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Constitutional Law: The Intersection of Title III and the First Amendment: A Diminishing Right to Privacy in an Expanding Technological Age

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NOTE

CONSTITUTIONAL LAW: THE INTERSECTION OF TITLE III AND THE FIRST AMENDMENT: A DIMINISHING RIGHT TO PRIVACY IN AN EXPANDING TECHNOLOGICAL AGE

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* This Note is dedicated to the memory of my father, William J. Patterson. I also would like to thank Professor Christopher Slobogin for introducing me to this topic.

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I. INTRODUCTION

One of the most prolific advancements in telecommunications technology has been the development and widespread use of wireless communication devices, such as cellular telephones.[1] The ubiquitous presence of these devices has fundamentally changed the way people conduct business and run their personal lives.[2] Notwithstanding the convenience and popularity of wireless communication, technological developments in this field have had a profound impact on individual privacy.[3] Most notably, communications conducted on wireless devices are

1. The Cellular Telecommunications and Internet Association reports that there are over 112 million wireless phone subscribers in the United States alone and that there are an additional 45,924 new wireless subscribers everyday. CELLULAR TELECOMM. & INTERNET ASSOC., Frequently Asked Questions and Fast Facts, *at* http://www.wow-com.com/consumer/faq/articles.cfm?ID=97 (last visited Mar. 16, 2002).

2. James X. Dempsey, *Communications Privacy in the Digital Age: Revitalizing the Federal Wiretap Laws to Enhance Privacy*, 8 ALB. L.J. SCI. & TECH. 65, 84 (1997) ("The rapid expansion of wireless services, which are increasingly used not just by the wealthy and in business applications, but by ordinary citizens for personal conversations, has made electronic communication totally flexible and constantly available, yet also more insecure."); *see also Cellular Privacy: Is Anyone Listening? You Betcha!: Hearing Before the Subcomm. on Telcomm., Trade, and Consumer Prot. of the House Comm. on Commerce*, 105th Cong. 5-6 (1997) [hereinafter *Cellular Privacy Hearing*] (statement of Del. Tom Bliley, Chairman, House Comm. on Commerce) ("Americans now have unprecedented convenience and ease of movement... when using wireless phones. We are no longer tethered to the cord .... Cellular ... services have also improved the bottom line ... of U.S. businesses by adding efficiencies in cost and speed ....).

3. WHITFIELD DIFFIE & SUSAN LANDAU, PRIVACY ON THE LINE: THE POLITICS OF WIRETAPPING AND ENCRYPTION 1-3 (1998).

notoriously susceptible to interception by individuals using advanced eavesdropping equipment,[4] including modified radio scanners.[5] Congress, concerned with the advance of electronic eavesdropping and the availability of hardware capable of defeating any expectation of privacy,[6] enacted the Electronic Communications Privacy Act of 1986 (ECPA).[7] This Act expanded Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Title III)[8]—the federal wiretap law—by making the unauthorized interception[9] and subsequent disclosure[10] of electronic communications illegal.[11]

Title III's prohibition against the intentional disclosure of the contents of illegally intercepted messages recognizes that disclosure compounds the harmful effects of the initial interception.[12] Nevertheless, the disclosure provisions in Title III have recently come under constitutional attack by First Amendment advocates in two cases, decided first by the Circuit Court of Appeals for the District of Columbia,[13] and second by the United States Supreme Court.[14] Both cases involved the illegal interception of private communications over cellular phones and the subsequent public disclosure of those communications by media outlets.[15]

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4. S. REP. NO. 99-541, at 3 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3557.

5. *See Cellular Privacy Hearing*, *supra* note 2, at 8-10 (testimony of Thomas E. Wheeler, President, Cellular Telecomm. Ind. Assoc.); *see also* Derek D. Wood, Comment, *The Emergence of Cellular and Cordless Telephones and the Resulting Effect on the Tension Between Privacy and Wiretapping*, 33 GONZ. L. REV. 377, 383 (1997/1998).

6. It is estimated that between ten and twenty million scanners are currently in operation in the United States. Kimberly R. Thompson, *Cell Phone Snooping: Why Electronic Eavesdropping Goes Unpunished*, 35 AM. CRIM. L. REV. 137, 149 (1997).

7. Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 (1986) (codified at 18 U.S.C. § 2510 et seq. (2000)). Congress noted that the "tremendous advances in telecommunications and computer technologies have carried with them comparable technological advances in surveillance devices and techniques," with the result that private communications "may be open to possible wrongful use and public disclosure by . . . unauthorized private parties." S. REP. NO. 99-541, at 3 (1986).

8. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, Tit. III § 801, 82 Stat. 197, 211 (1968) (as amended by the Electronic Communications Privacy Act, Pub. L. No. 99-508, 100 Stat. 1848, 18 U.S.C. § 2510 et seq. (2000)).

9. 18 U.S.C. § 2511 (1)(a)-(b) (2000).

10. *Id.* § 2511(1)(c)-(d).

11. Violations of Title III may result in the imposition of civil fines or may be prosecuted as criminal offenses. *Id.* § 2511(4)-(5).

12. Brief for the United States at 39, Bartnicki v. Vopper, 532 U.S. 514 (2001) (Nos. 99-1687, 99-1728) ("Title III protects against the magnified harm that results when any illegally intercepted conversation is disseminated to a wider audience.").

13. Boehner v. McDermott, 191 F.3d 463 (D.C. Cir. 1999).

14. Bartnicki v. Vopper, 532 U.S. 514 (2001).

15. *Id.* at 517-19; *Boehner*, 191 F.3d at 464-65.

In *Boehner v. McDermott*,[16] several Republican leaders of the House of Representatives, including former House Speaker Newt Gingrich, participated in a conference call to discuss potential responses to an ethics probe of Speaker Gingrich.[17] Boehner, a Republican representative from Ohio and Chairman of the House Republican Conference, participated in the conference call from his cell phone while driving through Florida.[18] Unbeknownst to the conference call participants, a Florida couple had intercepted Boehner's cellular transmission using a radio scanner and tape recorded the conversation.[19] The Florida couple determined that the tape was politically damaging to the House Republicans and delivered it to Representative McDermott, who at the time was the ranking Democratic member of the House Ethics Committee.[20] The day after he accepted the tape, McDermott distributed copies to three major newspapers,[21] which printed stories about the intercepted conversation.[22]

Boehner filed suit against McDermott, charging him with violating Title III's anti-disclosure provision.[23] Boehner did not, however, file suit against the newspapers that published the stories. The district court refused to accept McDermott's First Amendment defense[24] and instead held that Title III's non-disclosure provision promoted freedom of speech[25] and thus was constitutional.[26]

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16. 191 F.3d 463 (D.C. Cir. 1999).

17. *Id.* at 465.

18. *Id.*

19. *Id.* The couple first met with Democratic Representative Karen Thurman of Florida who suggested they deliver the tape to McDermott. *Id.* They also discussed the possibility of receiving immunity for their illegal interception of the call. *Id.*

20. *Id.*

21. *Id.* McDermott gave copies to the New York Times, the Atlanta Journal-Constitution, and Roll Call. *Id.*

22. *Id.*

23. *Id.* The relevant portion of the statute states, "Any person who 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 . . . shall be subject to suit . . . ." 18 U.S.C. § 2511 (1)(c)-(d) (2000).

24. *Boehner*, 191 F.3d at 466-67. McDermott argued that he engaged in protected speech by turning the taped conversation over to the media outlets. *Id.* The court declared that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *Id.* at 467 (quoting United States v. O'Brien, 391 U.S. 367, 376 (1968)).

25. *Id.* at 468. The court reasoned that "[i]nterception itself is damaging enough. But the damage to free speech is all the more severe when illegally intercepted communications may be distributed with impunity." *Id.*

26. *Id.* at 478.

Conversely, the Supreme Court, pitting freedom of speech against individual privacy,[27] ruled in favor of the media defendants' rights to publish an illegally intercepted conversation in *Bartnicki v. Vopper*.[28] In that case, Bartnicki was assigned as a negotiator in a contentious contract dispute between a teachers' union and a school district in Pennsylvania.[29] Bartnicki and the president of the local union engaged in a conversation regarding the status of the negotiations. Bartnicki was using her cellular phone, and the union president was using his convential home phone.[30] The conversation was illegally intercepted and recorded by an unknown person using a scanner that picked up Bartnicki's cellular signal.[31] This individual then delivered the recording to the head of a taxpayers' organization opposed to the union's demands.[32] The tape was later delivered to Vopper, a radio commentator who had criticized the union in the past.[33] Vopper repeatedly played a tape of the intercepted conversation on his radio talk show.[34]

Bartnicki and the union president filed suit against Vopper and the head of the taxpayers' organization under Title III's proscription against disclosing the contents of illegally intercepted messages.[35] The Supreme Court held that privacy concerns give way when balanced against the interest in publishing matters of public importance.[36] Determining that the defendants took no part in the illegal interception and obtained the information lawfully, the Court concluded that a "stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern."[37]

Balancing free speech and privacy rights can be very complex, considering that a presumptive preference for one set of rights will inevitably lead to presumptive violations of the other set of rights.[38] These

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27. Bartnicki v. Vopper, 532 U.S. 514, 532 (2001). The Court found the First Amendment interest in publishing matters of public importance outweighed the conversants' privacy rights. *Id.*

28. *Id.* at 535.

29. *Id.* at 518.

30. *Id.*

31. *Id.* at 518-19.

32. *Id.* at 519. Yocum, the head of the taxpayers' organization, testified that he found the tape in his mailbox shortly after the interception and recognized the voices of Bartnicki and the president of the union. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 520.

36. *Id.* at 534.

37. *Id.* at 535. The Court declared that the months of negotiations over the proper level of salary compensation for teachers were "unquestionably a matter of public concern, and respondents were clearly engaged in debate about that concern." *Id.*

38. Nadine Strossen, *Protecting Privacy and Free Speech in Cyberspace*, 89 GEO. L.J. 2103, 2111 (2001).

inherent conflicts notwithstanding, Congress clearly struck the balance in favor of privacy by enacting Title III to protect against surreptitious invasions of privacy and the magnified harm that results when an unauthorized interception is disseminated to a wider audience.[39] The Supreme Court's decision in *Bartnicki*, however, undermines Title III's strict statutory scheme[40] amended to protect the privacy of electronic communications.[41] In so doing, the Court not only strikes an improper balance between free speech and privacy, but tramples upon the First Amendment right to speak privately without fear of interception and widespread dissemination.[42]

This Note will address the tension between privacy and free speech in the context of Title III and suggest that the Supreme Court's recent denial of privacy perpetuates and exacerbates the denial of First Amendment freedoms, particularly the right not to speak publicly.[43] Part II of this Note addresses the history of Title III and its judicial underpinnings. Part III discusses the standard of review for content-neutral laws creating incidental burdens on speech and how the Supreme Court essentially abandoned this standard in *Bartnicki* in favor of strict scrutiny. Part IV will focus on the *Bartnicki* and *Boehner* decisions in light of Supreme Court precedent involving the media's use and publication of lawfully obtained, truthful information concerning matters of public significance. Finally, Part V addresses factors that should be considered in weighing the competing privacy and free speech concerns in Title III and suggests that Congress must enact stricter legislation that prevents the laundering of illegally intercepted private conversations.

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39. *See supra* note 12 and accompanying text.

40. Title III provides a "comprehensive scheme for the regulation of wiretapping and electronic surveillance." Gelbard v. United States, 408 U.S. 41, 46 (1972); *see also* Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, Tit. III, § 801, 82 Stat. 197, 211 (1968) (demonstrating that it was designed "to protect effectively the privacy of wire and oral communications").

41. S. REP. NO. 99-541, at 1 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3555.

42. "At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence." Turner Broad. Sys. v. FCC, 512 U.S. 622, 641 (1994).

43. Although "the 'essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas' there is 'a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.'" Harper & Row, Publishers v. Nation Enters., 471 U.S. 539, 559 (1985) (quoting Estate of Hemingway v. Random House, Inc., 244 N.E.2d 250, 255 (1968)).

II. ELECTRONIC SURVEILLANCE OF COMMUNICATIONS: THE HISTORY AND JUDICIAL UNDERPINNINGS OF TITLE III

A. *Supreme Court Decisions: Laying the Groundwork for Statutory Protection*

Protection for the privacy of communications from governmental intrusion stems primarily from the Fourth Amendment's ban against unreasonable searches and seizures.[44] However, in *Olmstead v. United States*,[45] the Supreme Court held that evidence obtained from warrantless wiretaps installed by federal agents did not involve any trespass into the homes or offices of the defendants and thus did not violate the Fourth Amendment.[46] The *Olmstead* Court "based Fourth Amendment protection on common law property principles and was consistent with the then prevailing view that the Fourth Amendment protected the individual's home and property only, rather than individual privacy rights per se."[47] Thus, since a telephone tap was not a trespass on the defendant's property, and because nothing tangible was seized, the Court held that Fourth Amendment protections did not extend to wiretapping.[48] Justice Louis Brandeis wrote a famous dissent, arguing that protections provided by the Bill of Rights should adapt to social change and operate in light of technological advancement.[49]

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44. The Fourth Amendment asserts the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend. IV.

45. 277 U.S. 438 (1928).

46. *Id.* at 466. The Court held that an individual's Fourth Amendment rights could only be violated if "there has been an official search and seizure of his person, or such a seizure of his papers or his tangible material effects, or an actual physical invasion of his house . . . for the purpose of making a seizure." *Id.*

47. Jose L. Nunez, *Regulating the Airwaves: The Governmental Alternative to Avoid the Cellular Uncertainty on Privacy and the Attorney-Client Privilege*, 6 ST. THOMAS L. REV. 479, 481 (1994).

48. *Olmstead*, 277 U.S. at 464-66.

49. *Id.* at 472 (Brandeis, J., dissenting). Brandeis stated:

> Whenever a telephone line is tapped, the privacy of the persons at both ends of the line is invaded and all conversations between them upon any subject, and although proper, confidential and privileged, may be overheard. Moreover, the tapping of one man's telephone line involves the tapping of the telephone of every other person whom he may call or who may call him. As a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire-tapping.

Id. at 475-76 (Brandeis, J., dissenting). He then synthesized certain privacy concepts and suggested they be afforded constitutional protection under an expanded notion of the Fourth Amendment:

Confronted with increasing developments in technology and a resulting decrease in privacy, the Supreme Court, in *Katz v. United States*,[50] held that the *Olmstead* trespass doctrine was no longer viable for controlling Fourth Amendment issues involving electronic government surveillance.[51] In *Katz*, the Court determined that evidence obtained from a warrantless wiretap placed outside of a public telephone booth was inadmissible under the Fourth Amendment.[52] The Court asserted that a person's "reasonable expectation of privacy"[53] was protected from governmental intrusion by the Fourth Amendment.[54] The Court, however, indicated that a short surveillance, narrowly focused on the interception of a few conversations, was constitutionally acceptable if approved by a magistrate in advance and based on a special showing of need.[55]

In the same year that *Katz* was decided, the Supreme Court addressed the Fourth Amendment's application to court-ordered electronic surveillance by government agents in *Berger v. New York*.[56] In *Berger*, the Court concluded that New York's eavesdropping statute[57] was "too broad

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfaction of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

Id. at 478 (Brandeis, J., dissenting).

50. 389 U.S. 347 (1967).

51. *Id.* at 353. The Court declared that the Fourth Amendment protects people and not simply areas, stressing that its reach cannot "turn upon the presence or absence of a physical intrusion into any given enclosure." *Id.*

52. *Id.*

53. "What a person knowingly exposes to the public, even in his own home or office is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id.* at 351.

54. *Id.* at 352-53.

55. *Id.* at 354-55.

56. 388 U.S. 41 (1967).

57. N.Y. CRIM. PROC. LAW § 813-a (1958), *construed in* Berger v. New York, 388 U.S. 41, 43 n.1 (1967). The statute read, in pertinent part:

> An ex parte order for eavesdropping . . . may be issued by any justice of the supreme court or judge . . . upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state . . . that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons

in its sweep," and thus would lead to "trespassory intrusion" in violation of the Fourth Amendment.[58] The Court condemned lengthy and indiscriminate surveillance and laid the framework with respect to constitutional requirements for court-ordered electronic surveillance.[59]

B. *Congressional Response: Title III's Protection of the Privacy of Oral and Wire Communications*

Congress responded to these Supreme Court decisions by codifying the holdings of *Katz* and *Berger* in Title III.[60] Title III generally proscribed the interception and disclosure of oral and wire communications,[61] while making provision for law enforcement to intercept these communications for use in criminal investigations.[62] According to the Senate report, the legislation had "as its dual purpose (1) protecting the privacy of wire and oral communications, and (2) delineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized."[63] By expressly prohibiting all forms

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> whose communications . . . are to be overheard or recorded . . . and, in the case of a telegraphic or telephonic communication, identifying the particular telephone number or telegraph line involved.

Id.

58. *Berger*, 388 U.S. at 44.

59. *Id.* at 59-60. The Court outlined seven constitutional requirements for court-ordered electronic surveillance: (1) there must be a probable cause showing that a particular offense has been or is about to be committed; (2) the applicant must describe with particularity the conversations to be intercepted; (3) the surveillance must be for a specific and limited period of time in order to minimize the invasion of privacy; (4) there must be continuing probable cause showings if the surveillance is to continue beyond the original termination date; (5) the surveillance must cease once the evidence sought is seized; (6) notice must be given unless there is an adequate factual showing of exigency; and (7) a return on the warrant is required so that the court may oversee and limit the use of the intercepted conversations. *Id.*

60. *See* CLIFFORD S. FISHMAN & ANNE T. MCKENNA, WIRETAPPING AND EAVESDROPPING § 1:6, at 1-11 (2d ed. 1995) (explaining that Congress enacted Title III in an effort to comport electronic surveillance legislation with the procedural and substantive requirements set forth in *Katz* and *Berger*).

61. 18 U.S.C. § 2511(1)(a) (1968) (amended 1986). Title III not only applies to government invasions of privacy, but also to "any person who willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication." *Id.*

62. *Id.* § 2516. For purposes of this Note, focus will be placed on those provisions regarding the interception and disclosure of wire or electronic communications. *See* 18 U.S.C. § 2511(1)(a)-(d) (2000).

63. S. REP. NO. 90-1097, at 66 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2153.

of unwarranted wiretapping and electronic surveillance,[64] Title III offered protection against both public and private eavesdropping.[65]

C. *The ECPA: Protecting the Privacy of Wireless Communications*

As discussed in the introduction, it was not until the 1986 passage of the ECPA, amending Title III, that Congress acted to provide privacy protection to wireless communications.[66] Recognizing that no federal statutory standards existed to protect the privacy and security of communications transmitted by new forms of telecommunications technology, Congress sought to reestablish federal privacy protections by enacting the ECPA.[67] According to Congress, this gap in privacy protection would likely discourage the use of innovative communications systems and the development of new forms of telecommunications technology.[68] The law, therefore, "must advance with the technology to ensure the continued vitality of the fourth amendment. Privacy cannot be left to depend solely on physical protection, or it will gradually erode as technology advances."[69]

Consistent with the findings made by Congress, the amended version of Title III broadly prohibits the interception and subsequent disclosure of intercepted communications.[70] First, the statute prohibits in broad terms using, or attempting to use, the contents of certain communications, knowing or having reason to know that the information was obtained through an illegal interception.[71] To make certain that disclosure is included among the prohibited uses of such communications, Title III specifically proscribes "intentionally disclos[ing], or endeavor[ing] 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 . . . [unlawful] interception."[72] Taken together, these two provisions make clear that all unauthorized uses of illegally intercepted communication by anyone with knowledge or reason to know of their unlawful origin is strictly prohibited.[73]

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64. 18 U.S.C. §§ 2510-2516 (1968) (amended 1986).

65. *See* NATIONAL WIRETAP COMMISSION, ELECTRONIC SURVEILLANCE REPORT 38-40 (1976) Title III was enacted in part as a reaction to public concerns regarding private wiretapping. *Id.*

66. S. REP. NO. 99-541, at 2-3 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3556-57.

67. *Id.* at 5.

68. *Id.*

69. *Id.*

70. 18 U.S.C. § 2511 (1)(d) (2000).

71. *Id.* § 2511(1)(d).

72. *Id.* § 2511(1)(c).

73. Brief for the United States at 6, Bartnicki v. Vopper, 532 U.S. 514 (2001) (Nos. 99-1687, 99-1728).

In framing Title III, Congress realized that prohibiting interceptions alone would be insufficient, considering that disclosure would serve to compound the evil Congress sought to eliminate.[74] Furthermore, it is not enough to prohibit disclosure by only those who conduct the interception.[75] "One would not expect [the interceptor] to reveal publicly the contents of the communication; if they did so they would risk incriminating themselves. It was therefore 'essential' for Congress to impose upon third parties, that is, upon those not responsible for the interception, a duty of non-disclosure."[76] Thus, without a prohibition on unauthorized disclosures of private conversations by third parties, Congress's purpose of protecting the privacy of wire, oral and electronic communications would be undermined.[77]

III. CONTENT-NEUTRAL LAWS: INTERMEDIATE SCRUTINY AND THE *O'BRIEN* FRAMEWORK

The First Amendment rights of freedom of speech and freedom of the press are among the most valued rights in American society today.[78] Maintenance of these rights "against overreaching by the legislature or the executive is among the judiciary's major and most demanding responsibilities."[79] Thus, where a statute is enacted that places restrictions on the right to free speech and press, courts must apply a certain level of scrutiny to determine whether the statute comports with constitutional requirements against the suppression of unpopular ideas or disfavored views.[80]

A. *Standard of Review: Distinguishing Between Content-Based and Content-Neutral Laws*

Laws that attempt to stifle speech on account of its message are generally subjected to strict scrutiny by the courts.[81] Under this rigorous

74. *Id.* Without the prohibition on disclosure, there would be an incentive to conduct illegal interceptions and the damage from such violations would be "compounded." Bartnicki v. Vopper, 200 F.3d 109, 133 (D.C. Cir. 1999) (Pollak, J., dissenting) (citing Boehner v. McDermott, 191 F.3d 463, 470 (D.C. Cir. 1999)).

75. *Bartnicki*, 200 F.3d at 133 (Pollak, J., dissenting) (citing *Boehner*, 191 F.3d at 470).

76. *Id.*

77. S. REP. NO. 99-541, at 1-3 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3555-57.

78. *Bartnicki*, 200 F.3d at 136 (Pollak, J., dissenting).

79. *Id.*

80. Turner Broad. Sys. v. FCC, 512 U.S. 622, 637 (1994). "[B]ecause not every interference with speech triggers the same degree of scrutiny under the First Amendment, [the Courts] must decide at the outset the [appropriate] level of scrutiny . . . ." *Id.*

81. *See, e.g.*, United States v. Playboy Entm't Group, 529 U.S. 803, 813 (2000); Reno v. ACLU, 521 U.S. 844, 871-72, 874 (1997); Sable Communications of Cal., Inc. v. FCC, 492 U.S.

standard, content-based statutes are generally unconstitutional unless they are "narrowly tailored to promote a compelling Government interest."[82] Conversely, government regulation of speech or other expressive activities for purposes and in a manner unrelated to the particular message or its communicative aspects is subject to intermediate scrutiny[83] because, in most cases, it "pose[s] a less substantial risk of excising certain ideas or viewpoints from the public dialogue."[84]

1. The Three-Pronged *O'Brien* Framework

The intermediate scrutiny standard was formulated in *United States v. O'Brien*,[85] wherein the Supreme Court upheld a law prohibiting the destruction of military draft cards against a First Amendment challenge.[86] O'Brien burned his Selective Service registration certificate in protest of the Vietnam War and argued that his actions were a form of protected political expression.[87] Under intermediate scrutiny, the Court held that a statute is sufficiently justified "if it furthers an important or substantial governmental 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."[88] The Court rejected O'Brien's First Amendment claim[89] and, applying intermediate scrutiny, held that the statute furthered substantial governmental interests unrelated to the suppression of expression and was not unnecessarily broad.[90]

Thus, when a law is not hostile to the particular message being conveyed and does not seek to abridge the communicative impact of expression,[91] it is content-neutral and intermediate scrutiny should apply.[92]

115, 126 (1989).

82. *Playboy*, 529 U.S. at 813.

83. *See Turner Broad.*, 512 U.S. at 642.

84. *Id.*

85. 391 U.S. 367, 377 (1968).

86. *Id.* at 386.

87. *Id.* at 376.

88. *Id.* The Court declared that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *Id.*

89. *Id.* "Even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity." *Id.*

90. *Id.* at 376-77, 381-82. The Court concluded that the government had a substantial interest in assuring the continuing availability of Selective Service certificates. *Id.* at 382. Because the noncommunicative impact of burning a registration certificate frustrated the Government's purpose, a governmental interest sufficient to convict O'Brien had been shown. *Id.*

91. The Court could not perceive any alternative means that would more precisely and

Such laws, according to the Supreme Court, "do not pose such inherent dangers to free expression, or present such potential for censorship or manipulation, as to justify application of the most exacting level of First Amendment scrutiny."[93] Accordingly, in determining whether a law that regulates speech or expression is subject to intermediate or strict scrutiny, the relevant inquiry is whether the law suppresses speech because of its message,[94] or, in contrast, reflects the legislature's pursuit of legitimate goals unrelated to the message conveyed.[95]

2. Title III: A Content-Neutral Law Subject to Intermediate Scrutiny

The language proscribing the disclosure of illegally intercepted messages in Title III is not directed at suppressing the dissemination of unpopular or governmentally disfavored ideas.[96] Rather, the provisions prohibit any use or disclosure of an illegally intercepted communication.[97] Title III prohibits disclosure, but it does so in a content-neutral manner without singling out a particular message, subject, or viewpoint for disfavored treatment.[98] Therefore, the incidental effects of Title III on speech must be judged under intermediate scrutiny, applying the three-pronged formula devised in *O'Brien*.[99]

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narrowly assure the continuing availability of draft cards than a law which prohibited their willful destruction. *Id.* at 381. The governmental interest and the statute were limited to the noncommunicative aspect of O'Brien's conduct. *Id.* at 381-82.

92. Turner Broad. Sys. v. FCC, 512 U.S. 622, 642 (1994).

93. *Id.* at 661.

94. *Id.* at 641. These laws pose the "inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion." *Id.* Such "restrictions 'raise the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.'" *Id.* (quoting Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991)).

95. *Id.* at 641; *see also* City of Erie v. Pap's A.M., 529 U.S. 277, 289 (2000) (plurality opinion) (determining that "[i]f the governmental purpose in enacting the regulation is unrelated to the suppression of expression, then the regulation need only satisfy the 'less stringent' standard from *O'Brien*," but "[i]f the government interest is related to the content of the expression, . . . then the regulation falls outside the scope of the . . . test and must be justified under a more demanding standard.").

96. Brief for Petitioners at 13, Bartnicki v. Vopper, 532 U.S. 514 (2001) (Nos. 99-1687, 99-1728). The non-disclosure provisions of Title III "do not 'distinguish favored speech from disfavored speech on the basis of the ideas or views expressed.'" *Id.* (quoting *Turner*, 512 U.S. at 643).

97. 18 U.S.C. § 2511(1)(b)-(d) (2000).

98. *See* Brief for Petitioners at 20, Bartnicki v. Vopper, 532 U.S. 514 (2001) (Nos. 99-1687, 99-1728). *Contra* United States v. Playboy Entm't Group, 529 U.S. 803, 806-11 (applying strict scrutiny analysis to a statute which required cable companies to fully scramble sexually-oriented programming or limit their transmissions because the regulation was a content-based restriction targeting the primary effects of protected speech).

99. Brief for the United States at 23, Bartnicki v. Vopper, 532 U.S. 514 (2001) (Nos. 99-

B. Boehner v. McDermott: *A Logical Outcome*

Following the *O'Brien* line of reasoning, the *Boehner* Court determined that the anti-disclosure provisions of Title III prohibit disclosure of all illegally intercepted communications, "without regard to the substance of the communication or the identity of the person who does the disclosing."[100] Furthermore, the court held that the provisions reveal no governmental interest in distinguishing between types of speech based on content.[101]

Relying on the test laid down in *O'Brien*, the court determined that it was evident that a substantial governmental interest existed in enacting the anti-disclosure provisions that was unrelated to the suppression of free expression.[102] According to the court, Title III's prohibition on disclosure of illegally intercepted messages promotes rather than impinges freedom of speech, and "damage to free speech is all the more severe when illegally intercepted communications may be distributed with impunity."[103] Therefore, applying intermediate scrutiny, the *Boehner* Court upheld the constitutionality of the anti-disclosure provision in the statute.[104]

C. Bartnicki v. Vopper: *An Illogical Deviation from the* O'Brien *Standard*

The Supreme Court, in *Bartnicki*, agreed that the disclosure provision of Title III was a content-neutral law of general applicability.[105] Nevertheless, the Court failed to apply intermediate scrutiny under the *O'Brien* framework.[106] The Court stated that "the naked prohibition against disclosures is fairly characterized as a regulation of pure speech."[107] Thus, even though the Court recognized that the disclosure provision did not distinguish favored speech from disfavored speech and was not justified

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1687, 99-1728).

100. Boehner v. McDermott, 191 F.3d 463, 467 (D.C. Cir. 1999).

101. *Id.*

102. *Id.* at 468.

103. *Id.* "Eavesdroppers destroy the privacy of conversations. The greater the threat of intrusion, the greater the inhibition on candid exchanges." *Id.*

104. *Id.* at 478.

105. Bartnicki v. Vopper, 532 U.S. 514, 526 (2001).

106. *Id.* at 526-29. Justice Rehnquist addressed this ambiguity in the Court's reasoning by stating "[t]he Court correctly observes that these are 'content-neutral laws of general applicability' which serve recognized interests of the 'highest order' . . . . It nonetheless subjects these laws to the strict scrutiny normally reserved for governmental attempts to censor different viewpoints or ideas." *Id.* at 544 (Rehnquist, C.J., dissenting).

107. *Id.* at 526.

by reference to the content of the messages, the Court applied a heightened level of scrutiny normally reserved for content-based statutes.[108]

IV. LEGALLY OBTAINED, TRUTHFUL INFORMATION: THE SUPREME COURT'S MISAPPLICATION OF FIRST AMENDMENT PRECEDENT

The Supreme Court's justification in *Bartnicki* for failing to apply intermediate scrutiny under *O'Brien* stems from its reliance on cases involving the publication of legally obtained, truthful information about matters of public concern.[109] It is well established that government officials may not punish the publication of information that is truthful and has been legally obtained.[110] This proposition, however, does not apply when the information has been secured through illegal means.[111] Furthermore, the line of cases supporting this principle does not suggest that "strict scrutiny is required where a law is addressed equally to all speakers and prohibits disclosure not because of the subject matter involved, but because of the manner in which the information was acquired."[112]

A. *The Daily Mail Principle: Establishing a Standard for the Publication of Legally Obtained, Truthful Information*

In *Cox Broadcasting Corp. v. Cohn*,[113] a television news reporter broadcasting a story concerning the guilty pleas of six men to the crimes of rape or attempted rape, also broadcast the name of the seventeen year-old victim.[114] The name of the victim was obtained by reviewing the indictments of the assailants, which were public records available for general inspection.[115] The victim's father brought an action against both the reporter and the television station,[116] asserting that the disclosure of his

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

109. *See* Fla. Star v. B.J.F., 491 U.S. 524, 533-36 (1989); Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 102-03 (1979); Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 838-39 (1978); Okla. Publ'g Co. v. Oklahoma, 430 U.S. 308, 311-12 (1977); Cox Broad. Corp. v. Cohn, 420 U.S. 469, 495-96 (1975).

110. Bartnicki v. Vopper, No. 3:CV-94-1201, 1996 U.S. Dist. LEXIS 22517, at *10 (M.D. Pa. June 14, 1996). It is "well-established that where the media lawfully obtains truthful information about a matter of public significance or concern, government officials may not constitutionally punish the publication of that information absent the need to further a government interest of a higher order." *Id.*

111. *Bartnicki*, 532 U.S. at 545-46 (Rehnquist, C.J., dissenting).

112. *See* Brief for Petitioners at 25, Bartnicki v. Vopper, 532 U.S. 514 (2001) (Nos. 99-1687, 99-1728).

113. 420 U.S. 469 (1975).

114. *Id.* at 472-74.

115. *Id.* at 472-73.

116. *Id.* at 474.

daughter's name violated a Georgia law prohibiting the publication of the identity of rape victims.[117]

The Supreme Court held that the government may not impose sanctions on the publication of truthful information that is open to public inspection.[118] The Court proclaimed that such records, by their very nature, are of interest to those concerned with the administration of government and, hence, the freedom of the press to publish that information is of vital importance.[119] The Court concluded that the burden of protecting private information revealed during judicial proceedings was on the states, rather than the press.[120] Therefore, the press could not be sanctioned for publishing truthful information once it had been disclosed in court documents open to public inspection.[121]

The tension between First Amendment and privacy principles was next addressed by the Court in *Landmark Communications, Inc. v. Virginia*.[122] *Landmark* involved a Virginia statute providing for the confidentiality of judicial disciplinary proceedings and the punishment of any person who divulged the identity of a judge subject to such proceedings.[123] The Court reversed the conviction of a newspaper for publishing the name of a judge involved in confidential disciplinary proceedings.[124] The newspaper ostensibly received the information regarding the judge from a participant in the judicial inquiry who, in violation of the Virgina law, breached the confidentiality of the commission.[125] The issue before the Court, then, was "whether the First Amendment permits the criminal punishment of third persons who are strangers to the inquiry, including the news media, for divulging or publishing truthful information regarding confidential proceedings of the Judicial Inquiry and Review Commission."[126] The Court concluded that the state's interests advanced by criminal sanctions were insufficient to justify clear infringement of the First Amendment guarantees of freedom of speech and of the press.[127] In reaching this conclusion, the Court declared that the newspaper could disseminate "accurate factual information about a legislatively authorized inquiry" that it had lawfully obtained.[128]

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117. *Id.* at 471-72 (citing GA. CODE ANN. § 26-9901 (1972)).
118. *Id.* at 495.
119. *Id.*
120. *Id.* at 496.
121. *Id.*
122. 435 U.S. 829 (1978).
123. *Id.* at 830-31 n.1. (citing VA. CONST. art. VI, § 10; VA. CODE ANN. § 2.1-37.13 (1973)).
124. *Id.* at 834.
125. *Id.* at 832.
126. *Id.* at 837.
127. *Id.* at 838.
128. *Id.* at 839.

The contemporary rule regarding publication of legally obtained, truthful information was formulated in *Smith v. Daily Mail Publishing Co.*[129] In *Daily Mail*, the Court considered a challenge to a West Virginia statute prohibiting newspapers from publishing the name of any youth charged as a juvenile offender without the written approval of the juvenile court.[130] Two West Virginia newspapers published the name and picture of a juvenile who was accused of shooting and killing a fifteen year-old high school student.[131] The newspapers had procured the juvenile's name by interviewing witnesses, the police, and an assistant prosecuting attorney at the school.[132] The newspapers were indicted by a grand jury several weeks after the publication, but the West Virginia Supreme Court of Appeals issued a writ prohibiting the prosecution and held that the statute violated the First Amendment by abridging the freedom of the press.[133]

In summarizing *Cox* and *Landmark*, the Supreme Court devised the rule that if the press "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."[134] Applying this form of strict scrutiny to the facts in *Daily Mail*, the Court held that the information published by the newspapers was legally obtained, concerned a matter of public significance and was truthful.[135] Furthermore, the state's interest in protecting the anonymity of the juvenile offender did not further a state interest of the "highest order."[136] Accordingly, the Court affirmed the West Virginia Supreme Court of Appeals' decision holding that the statute violated the First Amendment.[137]

Finally, in *Florida Star v. B.J.F.*,[138] the Supreme Court adopted and further clarified the *Daily Mail* principle. *Florida Star* involved the Court's review of the constitutionality of a Florida statute that made it unlawful to "'print, publish, or broadcast . . . in any instrument of mass

129. 443 U.S. 97, 98 (1979).

130. *Id.* at 98 (citing W. VA. CODE § 49-7-3 (1976)).

131. *Id.* at 99-100.

132. *Id.* at 99.

133. *Id.* at 100. The court determined "that the statute operated as a prior restraint on speech and that the State's interest in protecting the identity of the juvenile offender did not overcome the heavy presumption against the constitutionality of such prior restraints." *Id.*

134. *Id.* at 103.

135. *Id.* at 103-04

136. *Id.* at 104. The Court asserted that "[i]f the information is lawfully obtained, as it was here, the state may not punish its publication except when necessary to further an interest more substantial than is present here." *Id.*

137. *Id.* at 106.

138. 491 U.S. 524 (1989).

communication' the name of the victim of a sexual offense."[139] A newspaper obtained the identity of an alleged rape victim from an unredacted police report that was inadvertently placed in the pressroom of the Sheriff's office.[140] The newspaper published a story concerning the alleged rape and included the name of the victim in the article.[141] The alleged victim subsequently filed suit against *The Florida Star* and the Sheriff's Department, asserting that both had negligently violated the Florida statute.[142]

The trial court found *The Florida Star* liable under the statute;[143] however, the Supreme Court reversed and concluded that the *Daily Mail* rule applied and that imposing liability on the newspaper did not further a state interest of the highest order.[144] According to the Court, "[w]here . . . the government has failed to police itself in disseminating information, it is clear under *Cox Broadcasting* . . . and *Landmark Communications* that the imposition of damages against the press for its subsequent publication can hardly be said to be a narrowly tailored means of safeguarding anonymity."[145]

The Court determined the statute to be facially underinclusive in that it did not prohibit the spread of a victim's identity by means other than publication in an instrument of mass communication.[146] This determination rendered the selective ban on dissemination incapable of accomplishing its stated purpose of maintaining the privacy and safety of sexual assault victims.[147]

B. Bartnicki v. Vopper: *Ignoring the Daily Mail Principle*

The *Daily Mail* principle establishes that truthful information of public concern may be published when it has been "legally obtained."[148] In *Bartnicki*, the Supreme Court determined that the media outlet's access to the taped message was obtained lawfully, even though the information had been illegally intercepted by another party.[149] This proposition runs

139. *Id.* at 526 (citing FLA. STAT. § 794.03 (1987)).

140. *Id.* at 527. Signs existed in the press room making it clear that the names of rape victims were not a matter of public record and thus were not to be published. *Id.* at 546 (White, J., dissenting).

141. *Id.* at 527.

142. *Id.* at 528.

143. *Id.* at 528-29. The plaintiff settled with the Sheriff's Department for $2500 prior to trial. *Id.* at 528.

144. *Id.* at 537.

145. *Id.* at 538.

146. *Id.* at 540-41.

147. *Id.*

148. Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 103 (1979).

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

counter to language established by the Court in *Florida Star*. In *Florida Star*, the Court asserted that when sensitive information is in private hands, the government may forbid its nonconsensual acquisition, and any "information so acquired" is "outside the *Daily Mail* principle."[150] Additionally, it seems illogical to conclude that information is legally obtained when the source of the information breaks the law by placing the information in the publisher's hands.[151] Moreover, the Court's conclusion that the information had been legally obtained is antithetical to Congress' goal of protecting the privacy of communications through enactment of anti-disclosure provisions in Title III.[152] In essence, the Court condones the laundering of illegally intercepted messages through individuals who did not take part in the initial interception.[153] "Given the ease with which the identity of the intercepting party can be concealed, Title III would lose much of its force if the only means of preventing invasions into the sanctity of private communications were prosecution of the illegal interceptor himself."[154]

C. *Strict Scrutiny and the Daily Mail Principle: The Supreme Court's Misapplication of the Proper Standard of Review*

Leaving the issue of whether the information was legally obtained aside, the standard of review adopted in *Bartnicki* is further at odds with the *Daily Mail* principle. The form of strict scrutiny applied in the *Daily Mail* line of cases is the appropriate mode of analyzing statutes that discriminate both on the basis of content and on the basis of the speaker. A statute that prohibits speech only on particular subjects and allows disclosure of information on specified subjects by anyone other than the mass media, is subject to the "most exacting level of First Amendment scrutiny,"[155] because it is hostile to the message conveyed and poses an inherent danger to free expression.[156]

The challenged non-disclosure provisions in Title III, as discussed above, do not single out speech for any special prohibition; they prohibit

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150. *Florida Star*, 491 U.S. at 534.

151. *Bartnicki*, 532 U.S. at 548 (Rehnquist, C.J., dissenting).

152. Congress determined that the growth of communications technology had been accompanied by "the widespread use and abuse of electronic surveillance techniques," through which "privacy of communication is seriously jeopardized" and every "spoken word relating to each man's personal, marital, religious, political, or commercial concerns can be intercepted by an unseen auditor and turned against the speaker to the auditor's advantage." S. REP. NO. 90-1097, at 67 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2154.

153. Brief for the United States at 44, Bartnicki v. Vopper, 532 U.S. 514 (2001) (Nos. 99-1687, 99-1728).

154. *Id.*

155. Turner Broad. Sys. v. FCC, 512 U.S. 622, 661 (1994).

156. *Id.*

any kind of use or disclosure of an illegally intercepted communication.[157] Furthermore, the provisions do not preclude certain persons or groups from disseminating illegally intercepted messages, but rather prohibit "any person" from disclosing such messages.[158] Unlike the statutes in *Florida Star* and its predecessors, which forbade the publication of particular facts and focused on speech itself, Title III's anti-disclosure provisions are content and speaker neutral and thus should have been analyzed under intermediate scrutiny rather than the *Daily Mail* strict scrutiny standard.[159]

D. *The First Amendment and Content-Neutral Laws of General Applicability*

A significant factor in evaluating First Amendment claims is whether a content-neutral law of general applicability applies.[160] In *Cohen v. Cowles Media Co.*,[161] the Supreme Court recognized that generally applicable laws are not subject to strict scrutiny.[162] *Cohen* involved a newspaper that obtained public court records concerning a Democratic political candidate from a Republican activist in exchange for a promise of confidentiality.[163] The newspaper subsequently published the name of the activist and his connection to the campaign of the Republican opposition as part of its stories concerning the Democratic candidate.[164] The activist sued the newspaper for failing to honor its promise of confidentiality and the *Daily Mail* principle was raised in defense by the newspaper.[165]

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157. 18 U.S.C. § 2511(1)(c)-(d) (2000).

158. *Id.*

159. Brief for the United States at 21-23, Bartnicki v. Vopper, 532 U.S. 514 (2001) (Nos. 99-1687, 99-1728). Chief Justice Rehnquist rebuked the majority in *Bartnicki* for invoking strict scrutiny by stating:

> These laws are content neutral; they only regulate information that was illegally obtained; they do not restrict republication of what is already in the public domain; they impose no special burdens upon the media; they have a scienter requirement to provide fair warning; and they promote the privacy and free speech of those using cellular telephones. It is hard to imagine a more narrowly tailored prohibition of the disclosure of illegally intercepted communications, and it distorts our precedent to review these statutes under the often fatal standard of strict scrutiny.

Bartnicki v. Vopper, 532 U.S. 514, 548 (2001) (Rehnquist, C.J., dissenting).

160. *See Turner Broad. Sys.*, 512 U.S. at 662.

161. 501 U.S. 663 (1991).

162. *Id.* at 670.

163. *Id.* at 665.

164. *Id.* at 666.

165. *Id.* at 668-69.

The Supreme Court held that *Daily Mail* was inapplicable and that the case was controlled by the "well-established line of decisions holding that generally applicable laws 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."[166] Thus, the Court concluded that stricter scrutiny should not be applied to enforcement of general laws against the press than what would be applied to enforcement against other persons or organizations.[167]

Cohen demonstrates that strict scrutiny does not apply to generally applicable laws even when liability is attached to disclosure of truthful information of public importance, such as the identity of the source of information.[168] The Supreme Court in *Bartnicki*, however, essentially ignored the rule established in *Cohen*.[169] The Court correctly recognized that the disclosure provisions in Title III were content-neutral laws of general applicability, but nonetheless subjected the statute "to the strict scrutiny normally reserved for governmental attempts to censor different viewpoints or ideas."[170] Accordingly, the Supreme Court appears to have misapplied established precedent by adopting the *Daily Mail* line of reasoning to justify imposition of strict scrutiny where content-neutral restrictions on speech need pass only intermediate scrutiny.[171]

V. COMPETING INTERESTS: PRIVACY VS. FREE SPEECH AND THE SUPREME COURT'S UNFAIR BALANCING ACT

A. Bartnicki v. Vopper: *Eroding Privacy Rights and Hindering the Free Expression of Ideas*

In *Bartnicki*, the Supreme Court, faced with the difficult task of balancing free speech and privacy concerns, sided with the former interest

166. *Id.* at 669. The Court declared that "it is . . . beyond dispute that 'the publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others.'" *Id.* at 670 (quoting Associated Press v. NLRB, 301 U.S. 103, 132-33 (1937)).

167. *Id.* at 670.

168. Brief for the United States at 25, Bartnicki v. Vopper, 532 U.S. 514 (2001) (Nos. 99-1687, 99-1728); *see also* Konigsberg v. State Bar, 366 U.S. 36, 50-51 (1961) (determining that "general regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First . . . Amendment forbade Congress . . . to pass, when they have been found justified by subordinating valid governmental interests").

169. Bartnicki v. Vopper, 532 U.S. 514, 548 (2001) (Rehnquist, C.J., dissenting).

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

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

as opposed to the latter.[172] In considering the balance, the Court determined that the interest in publishing matters of public importance trumped the interest in protecting privacy.[173] The Court's swift dismissal of privacy concerns in favor of the media outlet's free speech rights is contrary to Congress's clear intent in Title III to protect the privacy of communications from the use and disclosure of surreptitiously intercepted private messages.[174] The Court's decision not only tramples the privacy rights of private citizens, but it is also incompatible with its goal of protecting free speech in that it exacerbates the degree to which such intrusions inhibit the free exchange of thoughts and ideas.[175] "If individuals lack assurance that the law will protect the confidentiality of their conversations, their willingness to speak candidly will necessarily suffer."[176] Thus, a statutory scheme that punishes interceptors of private communications, but allows the confidential message to be disclosed with impunity by third parties that did not participate in the initial interception, hardly protects privacy and fails to promote free speech.

In *Harper & Row, Publishers v. Nation Enterprises*,[177] the Supreme Court asserted:

> The essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas; it shields the man who wants to speak or publish when others wish him to be quiet. There is necessarily, and within suitably defined areas, a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.[178]

The First Amendment value in the choice not to speak publicly is advanced by Title III's prohibition of the use and disclosure of illegally intercepted messages. It supports this value by protecting against the "magnified harm that results when any illegally intercepted conversation is disseminated to a wider audience."[179] Nevertheless, the Supreme Court's

172. *Id.* at 532-34.

173. *Id.* at 534.

174. S. REP. No. 90-1097, at 66-67 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2118, 2153-54.

175. Brief for the United States at 34, Bartnicki v. Vopper, 532 U.S. 514 (2001) (Nos. 99-1687, 99-1728).

176. *Id.*

177. 471 U.S. 539 (1985).

178. *Id.* at 559 (quoting Estate of Hemingway v. Random House, Inc., 294 N.E.2d 250, 255 (1968)).

179. Brief for the United States at 39, Bartnicki v. Vopper, 532 U.S. 514 (2001) (Nos. 99-1687, 99-1728).

unfair balancing act in favor of the media's free speech rights effectively neutralizes the First Amendment right not to speak publicly.[180]

B. *Factors to Consider in Weighing the Competing Interests*

The Court's decision in *Bartnicki* defends and even encourages the evasion of Title III's anti-disclosure provisions. Concomitantly, the Court's decision hinders the First Amendment rights of the parties to the conversation including the right not to speak publicly. In weighing the competing interests, the Court failed to consider several factors that favor protection of the privacy interests of the parties to the private communication. First, the Court failed to consider the subjective expectations of privacy the parties had in their discussion.[181] In *United States v. Nixon*,[182] the Supreme Court held that an individual's "expectation of... the confidentiality of his conversations" is a matter "to which we accord deference for the privacy of all citizens."[183] Surely an individual communicating on a wireless device expects the contents of the conversation to be kept confidential or at least not be recorded and later disseminated to the world at large. Furthermore, the Court did not consider objective expectations of privacy concerning the confidentiality of communications occurring over wireless transmissions.[184] Final consideration should have been given to whether any important purpose that discloses the information could serve instead to be accomplished through alternative measures that would impinge less on privacy.[185]

It is clear that, based upon both subjective and objective expectations of privacy, parties to a wireless communication and reasonable persons not participating in the communication expect that such conversations will not be intercepted and subsequently disseminated to the world. Additionally, public debate and political discourse are alternative measures that impinge less on privacy than public disclosure.

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180. "At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence." Bartnicki v. Vopper, 532 U.S. 514, 553 (2001) (Rehnquist, C.J., dissenting) (quoting Turner Broad. Sys. v. FCC, 512 U.S. 622, 641 (1994)).

181. Strossen, *supra* note 38, at 2111.

182. 418 U.S. 683 (1974).

183. *Id.* at 708.

184. Strossen, *supra* note 38, at 2111.

185. *Id.*

C. *Amending Title III to Comport With the Goal of Protecting the Privacy of Communications*

In light of the decision in *Bartnicki*, Congress must amend the anti-disclosure provisions of Title III so that any third person receiving the contents of an illegally intercepted message is prohibited from disclosing those contents. Such an amendment would fulfill Title III's original purpose of protecting citizens from surreptitious invasions of privacy.[186] A gaping hole is currently left in the statute that allows for the "laundering" of intercepted communications by individuals engaged in illegal wiretapping.[187]

VI. CONCLUSION

Balancing free speech and privacy rights is a complex process, considering that presumptive preference for one set of rights leads to presumptive violations of the other set of rights.[188] Nevertheless, lines must be drawn and, by enacting Title III, Congress clearly drew the line in favor of protecting the privacy of communications. Such privacy is essential if citizens are to think and act creatively and constructively. Fear or suspicion that one's speech may be intercepted and subsequently disseminated with impunity can have a seriously inhibiting effect upon the willingness to voice critical and constructive ideas.

The Supreme Court has, however, seriously undermined Congress's strict statutory scheme to secure the privacy of communications by permitting the media to disseminate illegally intercepted messages when the media was not involved in the initial interception. In reaching this conclusion, the Court misapplies its own precedent by invoking strict scrutiny analysis in reviewing content-neutral laws of general applicability. This misapplication results in the Court not only trampling upon privacy rights, but also hindering the First Amendment right not to speak publicly. To alleviate the dangerous precedent set by the Court, Congress should amend Title III so it is clear that third parties receiving the contents of illegally intercepted messages and subsequently disclosing those contents are in violation of Title III's anti-disclosure provisions.

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186. S. REP. NO. 90-1097, at 66-67 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2153-54.

187. *See* Boehner v. McDermott, 191 F.3d 463, 470 (D.C. Cir. 1999) (asserting that unless disclosure is prohibited, there will be an incentive for illegal interceptions, and that without Title III's anti-disclosure provisions, the government would have no means to prevent the disclosure of private information because criminals could "launder" illegally intercepted messages and there would be almost no force to deter disclosure).

188. Strossen, *supra* note 38, at 2111.