finding that the rule of *Bartnicki* is not as clear as it seems.

##### A. *The Court’s Content-Based Decision*

Ironically, in holding a content neutral law of general applicability unconstitutional as applied, the Court focuses on the content of the disclosure itself. The *Bartnicki* decision clearly elevates speech on matters of public concern above other forms of speech protected under the First Amendment.<sup>134</sup> Ultimately, it also signals the triumph of press freedom over privacy interests.<sup>135</sup> Yet, a majority of the Court affords greater weight to the right to privacy and freedom of speech than the holding suggests.<sup>136</sup> Five

128. *Bartnicki v. Vopper*, 532 U.S. 514, 555 (2001) (Rehnquist, C.J., dissenting).

129. Karen N. Frederiksen, *The Supreme Court, the Press, and Illegally Recorded Cellular Telephone Calls*, HUM. RTS., Fall 2001, at 17, 18.

130. *Leading Cases*, 115 HARV. L. REV. 306, 413 (2001).

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. Paul M. Smith & Nory Miller, *When Can the Courts Penalize the Press Based on Newsgathering Misconduct?*, COMM. LAW., Summer 2001, at 1.

136. *Id.* at 28 (noting that five Justices seem willing to hold the press liable for disclosing the contents of a third party’s “illegal interception if the circumstances are sufficiently different from those presented in this case”).

Justices assert that strict scrutiny is an improper standard of review where privacy interests conflict with the First Amendment.<sup>137</sup> Clearly, the two concurring and three dissenting Justices are troubled by the Court's reasoning. They have reason to be. The Court's analysis is logically unsound, but will impact the legal interplay between the right to privacy, freedom of speech, and freedom of the press in an era where technological advances increasingly threaten privacy in communications.

### 1. Pure Speech?

The Court's application of the *Daily Mail* principle is predicated on its assertion that Title III's disclosure provision regulates "pure speech" rather than expressive conduct.<sup>138</sup> Since the "speech" disclosed by the media involves a matter of public importance, the Court applies the *Daily Mail* principle and renders Title III unconstitutional as applied.<sup>139</sup> But, it is not clear at the outset that disclosure of an illegally intercepted communication is "pure speech" at all within the meaning of the First Amendment.

The Court determines that a Title III disclosure involves "pure speech" by analogizing the disclosure to the delivery of a pamphlet or a handbill.<sup>140</sup> But the analogy itself is flawed.<sup>141</sup> The delivery of a pamphlet or handbill involves the intentional disclosure of its contents by the author or agents of the author.<sup>142</sup> Though the disclosure of illegally intercepted communications likewise provides the recipient the text of the statements, the statements being disclosed are not initially intended for publication.<sup>143</sup> On the contrary, these communications occur in private and are meant to remain confidential.<sup>144</sup>

Simply put, it is illogical to term the media disclosure "pure speech." The broadcast of these communications clearly implicates both the deliberately private speech of the conversant and the intentional conduct of

137. *Id.*

138. *Bartnicki*, 532 U.S. at 527.

139. *Bartnicki v. Vopper*, 532 U.S. 514, 518 (2001).

140. *Id.* at 527.

141. *Id.* at 540 (Rehnquist, C.J., dissenting).

142. *Id.*

143. *Id.* at 541; Brief Amicus Curiae Cellular Tel. Indus. Ass'n at \*17, *Bartnicki v. Vopper*, 532 U.S. 514 (2001) (No. 99-1687), available at 2000 WL 1280461 (providing an in depth analysis of this issue).

144. Even if the petitioners' expectations of privacy were diminished as the concurrence asserts, they never intended the contents of their conversation to be divulged. *Bartnicki*, 532 U.S. at 533.

the press in disclosing it.<sup>145</sup> Disclosing the contents of an illegally intercepted communication is simply not “pure speech” as the Court holds. Nevertheless, the Court finds this “pure speech” concerns a matter of public concern and applies the *Daily Mail* principle. The Court’s foundation for applying strict scrutiny is tenuous.

## 2. Compelling Speech

As the dissent points out, the First Amendment promotes the voluntary freedoms of expression.<sup>146</sup> The First Amendment was not ratified to coerce Americans to divulge their private conversations.<sup>147</sup> The Supreme Court of the United States recognized this critical distinction in *Harper & Row* when it noted that the right not to speak is not only protected under the First Amendment, but serves the same ultimate purposes as the freedom to speak.<sup>148</sup> Democracy requires that citizens are afforded privacy to think creatively and constructively without fear of exposure.<sup>149</sup> Yet, the *Bartnicki* Court holds that if the press receives information on a matter of public concern from an outside source that broke the law to obtain it, then the press cannot constitutionally be punished for publishing it.<sup>150</sup> *Bartnicki* compels the speech of the victim of the illegal interception.

At the crux of the First Amendment “lies the principle that each person should decide for himself or herself the ideas or beliefs deserving of expression.”<sup>151</sup> The Court’s analysis ignores a core purpose of the First Amendment by holding that public persons have abandoned their right to converse privately when discussing matters of public concern.<sup>152</sup> Over a century ago, Justices Warren and Brandeis surmised that as life becomes more complex and civilization advances, privacy becomes more essential to

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145. Amicus Brief at \*17, *Bartnicki* (No. 99-1687).

146. *Bartnicki*, 532 U.S. at 553.

147. *Id.* at 540.

148. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985).

149. *Buckley v. Valeo*, 424 U.S. 1, 14 (1976).

150. The Court has upheld press freedom to publish material unlawfully divulged by a source, but in *Bartnicki*, the disclosed information was never in the public domain in the first place, nor was it leaked by a source that rightfully had access to it. *Bartnicki v. Vopper*, 532 U.S. 514, 528 (2001) (distinguishing *Florida Star v. B.J.F.*, 491 U.S. 524 (1989) and *New York Times Co. v. United States*, 403 U.S. 713 (1971) on the basis of the government’s ultimate authority over the divulged information and the prior restraint imposed).

151. *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 641 (1994).

152. *Bartnicki*, 532 U.S. at 539.

the individual.<sup>153</sup> Could they ever have imagined the modern threats to privacy in communications? The Court's decision compels speech, diminishes the right to speak privately, and thus undermines an essential element of democratic society that the First Amendment was designed to promote.

### 3. Ignoring the Facts

The *Bartnicki* Court acknowledges that disclosing "the contents of a private conversation can be an even greater intrusion on privacy than the interception itself."<sup>154</sup> Yet the Court holds that although the media can be held liable under Title III for illegally intercepting a communication, it cannot constitutionally be punished for disclosing that same information unless it was involved in the initial illegality.<sup>155</sup> The Court reaches this conclusion in part by finding that Title III's disclosure provision has no significant deterrent effect on the initial interception.<sup>156</sup> Instead, the Court argues that punishment of the offender is the usual method of deterring unlawful conduct.<sup>157</sup> The Court suggests that the government further its interest in privacy of communications by imposing stiffer sanctions on violations of the procurement prong.<sup>158</sup>

While the Court limits the holding to the facts of the case, the Court's outright rejection of the deterrence rationale<sup>159</sup> ignores the facts of the very case it is deciding. In *Bartnicki*, the initial offender is unknown.<sup>160</sup> Imposing stiffer sanctions on the initial offender is meaningless. The government cannot further its objectives by punishing the source. As the dissent argues, preventing the offender "from enjoying the fruits of the crime" is a "time-tested" solution to deterring illegal acts that are difficult to detect.<sup>161</sup>

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153. Warren & Brandeis, *supra* note 31, at 196.

154. *Bartnicki*, 532 U.S. at 533.

155. *Leading Case*, *supra* note 132, at 406, 413.

156. *Bartnicki*, 532 U.S. at 529.

157. *Id.*

158. *Id.*

159. *Id.* at 530.

160. *Id.* at 518.

161. *Bartnicki v. Vopper*, 532 U.S. 514, 550 (2001) (Rehnquist, C.J., dissenting) (citing both the knowing possession of stolen goods and the Fourth Amendment exclusionary rule as examples).

The Court justifies its own dismissal of the facts simply by stating “surely this is [an] exceptional case.”<sup>162</sup> *Bartnicki* may indeed present an unusual set of facts, but this does not excuse the Court from addressing the facts before it. Privacy interests suffer as a result;<sup>163</sup> permitting the press to disclose the contents of an illegally intercepted communication increases the demand for illegal interceptions. This is especially true on matters of public concern where the interceptor’s primary objective is likely disclosure of the information itself. Failing to address the facts of the case at bar, the Court seriously undermines Title III’s mandate of maintaining privacy in communications.

#### 4. A Tale of Two Evils

The Court’s consideration of the use and disclosure provisions is equally troublesome. While deeming disclosure “pure speech,” the Court expressly states that the use of illegally intercepted communications constitutes conduct.<sup>164</sup> Since laws regulating conduct are generally subject to the less exacting *O’Brien* test,<sup>165</sup> imposing liability on the media for using an illegally intercepted communication is more likely constitutionally permissible than punishing disclosure of the same information. Arguably, the speaker’s sphere of privacy is more directly invaded by a verbatim broadcast of private communications than by the media’s use of the information to investigate a story.

The result is illogical because the Court effectively permits the press to commit the greater of two evils. If Vopper had used the intercepted information as an investigative lead and never disclosed the actual contents on the air, the Court’s reasoning implies that the press could be held liable for violating Title III’s use provision without offending the First Amendment.<sup>166</sup> Yet, the Court holds that punishing Vopper’s verbatim broadcast of the same information violates the First Amendment and is therefore unconstitutional.<sup>167</sup> The Court’s reasoning permits the press to disclose the

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162. *Bartnicki*, 532 U.S. at 531.

163. Conflict is created when a “general principle of law is applied to a case, although not applicable to the particular facts of that case.” *Sacks v. Sacks*, 267 So. 2d 73, 75 (Fla. 1972).

164. “Unlike the prohibition against the ‘use’ of the contents of an illegal interception . . . [disclosure] is not a regulation of conduct.” *Bartnicki*, 532 U.S. at 526–27.

165. *United States v. O’Brien*, 391 U.S. 367 (1968).

166. *See Boehner v. McDermott*, 191 F.3d 463 (D.C. Cir. 1999) (labeling Title III’s disclosure provision as conduct and finding it withstands the *O’Brien* test).

167. *Bartnicki*, 532 U.S. at 532.

conversation, while prohibiting it from engaging in the lesser evil of use. In the aftermath of *Bartnicki*, it appears that the media is safer directly invading a public figure's privacy than searching for a less intrusive means of presenting the same story. Surely, the Court could not have intended this illogical result.

The Court's reasoning is illogical and inconsistent. The underlying premise of the Court's opinion, that this disclosure is in fact "pure speech," is not justified. The Court not only fails to acknowledge that the First Amendment is designed to promote the voluntary freedoms of expression, but ignores the facts of the case at bar as well as the contradictory implications of its reasoning. Based on this defective foundation, the Court builds a hierarchy of First Amendment interests, elevating the freedom of the press above the freedom of speech and the right not to speak. By focusing so heavily on the freedom of the press to publish truthful information of public concern, the Court undervalues both the right to privacy and the First Amendment freedom of speech.

#### B. *Implications of Bartnicki v. Vopper*

The Court's reasoning, flawed as it is, will affect the outcome of future conflicts involving privacy rights and First Amendment freedoms; *Bartnicki* is the law. *Bartnicki* clearly signals a triumph for press freedom to publish truthful information on matters of public concern, but the extent the Court has extended this freedom is unclear.<sup>168</sup> Since the Court leaves important issues unresolved, the effect of the decision is dependent upon judicial interpretation. Although the decision is termed narrow, in an era of advancing technology privacy interests will increasingly collide with freedom of the press and *Bartnicki's* impact is potentially far-reaching.

##### 1. Unresolved Issues

*Bartnicki* leaves important questions unanswered. The Court makes three critical assertions that render the full significance of the decision unclear; the speakers are public figures, the media had no involvement in and no knowledge of the initial interception, and the information broadcast is of public concern. It is unlikely that future cases will present such pure factual scenarios. The legal interplay between privacy interests and freedom

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168. The concurring Justices claim "the Court's holding does not imply a significantly broader constitutional immunity for the media." *Id.* at 536.

of the press is thus dependent upon how the judiciary interprets these factors, including the weight afforded to the concurring opinion.<sup>169</sup>

First, the *Bartnicki* holding is predicated on a finding that the speech disclosed was made by public figures. The concurring Justices in *Bartnicki* emphasize that because Bartnicki and Kane are public figures, their privacy expectations are diminished. If the courts give weight to the concurring opinion, the press may be afforded even greater constitutional protection where public officials are involved.<sup>170</sup> Unfortunately, the Court does not address whether the holding governs disclosures of private individual's communications.<sup>171</sup> But by the same reasoning, the courts may afford the press less constitutional protection when the speech of private figures is at issue.

Second, the Court assumes that the media had no involvement in or knowledge of the initial interception. Clearly, if the press actively participates in the interception, it can be held liable under Title III's procurement and disclosure prongs. But, the Court does not determine the threshold level of press involvement necessary to trigger liability for disclosure. Can the press be held liable under the disclosure prong while indirectly participating in the initial interception?<sup>172</sup> Is mere knowledge that the interception is taking place sufficient to trigger liability?<sup>173</sup> *Bartnicki* leaves these questions unanswered. The scope of protection *Bartnicki* affords the press will remain unclear until these issues are litigated.<sup>174</sup>

Finally, and perhaps most critically, the Court assumes that the intercepted conversation involves a "matter of public concern."<sup>175</sup> Yet as the dissent points out, "'public concern' is an amorphous concept that the Court does not even attempt to define."<sup>176</sup> The opinion indicates that the speaker's interest in maintaining privacy does not determine whether a matter of public concern exists, but fails to clarify what makes a matter newsworthy.<sup>177</sup>

How publicly important must the disclosure be to place the press under the protective umbrella of the decision? The Court notes that domestic

169. Smith & Miller, *supra* note 135, at 29.

170. Frederiksen, *supra* note 129, at 19.

171. *See id.*

172. *See* discussion *infra* Part III.B.2.

173. Frederiksen, *supra* note 129, at 19. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999), suggests knowledge is not enough to trigger press liability for publication. Smith & Miller, *supra* note 136, at 30.

174. *See* discussion *infra* Part III.B.2.

175. *Bartnicki v. Vopper*, 532 U.S. 514, 525 (2001).

176. *Id.* at 542 (Rehnquist, C.J., dissenting).

177. Smith & Miller, *supra* note 135, at 30.



gossip does not fall within the ambit of the decision, but what if this gossip is about a public official?<sup>178</sup> The Court distinguishes trade secrets from matters of public importance, yet what if the secrets involve illegality?<sup>179</sup> Was the disclosure in *Bartnicki* of simple public importance or, as the concurring Justices argue, of unusual public significance? *Bartnicki* provides no guidance, leaving the line between issues of private and public concern as ambiguous as ever.<sup>180</sup>

The Court elevates matters of public concern above other forms of protected speech without presenting coherent guidelines for determining when the holding actually applies to a media disclosure. “[G]iven the malleability of the public concern standard and the ease of ex post explanations” the Court might have effectively answered the one question it repeatedly refuses to answer categorically;<sup>181</sup> whether truthful publication may ever be punished consistent with the First Amendment.<sup>182</sup> *Bartnicki* intimates that the press cannot be constitutionally prevented from publishing truthful information, regardless of the source.<sup>183</sup> But if the concurring rationale is followed, press freedom and privacy interests may be afforded variable protection based on the status of the speaker and the public significance of the disclosed speech.<sup>184</sup>

## 2. Resolution in the Aftermath? *Peavy* and *Boehner*

Shortly after rendering the *Bartnicki* decision, the Court denied certiorari in *Peavy* and granted review in *Boehner*.<sup>185</sup> In the long term, litigation of these and other cases will help resolve the ambiguities of the *Bartnicki* decision.<sup>186</sup> For now, analyzing the Court’s certiorari decisions provides insight into the scope of *Bartnicki*.<sup>187</sup> The Court’s certiorari

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178. *Id.* at 28–29.

179. *Id.*

180. *Leading Cases*, *supra* note 132, at 415.

181. *Id.* at 416.

182. *Bartnicki*, 532 U.S. at 527.

183. *Leading Cases*, *supra* note 132, at 416.

184. Concurring opinions can be significant. *See, e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (Jackson, J., concurring).

185. *Peavy v. WFAA-TV, Inc.*, 221 F.3d 158, (5th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001); *Boehner v. McDermott*, 191 F.3d 463 (D.C. Cir. 1999), *cert. granted, vacated, and remanded*, 121 S. Ct. 2190 (2001).

186. Frederiksen, *supra* note 129, at 18.

187. Having analyzed *Pravda* for many years, this author takes a Kremlinological approach.

decisions suggest three things. First, the threshold question is whether matters of public concern are disclosed. The more newsworthy the matter, the higher the government's interest must be to justify regulation. Second, and related, when the speech disclosed is that of a prominent public official, stricter scrutiny is required. Third, any indication of press entanglement may remove the press from *Bartnicki's* protective umbrella.

The United States Supreme Court allowed the *Peavy* decision to stand despite the fact that the lower court applied intermediate, rather than strict scrutiny.<sup>188</sup> This seemingly inconsistent denial can perhaps be explained by the possibility that more than "pure speech" is at issue in *Peavy*.<sup>189</sup> Unlike *Bartnicki*, this case implicates the concept of press involvement, requiring a factual analysis of whether the media "obtained" the interceptors.<sup>190</sup> The United States Supreme Court's denial of review may indicate that when the press is involved in the illegal interception, *Bartnicki* does not govern the outcome at all. Perhaps when the media even indirectly "participates" in the initial interception, intermediate scrutiny is sufficient.

After granting certiorari in *Boehner*, the United States Supreme Court vacated the decision below and remanded it for consideration consistent with *Bartnicki*.<sup>191</sup> The vacated opinion applied the *O'Brien* test and concluded that Congressman McDermott, a non-media defendant, could be held liable for disclosing an illegally intercepted communication made by a third party to the media.<sup>192</sup> Perhaps the enormous public significance of the disclosure triggered the United States Supreme Court's remand.<sup>193</sup> Or perhaps it was because the speech disclosed was that of Newt Gingrich, a prominent public official. In either case, the remand in *Boehner* suggests that when matters are of national significance, the *O'Brien* test is an improper mode of analysis. Whether disclosed by the press or by a non-media defendant, speech, not conduct, is at issue.

The remand of *Boehner* may be most significant in that the United States Supreme Court did not reverse the decision below, thereby holding the non-media defendant to the same standard of review as the media defendant in *Bartnicki*. Although the remand indicates that a higher level of scrutiny is required, it does not demand that the First Amendment must

188. *Peavy*, 221 F.3d at 181.

189. Fredericksen, *supra* note 129, at 19.

190. *Id.*

191. *Boehner v. McDermott*, 191 F.3d 463 (D.C. Cir. 1999), *cert. granted, vacated and remanded*, 532 U.S. 1050 (2001).

192. The media was not sued. Fredericksen, *supra* note 129, at 19.

193. *Id.*

triumph when the media is not involved. It remains to be seen whether McDermott, a non-media defendant, is immune from liability under Title III like the press, or should be held liable for disclosure under a different rationale.

#### V. A STANDARD OF ITS OWN?

The Court claims adherence to the general rule that the First Amendment does not subject enforcement of a general law against the press to stricter scrutiny than would be applied to others.<sup>194</sup> In fact, in a one-sentence footnote, the Court asserts that it “draw[s] no distinction between the media respondents and Yocum.”<sup>195</sup> Thus, the Court does not explicitly hold the press to a different standard of review. Yet, if the footnote is read literally, it implies that the disclosure provision is unconstitutional in *every* instance when the initial interception is made by an outside party without press involvement, the disclosure involves a matter of public significance, and the “speech” disclosed is that of a public figure. The Court’s reasoning does not support such a broad reading.

Logic dictates that the Court’s rationale cannot be applied to a non-media defendant’s disclosure. The holding is not only rooted in freedom of the press, but freedom of the press permeates every aspect of the Court’s analysis. The Court tellingly frames the question presented narrowly in order to be consistent with its “repeated refusal to answer categorically whether truthful *publication* may ever be punished consistent with the First Amendment.”<sup>196</sup> Publication is defined as “[t]he act or process of publishing” printed material.<sup>197</sup> Publish means “[t]o prepare and issue (printed material) for public distribution or sale.”<sup>198</sup> When the media institution is not the disclosing party, there is no *publication*, rendering the *Daily Mail* principle inapplicable to the analysis.

Clearly Yocum’s disclosure of the illegally intercepted communication is substantively identical to the media’s, but the form of his disclosure is distinguishable. Although Yocum is exercising his freedom of speech by disclosing information to the media, he is not *publishing* it. His disclosure does not directly implicate the First Amendment freedom of the press.

194. See *Bartnicki v. Vopper*, 532 U.S. 514, 525 (2001).

195. *Id.* at 525, n.8.

196. *Id.* at 529 (emphasis added).

197. THE AMERICAN HERITAGE DICTIONARY 628 (Williams Morris ed. 2001). This paper uses the term broadly to include all media disclosures.

198. *Id.*

Yocum's disclosure to the non-media party does not even indirectly implicate press freedom. Though *Bartnicki* does not address the issue of whether the non-media defendant's liability is dependent upon the endpoint of his disclosure, applying the *Daily Mail* principle is clearly inappropriate when there is no publication.<sup>199</sup>

In *Curtis Publishing Co. v. Butts*, the United States Supreme Court held that a newspaper publisher has no special immunity from general laws to invade the rights of others.<sup>200</sup> Title III is a content-neutral law of general applicability. In *Bartnicki*, the media respondents invaded the petitioners' privacy by disclosing their confidential conversations initially intercepted in violation of Title III. The *Bartnicki* decision subjects Title III to stricter scrutiny when applied to the press than as applied to others because the *Daily Mail* principle is inapplicable when a non-media defendant makes the same disclosure. Implicitly, the decision holds the press to a lesser standard of liability when violating a content-neutral law of general applicability than it does others. The Court has effectively offended its own rule.

## VI. CONCLUSION

*Bartnicki* clearly signals the triumph of freedom of the press over the right to privacy and other freedoms of expression protected by the First Amendment. But *Bartnicki* also demonstrates the importance of the distinction between legality and morality. Though it is now legally permissible for the media to publish a public person's illegally seized speech on a matter of public concern, it is not necessarily morally justifiable to do so. Despite the law, not all journalists would compel speech under the facts of *Bartnicki*.<sup>201</sup> Fortunately, morality and legality are not one in the same.

Certainly, journalists balanced the public right to know against the individual right to privacy before *Bartnicki*. But as advancing technology increasingly threatens privacy in communications, *Bartnicki* creates an additional ethical dilemma for the media. Currently, many codes of ethics

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199. If *Bartnicki* and *Kane* had sued only Yocum without suing the media, it is difficult to imagine that the Supreme Court would have granted certiorari. Unlike *Boehner*, this case does not involve matters of national significance or the speech of high-level public officials. Although acknowledging that Yocum and McDermott technically stand in the same shoes, the Third Circuit distinguished McDermott's disclosure based on his political motivations and his potential involvement in the initial interception. *Bartnicki*, 200 F.3d at 129.

200. 388 U.S. 130 (1967).

201. Interview with A. Barrett Seaman, Editor Emeritus, Time Magazine, in Ft. Lauderdale, Fla. (Feb. 14, 2002).

neglect to even address privacy interests.<sup>202</sup> Competition among journalists can transform a little irresponsibility into a colossal peril for the individual right to privacy. *Bartnicki* proclaims press freedom is first and foremost in importance. Prominence ought to be accompanied by responsibility. Our right to privacy depends on it.

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202. Bob Steele, *Codes of Ethics and Beyond*, available at <http://www.poynter.org/research/me/coethics.htm> (Apr. 1999).