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Bartnicki v. Vopper: Another Media Victory or Ominous Warning of a Potential Change in Supreme Court First Amendment Jurisprudence?

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In a recent event in Canada, two individuals engaged in a conversation via cellular phones, in which they fabricated a story about a local radio station that would award a prize to the first caller the following morning.[1] The next morning, nine people who had somehow monitored the previous day's conversation phoned the radio station claiming their prize.[2] Could this happen to you? If you think that your cellular phone conversations are safe from interception and possible publication, you may want to think again.

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1. Transcrypt International, *Guess Who Is Listening?*, *at* http://www.transcryptsecure.com/techcorner/listen.html (last updated Mar. 5, 2000).
2. *Id.*

I. INTRODUCTION

A. The Advent of the Cellular Phone

Once only conceivable in the imagination and James Bond movies, gadgets such as cellular phones have now, through recent advances in modern technology, become widely available to the public,[3] and it has been estimated that there are currently over forty-five million cellular phones in use in America alone.[4] The Federal Communications Commission first authorized the use of cellular phone services in 1981.[5] Cellular phones send out radio transmissions that are received by "cells," honeycomb-shaped segments within larger service areas that are equipped with transmitters that can receive and send out messages within their parameters.[6] When a call is placed, a signal is sent through the air to a cell site and then to a mobile telephone switching office (MTSO).[7] The cellular phone conversation is then automatically switched by the MTSO from one station and one

3. *See id.*

4. *Cellular Privacy: Is Anyone Listening? You Betcha!: Hearing Before the Subcomm. on Telecomm., Trade, and Consumer Prot. of the House Comm. on Commerce*, 105th Cong. 2 (1997) [hereinafter *Hearing*].

5. Shubert v. Metrophone, Inc., 898 F.2d 401, 402 n.5 (3d Cir. 1990) (citing S. REP. NO. 99-541, at 9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3563).

6. *Id.*

7. *Id.*

frequency to the next as the cell phone user moves about and the phone is moved from cell to cell.[8]

Along with the advent of cellular phones, however, came new challenges and concerns.[9] One such concern was privacy and the disclosure of confidential information about government activities,[10] celebrities, or one's own business competitors that could now be easily obtained through scanners and interception technology.[11] Congress understood this concern and recognized that "[e]lectronic hardware making it possible for overzealous law enforcement agencies, industrial spies and private parties to intercept the personal or proprietary communications of others is readily available in the American market . . . ."[12] Cellular phone communications are especially vulnerable to intrusion because simple, inexpensive radio scanners that have been slightly modified can intercept cellular transmissions.[13] Congress noted that digital technology has made eavesdropping more difficult because the service provider can encrypt the communications; however, it is not at all impossible to intercept digital signals.[14] Furthermore, protective measures have been developed to combat the unauthorized interception of cellular communications, including encryption, analog scrambling, authentication cards, and firewalls; however,

8. *Id.*

9. *See* Transcrypt International, *supra* note 1.

10. For example, years ago during the disastrous San Francisco earthquake, public safety officers were forced to communicate via cellular phones, but the media intercepted and broadcast their communications. *Id.* Additionally, during the tragic TWA disaster of some years back, government agents had to stop using their cell phones after the media began intercepting their calls, which led to various security problems and miscommunications between government agencies. *Hearing*, *supra* note 4, at 181.

11. *See* Transcrypt International, *supra* note 1.

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

13. H.R. REP. NO. 99-647, at 20 (1986). Interestingly, one can find numerous websites on the Internet that give instructions on altering a scanner to intercept a cellular phone conversation. *Hearing*, *supra* note 4, at 8. This type of information can also be found in many trade magazines and other publications. *Id.* at 9. Recreational eavesdroppers even have their own magazine entitled *Monitoring Times*, which boasts a circulation of 30,000. WIRELESS TECHNOLOGIES AND THE NATIONAL INFORMATION INFRASTRUCTURE 223 n.2, *at* http:www.wws.princeton.edu/cgi-bin/byteserv.prl/~ota/disk1/1995/9547/954713.PDF (last visited Mar. 13, 2003) [hereinafter WIRELESS TECHNOLOGIES]. Furthermore, analog scanners are available for purchase at many retail outlets and can sell for as little as eighty dollars. *Hearing, supra* note 4, at 181. Elaborate digital scanners are considerably more expensive; however, the availability of inexpensive units will improve as the demand for them increases with the rise in digital phone use. *Id.* The number of scanners estimated to be in use in the United States is in the millions. *Id.* at 182.

14. *Hearing*, *supra* note 4, at 4, 6.

these can be very expensive and will not always prevent the most sophisticated of operators from intercepting cellular communications.[15]

B. Congress Prohibits Interception of Cellular Transmissions and the Supreme Court Responds

"Historically, the struggle over the privacy of communications has been a battle between an individual's right to privacy and the legitimate needs of law enforcement to conduct surveillance (wiretapping, interception) in the investigation of crimes."[16] Achieving balance in this regard has been difficult for both Congress and the Supreme Court.[17] Congress' first attempt to regulate privacy in communication was codified in the Communications Act of 1934.[18] The Act made it illegal for anyone, except for law enforcement personnel or communication company employees, to intercept or disclose any private communication.[19]

Largely in response to two 1967 Supreme Court decisions, *Katz v. United States*[20] and *Berger v. New York*,[21] in which the Court struck down specific wiretapping operations by law enforcement officers because they violated the Fourth Amendment's prohibition on unreasonable search and seizure, Congress passed the Omnibus Crime Control and Safe Streets Act of 1968.[22] Title III of this Act (entitled Wiretapping and Electronic Surveillance) had the stated purpose of "protecting the privacy of wire and oral communications,"[23] and it prohibited the *interception* of private communications except under certain specified conditions where law enforcement could obtain evidence through electronic surveillance.[24] The Act, as initially written, only applied to wire/landline communications; however, the Electronic Communications Privacy Act of 1986 modified Title III of the Omnibus Crime Control and Safe Streets Act of 1968 to include electronic communications (including cellular phone conversations)

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15. *See* Transcrypt International, *supra* note 1. Encryption systems can range in cost from $300 to $1,000 per unit (with one unit being required at each end of a conversation), and, although an encrypted transmission cannot be decoded while a conversation is taking place, signals can be recorded and decoded at a later time. WIRELESS TECHNOLOGIES, *supra* note 13, at 230.

16. WIRELESS TECHNOLOGIES, *supra* note 13, at 227 box 10-2.

17. *Id.*

18. *Id.* (citing 47 U.S.C. § 605(a) (1995)).

19. *Id.* (citing 47 U.S.C. § 605(a) (1995)).

20. 389 U.S. 347 (1967) (holding that it was a "search" under the Fourth Amendment when police attached a recording device to the outside of a phone booth).

21. 388 U.S. 41 (1967) (holding that a New York statute allowing police to engage in wiretapping violated the Fourth Amendment).

22. WIRELESS TECHNOLOGIES, *supra* note 13, at 227 box 10-2.

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

24. *See* WIRELESS TECHNOLOGIES, *supra* note 13, at 227 box 10-2.

and expanded the scope of the Act by making it illegal to *disclose* the contents of protected communications.[25]

C. Applying Wiretapping Statutes to the Media

Countless Supreme Court decisions have settled the "general proposition that freedom of expression upon public questions is secured by the First Amendment,"[26] and, "[f]or decades, the media [has] hid[den] behind their First Amendment protection as if it were an impenetrable shield."[27] The media has assumed that implied in the First Amendment right to publish information is the right to gather that information through whatever means necessary.[28] The Supreme Court gave some support for this notion when, in the 1972 case of *Branzburg v. Hayes*, it stated that the media has "some" newsgathering rights, and that "news gathering does . . . qualify for First Amendment protection" because "without some protection for seeking out the news, freedom of the press could be eviscerated."[29] The Court, however, did caution, "the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability."[30] Despite this warning by the Court, many members of the media still believe that laws of general applicability do not, and should not, apply to them.[31]

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25. *Id.* The only type of oral communication protected by the Act is one "uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation." 18 U.S.C. § 2510(2) (2003).

26. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) (holding that the First and Fourth Amendments provide safeguards for the freedom of speech and press, and the media is protected when it publishes criticism of a public official's conduct); *see also* Roth v. United States, 354 U.S. 476, 484 (1957) (arguing that speech and press are protected in order to assure the free exchange of political and social ideas, and the press has a right to publish "'sentiments on the administration of Government'") (quoting 1 JOURNALS OF THE CONTINENTAL CONGRESS 108 (1774)); Bridges v. California, 314 U.S. 252, 270 (1941) (noting "it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions"); Stromberg v. California, 283 U.S. 359, 369 (1931) (claiming that "the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means . . . is a fundamental principle of our constitutional system").

27. Karen E. Klein, *The Legalities of Reporting the News*, QUILL, Sept. 1, 2001, at 26, *available at* 2001 WL 20072354.

28. *Id.*

29. Branzburg v. Hayes, 408 U.S. 665, 681 (1972) (holding that even though the media does have some protection, a journalist could be ordered to testify before a grand jury as to the identity of a confidential source).

30. *Id.* at 682.

31. Klein, *supra* note 27.

With the creation and enforcement of federal wiretapping statutes, Congress and the courts have attempted to "hold invasive technology at bay without handcuffing the news media," and this has forced the Supreme Court to engage in a balancing act with privacy interests on one side and freedom of the press on the other.[32] Recently, the Supreme Court, in *Bartnicki v. Vopper*,[33] addressed the common situation in which a third party illegally intercepts a cellular phone conversation, records it, and then releases a tape of that conversation to the media.[34] The holding in that case, that "a stranger's illegal [interception] does not suffice to remove the First Amendment shield from speech about a matter of public concern,"[35] was a victory for the individual members of the media that were involved.[36]

As precedent, however, the narrow holding in *Bartnicki* "could have repercussions for the media for decades to come,"[37] and might very well be "a gift to the media with strings attached. Or, more precisely, it might be the last gift to the media from the Supreme Court for a very long time."[38] This is evidenced by the increased importance the Court placed on privacy, the majority's reluctance to define exactly when, or if, a media defendant can ever be punished for broadcasting the contents of an intercepted conversation, and the Court's failure to address whether or not media disclosures of gossip, trade secrets, or other private matters would be protected.[39]

Section II of this Note will discuss the holding of the majority of the Court in *Bartnicki v. Vopper*, and will analyze the important concurring and dissenting opinions of this landmark case. Section III will argue that the narrow holding in *Bartnicki* might be less of a victory for the media than was originally thought. Finally, Section IV will discuss how the decision in *Bartnicki* has impacted two important, and similar, cases in the lower courts and what the decision means for the media in the future.

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32. Kenneth A. Paulson, *Stolen Conversations and Freedom of the Press*, *at* http://www.freedomforum.org/templates/document.asp?documentID=14015 (May 27, 2001).

33. 532 U.S. 514 (2001). This was the first United States Supreme Court case to address the freedom of the press in almost a decade. Tony Mauro, *Press Freedom on the Line in Illegal Wiretap Case*, RECORDER, Dec. 6, 2000, at News 3.

34. Klein, *supra* note 27.

35. *Bartnicki*, 532 U.S. at 535.

36. *See* Klein, *supra* note 27.

37. *Id.*

38. Tony Mauro, *Present from Justices May Signal End of Party*, NEWS MEDIA & THE L., July 1, 2001, at 9.

39. *See id.*

II. *BARTNICKI V. VOPPER*

A. Summary of the Facts

Throughout 1992 and 1993, contract negotiations took place between the Wyoming Valley West School District and the Wyoming Valley West School District Teachers' Union.[40] In May of 1993, Gloria Bartnicki, a chief negotiator for the Teachers' Union, placed a cellular phone call to Anthony F. Kane, the president of the Teachers' Union.[41] During their conversation, in which they discussed the negotiations, Kane said, "'If they're not going to move for three percent, we're gonna have to go to their . . . homes . . . to blow off their front porches, we'll have to do some work on some of those guys . . . .'"[42] The communication was illegally intercepted by an unknown source, and a tape of the conversation was anonymously delivered to Jack Yocum, the leader of a local taxpayers' group that opposed the Teachers' Union's proposals.[43] Yocum then delivered the tape to Frederick W. Vopper, a radio commentator, who aired the tape of the illegally intercepted conversation on his talk show devoted to the discussion of public affairs.[44]

Bartnicki brought suit under federal wiretapping statute 18 U.S.C. § 2511(1)(c), which states that anyone 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 [illegal] interception of a wire, oral, or electronic communication . . . shall be punished . . . .'"[45] Bartnicki also sued Vopper under a similar Pennsylvania wiretapping statute and alleged that Vopper violated the statutes when he knowingly disclosed the contents of

40. Bartnicki v. Vopper, 200 F.3d 109, 112-13 (3d Cir. 1999), *aff'd*, 532 U.S. 514 (2001).

41. *Id.* at 113.

42. *Id.* (quoting Appendix at 35-36).

43. *Id.*

44. *Id.*

45. *Id.* at 114 (quoting 18 U.S.C. § 2511(1)(c) (1999)). Section 2511(1)(c) is part of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, entitled Wiretapping and Electronic Surveillance. Bartnicki v. Vopper, 532 U.S. 514, 523 (2001). Violations of this provision are punishable by a fine, imprisonment for up to five years, or both. 18 U.S.C. § 2511(4)(a) (2003). The District of Columbia and every state except for Arkansas, Mississippi, South Carolina, South Dakota, Virginia, Vermont, and Washington have wiretapping laws that are similar to Title III of the Omnibus Crime Control and Safe Streets Act of 1968. Associated Press, *High Court Agrees to Resolve Split in Lower Courts over Wiretap Laws*, *at* http://www.freedomforum.org/templates/document.asp?documentID=12779 (June 26, 2000).

the illegally intercepted conversation.[46] After discovery, both parties moved for summary judgment.[47] Vopper argued, *inter alia*, that he had not violated the wiretapping statutes because he had not been directly involved in the illegal interception of the conversation.[48] He further argued that even if he had violated the statutes in broadcasting the tape, the First Amendment protected that broadcast.[49]

B. District Court Opinion

The district court found that direct involvement in the illegal interception was not required to establish a violation of the wiretapping statutes, and Vopper had violated the statutes when he intentionally disclosed the contents of the phone conversation that he knew, or had reason to know, had been illegally intercepted.[50] The court went on to hold that the First Amendment did not protect Vopper's broadcast because the statutes involved were "content-neutral laws of general applicability that contained 'no indicia of prior restraint or the chilling of free speech.'"[51] The district court then approved a motion for an interlocutory appeal, which was accepted by the Court of Appeals for the Third Circuit.[52]

C. The Court of Appeals Decision

The court of appeals agreed that the wiretapping statutes involved were "content-neutral" and were thus subject to "intermediate scrutiny";[53] however, the court remanded the case to the district court with instructions to grant summary judgment for Vopper.[54] The appellate court held that the statutes involved were unconstitutional as applied to Vopper because they "deter[red] significantly more speech than [was] necessary to serve the government's asserted interest [in protecting privacy]."[55] The court was concerned that media reporters would not always be certain of the "precise origins of information they receive," or whether that information "stem[med] from a lawful source."[56] A "cautious reporter," then, might

46. *Bartnicki*, 200 F.3d at 113.
47. *Id.*
48. *See id.* at 115.
49. *See id.* at 116.
50. *Id.* at 115.
51. Bartnicki v. Vopper, 532 U.S. 514, 521 (2001) (quoting Application to Petition for Certiorari at 55a-56a, *Bartnicki* (No. 99-1687)).
52. *See Bartnicki*, 200 F.3d at 113-14.
53. *Id.* at 123.
54. *Id.* at 129.
55. *Id.* at 126.
56. *Id.* at 127.

choose not to report on a matter of public concern for fear that he may violate the wiretapping statutes in doing so.[57]

In dissent, Judge Pollak argued that the prohibition against disclosing an illegally intercepted conversation, above and beyond the prohibition against the interception itself, was needed to reduce the incentive for engaging in illegal interceptions and to prevent compounding the harm that would result from such interceptions through wide dissemination.[58]

D. The Supreme Court Decision

The Supreme Court granted certiorari[59] and declared that its job was to question "the validity of the statutes as applied to the specific facts of this case."[60] The Court, in an opinion written by Justice Stevens, accepted that the original interception was illegal and that Vopper knew, or should have known, that the intercepted conversation had been obtained unlawfully.[61] Therefore, when Yocum delivered the tape of the intercepted conversation to the media defendant, and when Vopper then played the tape on the air, the statutes in question were violated.[62]

The only remaining question facing the Court was "whether the application of these statutes in such circumstances violate[d] the First Amendment."[63] In this case, Vopper did not participate in the illegal interception of the conversation, but instead only became aware of the interception after it occurred.[64] Furthermore, even though the initial interception by an unknown person was unlawful, Vopper obtained access to the tape of the recorded conversation in a lawful manner.[65] Finally, the intercepted conversation in this case involved a matter of public concern, and the statements regarding the labor negotiations would have been newsworthy if they had been made in a public arena, or if they had been inadvertently overheard by a third party.[66]

57. *Id.*
58. *See id.* at 133 (Pollack, J., dissenting).
59. Bartnicki v. Vopper, 532 U.S. 514, 522 (2001).
60. *Id.* at 524.
61. *Id.* at 525.
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*

The Court acknowledged that § 2511(1)(c) (and, by extension, the Pennsylvania statute) is a "content-neutral law of general applicability";[67] however, "the naked prohibition against disclosures is fairly characterized as a regulation of pure speech."[68] Section 2511(1)(c) has the effect of regulating speech because the goal of delivering a tape recording "is to provide the recipient with the text of recorded statements, . . . and as such, it is the kind of 'speech' that the First Amendment protects."[69] In this regard, the Court agreed with the Third Circuit, which said, "'[i]f the acts of "disclosing" and "publishing" information do not constitute speech, it is hard to imagine what does fall within that category.'"[70]

The Court went on to say that it is rarely constitutional for the government to punish those who publish truthful information, and it has been held on numerous occasions that, absent some *great* need, the government may not punish those who publish truthful, and *lawfully obtained*, information regarding a matter of public concern.[71] This proposition, called the *Daily Mail* principle,[72] holds that "'if 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 . . . of the highest order.'"[73]

The Court, however, refused "to answer categorically whether truthful publication may ever be punished consistent with the First Amendment" and limited the issue in this case to the question: "'[w]here 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,

67. *Id.* at 526. The statutes are content-neutral because their purpose is to protect the privacy of those engaging in wire, oral, or electronic communications, and the regulations do not single out communications based on their subject matter, but only because they are illegally intercepted. *Id.* It can be difficult to determine whether a specific regulation is content-neutral or content-based; however, the general rule is that "laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based." Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 643 (1994).

68. *Bartnicki*, 532 U.S. at 526.

69. *Id.* at 527.

70. *Id.* (quoting Bartnicki v. Vopper, 200 F.3d 109, 120 (3d Cir. 1999), *aff'd*, 532 U.S. 514 (2001)).

71. *Id.* at 527-28.

72. This principle is made up of cases that have struck down statutes forbidding the media from publishing certain types of truthful information as violative of the First Amendment. *Id.* at 545 (Rehnquist, C.J., dissenting). The cases that established this principle include *Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (striking down a statute prohibiting the publication of the name of a rape victim); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979) (striking down a statute prohibiting publication of the name of a juvenile offender); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) (holding that a statute that prohibited publication of a state judicial review proceeding violated the First Amendment); and *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (striking down an award of damages against a TV station for broadcasting a rape victim's name in violation of a law forbidding the broadcast). *Id.*

73. *Id.* at 528 (quoting *Daily Mail*, 443 U.S. at 103).

may the government punish the ensuing publication of that information based on the defect in the chain?'"[74] This refusal by the Court to discuss whether a publisher of truthful information could ever be punished is consistent with other cases in which the Court has "'carefully eschewed reaching this ultimate question, mindful that the future may bring scenarios which prudence counsels . . . not resolving anticipatorily,'" and the Court desired to instead rely "'on limited principles that [swept] no more broadly than the appropriate context of the instant case.'"[75]

The government argued that the wiretapping statutes at issue served two interests—to eliminate the incentive to intercept private conversations and to reduce the potential harm to those who fall victim to having their conversations illegally intercepted.[76] The Court recognized that these interests justified the prohibition against the *use* of illegally obtained information by the *actual interceptor*, but it did not follow that these interests would be served by punishing the disclosure of information of public concern that was lawfully obtained by one who was not involved in the original illegal interception.[77] It would be unreasonable, the Court argued, to hold that a disclosure by a law-abiding possessor of important information could "be suppressed in order to deter conduct by a non-law-abiding third party," because there is no real evidence to support the claim that the prohibition against disclosures would actually reduce the amount of illegal interceptions.[78] The Court contended that it could not be assumed that punishing Vopper would deter the unknown original interceptor in this case from continuing to engage in illegal interceptions of communications.[79]

The Court acknowledged that the governmental interest in securing privacy is an important and legitimate one, and one of the stated purposes of the statutes involved was to protect privacy of communication and encourage "'the uninhibited exchange of ideas and information among private parties.'"[80] The Court admitted that "the fear of public disclosure of private conversations might well have a chilling effect on private speech," and, therefore, the Court would have to weigh and consider important

74. *Id.* at 528-29 (quoting Boehner v. McDermott, 191 F.3d 463, 484-85 (D.C. Cir. 1999) (Sentelle, J., dissenting), *vacated by* 532 U.S. 1050 (2001), *remanded to* No. 98-7156, 2001 U.S. App. LEXIS 27798 (D.C. Cir. Dec. 21, 2001) (per curiam)).

75. *Id.* at 529 (quoting *Florida Star*, 491 U.S. at 532-33).

76. *Id.*

77. *Id.*

78. *Id.* at 529-30.

79. *Id.* at 531.

80. *Id.* at 532 (quoting Brief for United States at 27).

interests "on *both* sides of the constitutional calculus."[81] In balancing those interests, the Court acknowledged "that some intrusions on privacy are more offensive than others[;] . . . disclosure of the contents of a private conversation can be an even greater intrusion on privacy than the interception itself," and this creates an important "justification for prohibiting such disclosures by persons who lawfully obtained access to the contents of an illegally intercepted message."[82]

Despite this justification, however, the Court held that applying § 2511(1)(c) to the present case "implicate[d] the core purposes of the First Amendment because [the statute] impose[d] sanctions on the publication of truthful information of *public concern*."[83] The Court declared that "[i]n this case, privacy concerns [had to] give way when balanced against the interest in publishing matters of public importance," and "[o]ne of the costs associated with participation in public affairs is an attendant loss of privacy."[84] The Court affirmed the decision of the Court of Appeals for the Third Circuit[85] and held that "a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern."[86] Since the collective-bargaining negotiations between the School District and the Teachers' Union were a matter of public concern, and Bartnicki and Kane were engaged in a discussion about those negotiations, the disclosure of that conversation by Vopper was protected by the First Amendment to the Constitution.[87]

The Court did limit its holding, however, to matters of *public concern* and refused to decide whether the interest in protecting the privacy of communications was "strong enough to justify the application of § 2511(c) [sic] to disclosures of *trade secrets* or *domestic gossip* or other *information of purely private concern*."[88]

1. Concurring Opinion

Justice Breyer, joined by Justice O'Connor, wrote a separate concurring opinion agreeing with the majority's narrow holding on the specific facts, but explaining that the Court's holding should not be used to "imply a significantly broader constitutional immunity for the media."[89] Justice

81. *Id.* at 533.
82. *Id.*
83. *Id.* at 533-34 (emphasis added).
84. *Id.* at 534.
85. *Id.* at 535.
86. *Id.*
87. *Id.*
88. *Id.* at 533 (emphasis added).
89. *Id.* at 535-36 (Breyer, J., concurring).

Breyer acknowledged that the question put before the Court in this case necessarily involved the balancing of conflicting constitutional concerns.[90] The statutes involved directly interfere with free expression because they prohibit the media from publishing certain types of information, yet they also protect privacy and foster private speech.[91]

Justice Breyer suggested that in a situation like the one presented in this case, where "important competing constitutional interests are implicated," the strictest scrutiny "with its strong presumption against constitutionality is normally out of place," and it should instead be asked "whether the statutes strike a reasonable balance between their speech-restricting and speech-enhancing consequences, [o]r . . . instead impose restrictions on speech that are disproportionate when measured against their corresponding privacy and speech-related benefits."[92] Justice Breyer argued that even though the statutes involved directly restrict speech, the "Constitution must tolerate laws of this kind because of the importance of [their] privacy and speech-related objectives," and, instead of broadly prohibiting these statutes, "the Constitution demands legislative efforts to tailor the laws in order reasonably to reconcile media freedom with personal, speech-related privacy."[93]

Justice Breyer claimed that the wiretapping statutes, as applied to the specific facts of this case, did not reasonably balance the conflicting constitutional objectives involved, but instead "disproportionately interfere[d] with media freedom" because Vopper did not participate in, or encourage, the illegal interception, and did not engage in any unlawful behavior other than to publish the information that had been illegally obtained by an unknown third party.[94] Furthermore, Bartnicki and Kane did not have a legitimate privacy interest in their conversation because it involved a threat to blow off front porches, which "thereby rais[ed] a significant concern for the safety of others."[95] Justice Breyer stressed this part of the intercepted conversation and noted that "[w]here publication of private information constitutes a wrongful act, the law recognizes a privilege allowing the reporting of threats to public safety," and this is true "[e]ven where the danger may have passed by the time of publication" because

90. *Id.* at 536 (Breyer, J., concurring).
91. *Id.*

92. *Id.*
93. *Id.* at 537-38 (Breyer, J., concurring).
94. *Id.* at 538 (Breyer, J., concurring).
95. *Id.* at 539 (Breyer, J., concurring).

"editors, who must make a publication decision quickly, [should not] have to determine present or continued danger before publishing this kind of threat."[96] Finally, Justice Breyer noted that Bartnicki and Kane were public figures who voluntarily placed themselves in a public controversy and, therefore, were "subjected . . . to somewhat greater public scrutiny and had a lesser interest in privacy than an individual engaged in purely private affairs."[97]

Justice Breyer was quick to say that the Constitution does not require public figures to entirely give up the right to have private communications; however, "the subject matter of the conversation at issue here [was] far removed from that in situations where the media publicizes truly private matters."[98] The constitutional privilege for the media to disclose illegally obtained conversations of public concern does not, therefore, establish a "'public interest' exception that swallows up the statutes' privacy-protecting general rule. Rather, it finds constitutional protection for publication of intercepted information of a special kind."[99] Enforcement of the statutes in this case would disproportionately stifle media freedom because Bartnicki and Kane had unusually low legitimate privacy expectations, while the interest in defeating those expectations was extremely high.[100] This, and the fact that Vopper did not participate in the illegal interception, prevented enforcement of the statutes in this case.[101]

Justice Breyer went on to explain that the holding in this case should not be extended beyond its specific facts, and the Court should "avoid adopting overly broad or rigid constitutional rules, which would unnecessarily restrict legislative flexibility."[102] Since future technology could create challenges to individual privacy, legislatures should be free to revisit wiretapping statutes in order to create "better tailored provisions designed to encourage . . . more effective privacy-protecting technologies."[103]

2. Dissenting Opinion

Chief Justice Rehnquist, joined by Justice Scalia and Justice Thomas, dissented.[104] The dissent focused on the privacy concerns raised by modern technology that permits the interception of one's personal communications

96. *Id.*
97. *Id.*
98. *Id.* at 540 (Breyer, J., concurring).
99. *Id.*
100. *Id.*
101. *See id.*
102. *Id.* at 541 (Breyer, J., concurring).
103. *Id.*
104. *Id.* (Rehnquist, C.J., dissenting).

and records.[105] The majority held that the First Amendment protected the disclosure of illegally intercepted conversations involving a matter of public concern; however, the Court failed to even attempt to define what constituted a matter of "public concern."[106] This omission by the majority, and the general holding of the Court, according to the dissent, "diminish[ed], rather than enhanc[ed], the purposes of the First Amendment" and would serve to "chill[] the speech of the millions of Americans who rely upon electronic technology to communicate each day."[107]

The dissent argued that the wiretapping statutes at issue in this case were enacted with the purpose of protecting important speech and privacy interests, and, even though the majority correctly labeled the statutes as content-neutral, the Court "nonetheless subject[ed] these laws to the strict scrutiny normally reserved for governmental attempts to censor different viewpoints or ideas."[108] These statutes regulate speech, and prohibit disclosure of communications, without any reference to content, and "[t]he same information, if obtained lawfully, could be published with impunity."[109] As such, the dissent argued, the wiretapping statutes only needed to pass a test of intermediate scrutiny, and the majority's reliance on the *Daily Mail* string of cases to justify applying a standard of strict scrutiny was unpersuasive.[110] The dissent argued that in each case establishing the *Daily Mail* principle, the statutes at issue regulated the *content* of speech (*i.e.*, were content-based), which required the Court to apply a strict scrutiny test.[111]

The dissent noted that the published information involved in the *Daily Mail* string of cases had been lawfully obtained by the media defendants

105. *Id.*

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

107. *Id.* The dissent noted that Congress, in drafting Title III of the Omnibus Crime Control and Safe Streets Act of 1968, recognized that privacy of communication is jeopardized by recent technological developments, and it is no longer possible "'for each man to retreat into his home and be left alone.'" *Id.* at 542-43 (Rehnquist, C.J., dissenting) (quoting S. REP. NO. 90-1097, at 67 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2154). "'[P]rivacy of communication is essential if citizens are to think and act creatively and constructively. Fear or suspicion that one's speech is being monitored by a stranger, even without the reality of such activity, can have a seriously inhibiting effect upon the willingness to voice critical and constructive ideas.'" *Id.* at 543 (Rehnquist, C.J., dissenting) (quoting PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 202 (1967)).

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

109. *Id.* at 544-45 (Rehnquist, C.J., dissenting).

110. *Id.* at 545 (Rehnquist, C.J., dissenting). For a discussion of the *Daily Mail* string of cases referred to by the dissent, *see supra* note 72 and accompanying text.

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

from the government itself, while the present case involved a private conversation that had not been intended for the public domain.[112] Moreover, the information published in the *Daily Mail* string of cases was already available to the public, and punishing further publication would not have furthered any government interest in confidentiality.[113] The reporters in the *Daily Mail* cases obtained their information lawfully from public documents and interviews.[114] In this case, however, "[the wiretapping] statutes only prohibit 'disclos[ure],' and one cannot 'disclose' what is already in the public domain."[115] Vopper committed an illegal act when he knowingly disclosed the contents of the illegally intercepted conversation[116] because the communication was not publicly available and the parties involved had not lost their privacy interests in the conversation.[117]

Finally, the *Daily Mail* cases were concerned with self-censorship and the chilling of speech that could "'result from allowing the media to be punished for publishing certain truthful information.'"[118] In this case, however, the fear of self-censorship was a reason for *upholding* the wiretapping statutes at issue because they permit private communications to take place without inhibition, and they only apply to "those who *knowingly* disclose an illegally intercepted conversation."[119]

The dissent posited that the *Daily Mail* cases did not really address the issue involved in this case, which was "'whether, in cases where information has been acquired *unlawfully* by a newspaper or by a source, the government may ever punish not only the unlawful acquisition, but the ensuing publication as well.'"[120] Since the *Daily Mail* principle could not apply to this case, the wiretapping statutes involved should have been "upheld if they further[ed] a substantial governmental interest unrelated to the suppression of free speech."[121] In the dissent's view, the statutes did just that—they furthered the governmental interest in protecting the privacy of communication.[122]

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112. *Id.* at 546 (Rehnquist, C.J., dissenting). The dissent noted that in *Florida Star v. B.J.F.*, 491 U.S. 524, 535 (1989), and *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 841 n.12 (1978), the respective states could have implemented measures to protect the confidentiality of the published information if they had so desired, but the parties in the present case could not have prevented the interception of their cellular communication. *Id.*

113. *Id.* (citing *Florida Star*, 491 U.S. at 535).

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

115. *Id.* at 546 (Rehnquist, C.J., dissenting) (citation omitted).

116. *See id.* at 548 (Rehnquist, C.J., dissenting).

117. *See id.* at 546 (Rehnquist, C.J., dissenting).

118. *Id.* at 547 (Rehnquist, C.J., dissenting) (quoting *Florida Star*, 491 U.S. at 535).

119. *Id.*

120. *Id.* (quoting *Florida Star*, 491 U.S. at 535 n.8).

121. *Id.* at 548-49 (Rehnquist, C.J., dissenting).

122. *See id.*

The dissent further noted that prohibiting the knowing publication of an illegally intercepted conversation would serve to "deter the initial interception itself, a crime which is extremely difficult to detect."[123] The majority claimed that Congress had failed, in their defense of § 2511(1)(c), to provide any evidence that the anti-disclosure provision had actually reduced, or would reduce, the amount of illegal interceptions.[124] The dissent argued, however, that courts have a duty to give "substantial deference" to the predictions and judgments of Congress because Congress is best equipped to analyze the data on complex issues, and "'[s]ound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable.'"[125]

Furthermore, the dissent argued, the notion that illegal acts that are difficult to prevent can be deterred by keeping the wrongdoer from getting to enjoy the fruits of the crime, also called the "dry up the market" theory, is "neither novel nor implausible. It is a time-tested theory that undergirds numerous laws . . . ."[126] Without the prohibition against the knowing disclosure of illegally intercepted conversations, an "eavesdropper . . . could anonymously launder [an] interception through a third party and thereby avoid detection. Indeed, demand for illegally obtained private information would only increase if it could be disclosed without repercussion. The law against interceptions, which the Court agree[d] is valid, would be utterly ineffectual without these anti-disclosure provisions."[127] The majority did not "explain how or from where Congress should obtain statistical evidence about the effectiveness of these laws,"[128] and the Court's decision to strike down the statutes was simply a "bald substitution of its own prognostications in place of the reasoned judgment of . . . legislative bodies and the United States Congress," when reliance on the "dry up the market" theory would have been more appropriate because it is "'far stronger than mere speculation.'"[129]

123. *Id.* at 549 (Rehnquist, C.J., dissenting).

124. *Id.*

125. *Id.* at 550 (Rehnquist, C.J., dissenting) (alteration in original) (quoting Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 665 (1994)).

126. *Id.*

127. *Id.* at 551 (Rehnquist, C.J., dissenting).

128. *Id.* at 552 (Rehnquist, C.J., dissenting).

129. *Id.* at 552-53 (Rehnquist, C.J., dissenting) (quoting United States v. Treasury Employees, 513 U.S. 454, 475 (1995)).

The dissent also argued that it is necessary for people to have the right *not* to have to speak publicly, and one should feel free to speak into a phone and assume that his words will not be broadcast.[130] The statutes involved in this case serve to deter interceptions and disclosures of communications, thereby protecting this revered right of privacy.[131] The statutes "further the First Amendment rights of the parties to the conversation" in that they "further the 'uninhibited, robust, and wide-open' speech of the private parties."[132] Furthermore, it was argued that the wiretapping statutes at issue in this case serve to "protect millions of people who communicate electronically on a daily basis," while the statutes struck down in the *Daily Mail* string of cases only protected "the identities and actions of a select group of individuals."[133]

Finally, the dissent admitted that the majority was correct in stating that the statements made by Kane and Bartnicki would have been newsworthy if they had been made in a public arena.[134] The crucial factor in this case, however, was that Bartnicki and Kane "had no intention of contributing to a public 'debate' at all, and it [was] perverse to hold that another's unlawful interception and knowing disclosure of their conversation [was] speech 'worthy of constitutional protection.'"[135] The Constitution, according to the dissent, "should not protect the involuntary broadcast of personal conversations," and this should be true "[e]ven where the communications involve public figures or concern public matters, [because] the conversations are nonetheless private and worthy of protection."[136] Public figures may not be free from public scrutiny in certain areas; however, this does not mean "that they also have abandoned their right to have a private conversation without fear of it being intentionally intercepted and knowingly disclosed."[137] Certainly, the dissent concluded, the interest in privacy "at its narrowest must embrace the right to be free from surreptitious

130. *Id.* at 553 (Rehnquist, C.J., dissenting). Justice Scalia, who joined in the dissent, suggested during oral arguments that private speech would be chilled, and people would be more reluctant to communicate through cell phones, if they knew that their conversations could be broadcast with impunity. Tony Mauro, *Press Freedom on the Line in Illegal Wiretap Case*, RECORDER, Dec. 6, 2000, at 3. It is also interesting to note that Justice Scalia "never uses his wireless phone at home to discuss court matters for fear his remarks will be intercepted and published." *Id.*

131. *See Bartnicki*, 532 U.S. at 553 (Rehnquist, C.J., dissenting).

132. *Id.* at 553-54 (Rehnquist, C.J., dissenting) (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

133. *Id.* at 554 (Rehnquist, C.J., dissenting). The dissent noted that there are 49.1 million cellular phones currently in operation, and "[t]he chilling effect of the Court's decision upon . . . private conversations will surely be great." *Id.* (citing Sean Hao, *Nokia Profits from Surge in Cell Phones*, FLA. TODAY, July 18, 1999, at E1).

134. *Id.*

135. *Id.*

136. *Id.* at 554-55 (Rehnquist, C.J., dissenting).

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

eavesdropping on, and involuntary broadcast of, our cellular telephone conversations."[138]

III. *BARTNICKI V. VOPPER* MAY NOT REALLY BE THE SWEEPING VICTORY FOR THE MEDIA AND FIRST AMENDMENT IT SEEMS TO BE

At first blush, it would appear that the holding in *Bartnicki v. Vopper* was a sweeping victory for media defendants everywhere because it upheld the news media's right to publish information illegally obtained by a third party.[139] The press does not seem to be the only winner in this case, either, because the holding implies that private citizens can continue to legally "share with the public, the press or public officials information about threats, crime or corruption," as long as *they* receive the information legally.[140] Yes, it would seem that in the opinion, the majority in *Bartnicki v. Vopper* "avoided what could have been a very troubling precedent allowing the government to suppress . . . truthful speech about matters of public importance based on the notion that misconduct in obtaining that information had tainted the information itself" and, instead, implemented a balancing test that weighed the First Amendment right to publish truthful information of public concern against the interest in securing privacy.[141]

It remains to be seen, however, "whether the Court laid the proper groundwork for a fair balancing of these competing interests in future cases."[142] The concurring opinion of Justices Breyer and O'Connor, the increased importance the Court placed on privacy, Justice Stevens' declaration that the First Amendment would not apply to protect the disclosure of trade secrets, gossip, or other purely private matters, and the Court's refusal to resolve the question of if, and when, the media may ever be punished for publishing truthful information all suggest that the press still remains exposed to lawsuits, and the very real threat of liability continues to loom.[143]

138. *Id.*

139. Paulson, *supra* note 32.

140. *See* Paul McMasters, *Will Supreme Court Give Primacy to Privacy?*, *at* http://www.freedomforum.org/templates/document.asp?documentID=12973 (Jan. 4, 2001).

141. Paul M. Smith & Nory Miller, *When Can the Courts Penalize the Press Based on Newsgathering Misconduct?*, 19 COMM. LAW. 1, 1 (Summer 2001).

142. *Id.*

143. *See id.* at 1, 27.

A. The Concurring Opinion

The ruling in *Bartnicki* was extremely narrow and "suggest[ed] that as technology becomes more advanced and more invasive, the Supreme Court may well conclude that illegally obtained information—even information in the public interest—may not be shared with the public."[144] This is evidenced in the concurring opinion of Justices Breyer and O'Connor, which argued that intercepting a marginally secure cellular phone conversation "'is a very different matter from eavesdropping on encrypted cellular phone conversations or those carried on in the bedroom. But the technologies that allow the former may come to permit the latter,'" and if more invasive technology is used in intercepting a conversation in the future, a different conclusion might be reached.[145] If this type of situation were to present itself in the future, and if Justice Breyer and Justice O'Connor then joined in the opinion of the dissent, it could result in a majority of the Court holding "that the right to personal privacy should limit the rights of a free press to report on matters of public interest."[146]

Furthermore, and most importantly, the concurring Justices stressed the fact that they were not in favor of a free-speech right to disclose gossip regarding a person's private affairs, but only upheld "constitutional protection for publication of intercepted information of a special kind."[147] The point was stressed that the Court was not "[creating] a 'public interest' exception that swallow[ed] up the statutes' privacy-protecting general rule,"[148] and the concurring Justices only joined in the holding of the majority because "the information publicized involved a matter of unusual public concern, namely a threat of potential physical harm to others."[149] Justice Breyer, joined by Justice O'Connor, acknowledged that Bartnicki and Kane were public figures who had voluntarily involved themselves in a public controversy; however, they concurred in the judgment because the plaintiffs did not have a "legitimate privacy interest in keeping secret a conversation containing threats of violence."[150] This suggests that if the subject matter of the conversation had contained information of public concern, but did not contain threats of physical violence, the two concurring Justices might have joined with the dissent to turn the holding of the Court toward a finding of liability for the media defendant.[151]

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144. Paulson, *supra* note 32.

145. *Id.* (quoting Bartnicki v. Vopper, 532 U.S. 514, 541 (2001) (Breyer, J., concurring)).

146. *Id.*

147. *Bartnicki*, 532 U.S. at 540 (Breyer, J., concurring).

148. *Id.*

149. *Id.* at 535-36 (Breyer, J., concurring).

150. Smith & Miller, *supra* note 141, at 28 (citing *Bartnicki*, 532 U.S. at 539 (Breyer, J., concurring)).

151. *See id.*

B. The Increased Importance the Court Placed on Privacy

The Court has shown in previous decisions that it understands and enforces the First Amendment's Free Press Clause; however, "[t]he biggest threat to that constitutional trend line is the increasing potency of privacy as a principle in the [C]ourt's jurisprudence."[152] The majority in *Bartnicki* gave the interest in protecting privacy nearly the same amount of weight as it gave the freedom of the press.[153] Every member of the Court acknowledged the importance of individual privacy, and the majority opinion did contain ominous language that suggested that if the contents of the conversation at issue had been even a little bit less newsworthy, the outcome might have been very different.[154] The Court recognized the need for freedom of the press, but also noted that the protection of privacy was an essential and important goal of the government.[155] Justices Breyer and O'Connor, in their concurring opinion, exhibited even less concern for the media interest at stake and "expressed concern about the loss of privacy in phone conversations."[156] Justice Breyer declared that the Constitution tolerates laws that protect privacy and "demands legislative efforts to tailor the laws in order reasonably to reconcile media freedom with personal, speech-related privacy."[157]

Furthermore, when the Court noted that "'there [were] important interests to be considered on *both* sides of the constitutional calculus,'" the majority approvingly discussed, without acknowledging that it was doing so, Justice Breyer's commonly voiced idea that it is acceptable for the government to restrict some speech in order to promote other speech.[158]

152. Mauro, *supra* note 38, at 9. *Bartnicki v. Vopper* is the only recent Supreme Court case to address classic First Amendment rights of the media; however, there have been other recent cases in which privacy has won out over other interests. *Id.* A few of these cases are *Reno v. Condon*, 528 U.S. 141 (2000) (supporting the privacy of information contained on drivers' licenses); *Los Angeles Police Department v. United Reporting Publishing*, 528 U.S. 32 (1999) (discussing the commercial use of information found on police blotters); and *Wilson v. Layne*, 526 U.S. 603 (1999) (holding that it violated the Fourth Amendment for members of the media to be in a home during the execution of a search warrant). *Id.* These cases were not direct First Amendment cases; however, in all of them, the Court, "with a nod toward the privacy interests that were asserted, . . . shut the door on public access. The press lost, even if indirectly." *Id.*

153. *Id.*

154. Tony Mauro, *Odd Lot of Cases Tends to Favor First Amendment*, *at* http://www.freedomforum.org/templates/document.asp?documentID=14397 (July 16, 2001).

155. Tony Mauro, *Press Rights Outweigh Privacy in Wiretapping Case, Justices Find*, *at* http://www.freedomforum.org/templates/document.asp?documentID=13976 (May 22, 2001).

156. Mauro, *supra* note 38, at 9.

157. Bartnicki v. Vopper, 532 U.S. 514, 538 (2001) (Breyer, J., concurring).

158. John P. Elwood, *What Were They Thinking: The Supreme Court in Revue, October Term*

Bartnicki is the first case in which the Court has, in a majority opinion, endorsed this so-called "speech-trading theory," and this implies that the Court may be leaning towards a more favorable view of restricting speech in certain situations where doing so could encourage and protect other types of speech.[159]

C. *The Court Denied First Amendment Protection to the Disclosure of Trade Secrets, Gossip, or Other Private Matters, but Failed to Clearly Define These Terms*

Justice Stevens, writing for the majority, expressed the view that the disclosure of information of public concern outweighed privacy interests in this case; however, he implied that if a case were to involve the broadcast of illegally intercepted "trade secrets or domestic gossip or other information of purely private concern," the interest in privacy might prevail.[160] However, "[t]he line between public and private concern is scarcely self-executing," and difficulty and uncertainty lies in determining what in fact constitutes a matter of public concern.[161] If one defines a matter of public concern as *any* piece of information that the public would have an interest in knowing, what Justice Stevens excluded as "domestic gossip" would have to be designated a matter of public concern, if those involved were celebrities, because the public is very curious as to their private affairs.[162]

Moreover, the distinction that Justice Stevens drew between "trade secrets" and matters of public concern can be hard to define.[163] It is obvious that a product's secret formula should be protected from publication as a "trade secret," but "what if the secret involves . . . a confidential practice that consumers would strongly object to or that is illegal?"[164] Should this type of disclosure "be treated as a (punishable) betrayal of a trade secret or as a (protected) matter of public importance?"[165] The Court did not give much guidance in this area within the *Bartnicki* opinion, and it remains to be seen how courts will define "trade secrets" and "domestic gossip" in future cases.[166]

2000, 4 GREEN BAG 2d 365, 372 (2001) (quoting *Bartnicki*, 532 U.S. at 533); *see, e.g.*, Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 400 (2000) (Breyer, J., concurring).

159. *See* Elwood, *supra* note 158, at 372.

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

161. Smith & Miller, *supra* note 141, at 29.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *See id.* at 29-30.

D. The Court Refused to Answer if the Media Can Ever Be Punished forPublishing Truthful Information

In *Bartnicki*, the Court expressly limited its holding to the facts before it and did not address whether the Constitution would protect a media defendant who had participated in the initial illegal interception.[167] The Court, in declining to address this situation, remained true to its "repeated refusal to answer categorically whether truthful publication may ever be punished consistent with the First Amendment."[168]

Justice Stevens' majority opinion surely implied that press involvement of any kind in the initial illegal interception would suffice to justify a finding of liability.[169] The majority did not formally address the issue; however, it did stress the fact, many times throughout the opinion, that the media defendant in *Bartnicki* had *not* participated in the illegal interception.[170] This seems to suggest that the Court would hold a media defendant liable for an ensuing publication if he had participated in the illegal interception, regardless of the type of information involved or the circumstances surrounding the interception.[171]

IV. THE IMPACT OF THE HOLDING IN *BARTNICKI V. VOPPER*

In the midst of the clash between the right to privacy and the right of the media to publish truthful information of public concern, *Bartnicki* did establish one clear rule: media defendants cannot be punished for publishing the contents of an illegally intercepted conversation as long as the information is a matter of public importance and the media did not encourage or take part in the illegal interception.[172] "The parameters of these . . . important qualifications remain unclear";[173] however, "the Court's [narrow holding] in *Bartnicki* may provide guidance in [situations similar to those presented] in two [other] cases," *Boehner v. McDermott* and *Peavy v. WFAA-TV, Inc.*[174]

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167. *Id.* at 28.
168. Bartnicki v. Vopper, 532 U.S. 514, 529 (2001).
169. *See* Smith & Miller, *supra* note 141, at 29.
170. *Id.*
171. *Id.*
172. Karen N. Frederiksen, *The Supreme Court, the Press, and Illegally Recorded Cellular Telephone Calls*, 28 HUM. RTS. 17, 17 (Fall 2001).
173. *Id.*
174. Klein, *supra* note 27.

A. Boehner v. McDermott[175]

1. The Facts

The Martins, a Florida couple, used a radio scanner to illegally intercept and record a conference call between Republican Representative John A. Boehner and other representatives of the Republican Party leadership, in which they discussed an investigation by the Ethics Subcommittee of then-Speaker of the House Newt Gingrich.[176] The Martins turned over the tape of the conversation to James A. McDermott, the then-ranking Democratic member of the House Ethics Committee, with a letter explaining that the conversation had been intercepted using a scanner.[177] McDermott then turned the tape over to the *New York Times* and several other newspapers, which then published verbatim transcripts of the conversation.[178] Boehner then brought suit under federal wiretapping statute 18 U.S.C. § 2511(1)(c).[179]

2. The Court of Appeals Decision

The trial court held that § 2511(1)(c), as applied to this case, violated the First Amendment because the conversation involved a matter of public concern, and McDermott obtained the tape recording legally.[180] However, the Court of Appeals for the District of Columbia Circuit reversed the ruling of the trial court on the ground that McDermott did not engage in speech when he delivered the recorded conversation to the newspapers and was, therefore, not protected under the First Amendment.[181] The court claimed that "those who expose private activity to public gaze are not necessarily engaging in speech, let alone 'the freedom of speech,'" and, while the contents of the tape contained "speech," the speech was not that of McDermott's.[182] The court held that it was McDermott's conduct in handing the tape over to the press that caused him to be liable under § 2511(1)(c) because he "'caused a copy of the tape' to be given to the newspapers; and . . . he 'did so intentionally and with knowledge and reason to know that the recorded phone conversation had been illegally intercepted.'"[183]

175. 191 F.3d 463 (D.C. Cir. 1999), *vacated by* 532 U.S. 1050 (2001), *remanded to* No. 98-7156, 2001 U.S. App. LEXIS 27798 (D.C. Cir. Dec. 21, 2001) (per curiam).
176. *Id.* at 465.
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.* at 464.
181. *Id.* at 466.
182. *Id.*
183. *Id.* at 467 (quoting Complaint at ¶ 20).

The court went on to say that even if McDermott had engaged in "speech," there was, at best, a combination of "speech" and "non-speech" elements in his conduct.[184] The Supreme Court held, in *United States v. O'Brien*,[185] that, in these types of situations, "'a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.'"[186] The test given in *O'Brien* states that a regulation on speech is justified if: (1) it falls within a power given to the government by the Constitution; (2) it advances an important governmental interest, but does not directly relate to suppression of free speech; and (3) the restriction on free speech is no more severe than is necessary to advance that governmental interest.[187] The court analyzed the facts of the case and held that § 2511(1)(c) could be upheld under the test laid out in *O'Brien* because the statute serves the important governmental interest of protecting privacy of communication; it does not restrict speech, but actually promotes it through the prohibition on intercepting conversations and disclosing them; and it helps to deter illegal interceptions and "dry up the market" for them.[188]

Furthermore, the court concluded that the minor restriction on speech that is imposed by § 2511(1)(c) is not any more severe than what is essential for the advancement of the governmental interest involved.[189] It would not have been enough for Congress "to prohibit disclosure only by those who conduct the unlawful eavesdropping. One would not expect [illegal interceptors] to reveal publicly the contents of the communication . . . [because] they would risk incriminating themselves. It was therefore 'essential' for Congress to impose upon . . . those not responsible for the interception, a duty of nondisclosure."[190]

McDermott argued that he could not be punished under the statute because the *Daily Mail* principle protects the disclosure of lawfully obtained truthful information of public concern.[191] The trial court had accepted this argument because it felt it had no other choice; however, the court of appeals felt this theory left the government without any method of preventing public disclosure of private information.[192] The court distinguished *Florida Star v.*

184. *Id.*
185. 391 U.S. 367 (1968).
186. *Boehner*, 191 F.3d at 467 (quoting *O'Brien*, 391 U.S. at 376).
187. *Id.* at 468 (citing *O'Brien*, 391 U.S. at 377).
188. *Id.* at 468-69.
189. *Id.* at 470.
190. *Id.*
191. *Id.*
192. *Id.* at 470-71.

B.J.F. and *Smith v. Daily Mail Publishing Co.* to determine that their principles did not really apply to this case.[193] For example, in *Florida Star*, the government itself made a rape victim's name available to the media by including it in a police blotter that was available to the public.[194] The government could have taken steps to prevent the release of that information if it had desired to keep it private, and, even though a Florida statute made media disclosure of a rape victim's name unlawful, the media had a right to assume that "the government 'considered dissemination lawful' because the information stemmed from a 'government news release.'"[195] In the present case, however, the intercepted conversation was not publicly available prior to McDermott's disclosure, and McDermott knew that the Martins had obtained the recording of the conversation unlawfully.[196]

The court further argued that the Supreme Court made clear that its opinion in *Florida Star* was meant to be narrow and was not intended to "declare a universal First Amendment principle," because future situations could arise in which the reasoning of *Florida Star* could not appropriately apply.[197] The Supreme Court also noted, "'[t]he *Daily Mail* principle does not settle the issue whether, in cases where information has been acquired unlawfully by a newspaper or by a source, [the] government may ever punish not only the unlawful acquisition, but the ensuing publication as well.'"[198] If, as he argued, McDermott was the "newspaper" and his disclosure of the intercepted conversation was a "publication," then the interception by the Martins would have been McDermott's "source," but *Florida Star* and *Daily Mail* would not settle this case.[199] The court argued, instead, that the Supreme Court's reasoning in *Florida Star* and *Daily Mail* stood for the proposition that "regardless [of] whether the illegality is committed by a newspaper[] [McDermott in this hypothetical] . . . or by a source [the Martins], if the newspaper [McDermott] publishes the illegally obtained information, the First Amendment may not shield it from punishment."[200]

Furthermore, the Court in *Florida Star* based its holding on three considerations that were not present in McDermott's case.[201] First, in *Florida Star*, the information disclosed (the name of a rape victim) was entrusted to the government, and, according to the Supreme Court, there were better ways for the government to prevent the public disclosure of that

193. *Id.* at 471-73.
194. *Id.* at 471.
195. *Id.* (citation omitted) (quoting Florida Star v. B.J.F., 491 U.S. 524, 538-39 (1989)).
196. *See id.* at 469.
197. *Id.* at 471.
198. *Id.* at 472 (quoting *Florida Star*, 491 U.S. at 535 n.8).
199. *Id.* at 472-73.
200. *Id.* at 473.
201. *Id.* at 475.

information than by punishing the media for publishing it.[202] In the present case, however, the information disclosed was not entrusted to the government, but was instead a private communication.[203] In a case such as this, which involves "'sensitive information' in 'private hands,' . . . if the government forbids 'its nonconsensual acquisition,' as it has in [the wiretapping statute at issue], 'the publication of any information so acquired' is 'outside the *Daily Mail* principle.'"[204]

Secondly, the information published in *Florida Star* was readily available to the public before the media disclosed it.[205] Therefore, punishing the media in that case would not have served to further the State's interest in preventing public disclosure of private information.[206] In McDermott's case, however, the intercepted conversation was not publicly available prior to when McDermott handed over the tape to the newspapers.[207]

Finally, the Supreme Court applied the *Daily Mail* principle in *Florida Star* because self-censorship might result from punishing the media for publishing information released by the government.[208] In the present case, however, the government did not disseminate the information disclosed, McDermott was not the "media," and "it would not be out of 'timidity [or] self-censorship' for someone [like McDermott] to alert the authorities after being handed evidence of a crime by those who perpetrated the offense [the Martins]. It would instead be an act worthy of a responsible citizen."[209]

To give further support to this contention, the court of appeals argued that the 1972 Supreme Court case of *Branzburg v. Hayes*[210] came very close to holding that the First Amendment will not protect a newspaper who publishes information illegally obtained by a source.[211] In that case, the Court claimed, "no matter how great 'the interest in securing the news,' the First Amendment 'does not reach so far as to override the interest of the public in ensuring that neither reporter nor source is invading the rights of other citizens through reprehensible conduct forbidden to other persons.'"[212] The expressly limited and narrow holding in *Florida Star* and the Supreme Court's statement in *Branzburg*, the court argued, did not lead to the

202. *Id.*
203. *Id.*
204. *Id.* (quoting Florida Star v. B.J.F., 491 U.S. 524, 534 (1989)).
205. *Id.* at 471.
206. *Id.* at 475.
207. *Id.*
208. *Id.* at 476.
209. *Id.* (alteration in original) (quoting *Florida Star*, 491 U.S. at 535).
210. 408 U.S. 665 (1972).
211. *Boehner*, 191 F.3d at 473.
212. *Id.* (quoting Branzburg v. Hayes, 408 U.S. 665, 691-92 (1972)).

conclusion argued by McDermott that the First Amendment prohibits the punishment of an individual for publicly disclosing private information that he obtained legally, but that was initially intercepted unlawfully by a third party.[213]

The court claimed that "the illegal activity of the Martins, of which McDermott was well aware when he took possession of the tape, [took] McDermott's actions 'outside of the *Daily Mail* principle' and the *Florida Star* line of cases," and further stated that there can be no strong First Amendment right to disclose private information merely because the information was acquired lawfully by the person who eventually ended up revealing it.[214] The court finally went on to hold that because McDermott's conduct in giving the tape to the media did not include speech, because the wiretapping statute involved served to actually promote speech by prohibiting and deterring unlawful eavesdropping, and because the *Daily Mail* principle did not apply to protect McDermott, § 2511(1)(c) was not, as applied to this case, unconstitutional.[215] The court did, however, claim that this decision did not decide "[w]hether the [wiretapping] statute would be constitutional as applied to a newspaper who published excerpts from the tape—who, in other words, engaged in speech."[216]

3. The Supreme Court Grants Certiorari, Vacates, and Remands

Just days after the Supreme Court handed down its decision in *Bartnicki v. Vopper*, the Court granted certiorari in *Boehner*.[217] Largely "because of the enormous public importance of the intercepted political conversations at issue in that case,"[218] the Supreme Court vacated the judgment of the Court of Appeals for the District of Columbia Circuit and remanded the case "for further consideration in light of *Bartnicki v. Vopper*."[219] On remand to the

213. *Id.* at 474.

214. *Id.* at 476 (quoting *Florida Star*, 491 U.S. at 534). The court went on to note many other situations in which an individual can be punished for disclosing information that he/she had received legally. *See id.* at 476-77, 477 n.18. A grand juror, for example, may not disclose the testimony of witnesses that he/she lawfully hears during a proceeding. *Id.* at 476. There are also laws prohibiting employees from disclosing trade secrets they have lawfully obtained through their employment. *Id.* Finally, the court noted that the Copyright Act prohibits the unauthorized publication of material that has been copyrighted, even when the publisher lawfully receives the material. *Id.*

215. *See id.* at 477-78.

216. *Id.* Judge Sentelle dissented and argued that it is very difficult to draw the line between non-media and media defendants. *Id.* at 483 (Sentelle, J., dissenting). He claimed that he "never believed that the First Amendment protection of 'the freedom . . . of the press,' afforded greater protection to professional publishers than it does to anyone who owns a typewriter, or for that matter than its protection of 'the freedom of speech' affords those who communicate without writing it down." *Id.* (alteration in original).

217. McDermott v. Boehner, 532 U.S. 1050 (2001), *remanded to* No. 98-7156, 2001 U.S. App. LEXIS 27798 (D.C. Cir. Dec. 21, 2001) (per curiam).

218. Frederiksen, *supra* note 172, at 19.

219. *McDermott*, 532 U.S at 1050.

court of appeals, the issue presented was "whether, in light of *Bartnicki*, Boehner's complaint state[d] a claim upon which relief [could] be granted."[220] The appellate court, however, declined to address this question and, instead, remanded the case back "to the district court for further proceedings."[221] The appellate court found that Boehner could amend his complaint to address "the constitutional issues now raised," and the court felt that it "would benefit from having the district court pass upon the arguments that have taken on new-found importance after *Bartnicki*."[222]

4. How *Bartnicki* Will Impact the *Boehner* Decision on Remand

"The ambiguity journalists face under *Bartnicki* largely may be resolved by the litigation surrounding [this] dispute[]."[223] It is unknown whether the district court, on remand, will apply the test applied by the majority in *Bartnicki* or if it will apply the "unusual" public concern standard promulgated by Justice Breyer in his concurring opinion.[224] If Justice Breyer's standard prevails, "more constitutional safety may be accorded the press when the speakers are not private individuals or perhaps even celebrities, but [are] instead government figures or officials of some kind," such as were the speakers in *Boehner*.[225] It remains unclear exactly how the district court will apply the holding in *Bartnicki* to the facts presented in *Boehner*; however, it is very likely that McDermott's lack of participation in the illegal interception of Boehner's conversation will ultimately convince the district court to hold that McDermott cannot be found liable, especially given the high level of public interest in the contents of the conversation.[226]

Boehner argues that the First Amendment does not protect McDermott, even after the decision in *Bartnicki*, because McDermott is a public official and because, unlike Vopper in *Bartnicki*, he knew who illegally intercepted and recorded the conversation in question.[227] However, Frank Cicero, Jr., McDermott's attorney, argues that *Bartnicki* settles Boehner's case, and

220. *Boehner*, 2001 U.S. App. LEXIS 27798, at *2.
221. *Id.*
222. *Id.*
223. Frederiksen, *supra* note 172, at 18.
224. *Id.* at 19.
225. *Id.*
226. Klein, *supra* note 27.
227. Heather Forsgren Weaver, *Appeals Court Gives Cell-Phone Taping Case New Life*, RCR WIRELESS NEWS, Jan. 14, 2002, *available at* 2002 WL 10369599.

"'[s]ooner or later . . . this case is going to get dismissed on the same constitutional grounds.'"[228]

B. Peavy v. WFAA-TV, Inc.[229]

1. Summary of the Facts

Carver Dan Peavy, a trustee for the Dallas Independent School District (DISD) who managed insurance purchases for DISD employees, did not get along with his neighbor Charles Harman.[230] In December of 1994, Harman acquired a police scanner, which he used to intercept Peavy's phone conversations.[231] During these conversations, which Harman recorded, Peavy made threats to harm Harman and discussed his involvement in an insurance kickback scheme.[232] Harman then contacted WFAA-TV and offered to hand over the tapes of the recorded phone calls and to continue to make more interceptions and recordings.[233] Riggs, an investigative reporter at WFAA-TV, met Harman at his home to discuss the matter and was made aware of the fact that Peavy did not know about, or consent to, the interceptions and recordings.[234] During this meeting, Riggs stated that he wanted copies of any recorded conversations, and he also "instructed Harman to leave the recorder running throughout the entire conversation and not to edit the tapes so their authenticity could not be questioned."[235]

Both Harman and WFAA-TV came to learn that the interception and recording of Peavy's conversations was illegal; however, Harman proceeded to intercept at least one more of Peavy's conversations.[236] Harman was subsequently charged with violating a federal wiretapping statute and pled guilty.[237] WFAA-TV broadcast reports on Peavy's alleged misconduct and, although Peavy's conversations were not aired,[238] WFAA-TV and Riggs had "used the contents of the tapes in other ways. They analyzed the tapes . . .[,] compiled relevant portions to be transcribed[,] [and] . . . made notes and developed leads based on the substance of the intercepted conversations.

228. *Id.* (quoting Frank Cicero, Jr.).
229. 221 F.3d 158 (5th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001).
230. Peavy v. Harman, 37 F. Supp. 2d 495, 502 (N.D. Tex. 1999), *aff'd in part, rev'd in part sub nom.* Peavy v. WFAA-TV, Inc., 221 F.3d 158 (5th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001), *settled*, No. 3-96-CV-2945-R, 2001 U.S. Dist. LEXIS 21405, at *2 (N.D. Tex. Dec. 26, 2001).
231. *Id.*
232. *Id.* at 502-03.
233. *Id.* at 503.
234. *Id.*
235. *Id.*
236. *Id.* at 503-04.
237. *Id.* at 504.
238. *Id.*

Ultimately, the tapes formed the basis for the broadcasts themselves."[239] When Peavy brought suit under federal and Texas wiretapping statutes, the district court granted summary judgment for WFAA-TV and Riggs, holding that even though they had "disclosed the 'substance, purport, and meaning' of the illegally intercepted communications" in violation of the wiretapping statutes, the First Amendment shielded the defendants from liability.[240]

2. The Court of Appeals Decision

On appeal, Peavy argued that the First Amendment should not shield WFAA-TV or Riggs because they did not just disclose the contents of the intercepted conversations, but "procured" or "obtained" the interceptions by encouraging Harman to intercept Peavy's conversations and by instructing him on recording techniques.[241] The Court of Appeals for the Fifth Circuit held that neither Peavy nor the media defendants were entitled to summary judgment on this issue because "a reasonable jury *could* [have found] that, with the exception of the interceptions made by the Harmans *prior* to their contacting WFAA and Riggs, . . . [the] defendants' interim conduct constituted 'obtaining' [or procuring] the Harmans to intercept the Peavys' conversations, in violation of the [wiretapping statutes]."[242] Riggs instructed Harman to record entire conversations, which could have led Harman to record portions of conversations that he might not have otherwise.[243] Furthermore, a jury could have concluded that WFAA-TV's investigation and interest in receiving the tapes of the intercepted conversations encouraged Harman to continue to intercept Peavy's communications.[244] On remand, if a jury did conclude that WFAA-TV and Riggs had "procured" or "obtained" the illegal interceptions, the "First Amendment would *not* bar an action against them for interception [because] [t]here is *no* basis for distinguishing . . . between a person intercepting, on the one hand, and *obtaining* it through someone else, on the other."[245]

WFAA-TV and Riggs argued that they did not violate the anti-disclosure provisions of the wiretapping statutes because their "broadcasts

239. *Id.* at 514 (citations omitted).
240. *Id.* at 514-15, 518.
241. Peavy v. WFAA-TV, Inc., 221 F.3d 158, 167, 170 (5th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001), *settled*, No. 3-96-CV-2945-R, 2001 U.S. Dist. LEXIS 21405, at *2 (N.D. Tex. Dec. 26, 2001).
242. *Id.* at 171-72.
243. *Id.* at 172.
244. *Id.*
245. *Id.*

were based entirely on sources independent of the tapes," and they did not actually use or disclose the contents of the tapes during their broadcasts.[246] The defendants argued that "they should *not* be forever barred from investigating all topics discussed in the intercepted conversations merely because they first learned of those topics as a result of the interceptions."[247] Moreover, WFAA-TV and Riggs argued that their broadcasts did not disclose the contents of the intercepted calls because most of the information contained in the broadcasts had been reported earlier by another television station.[248]

The court rejected the defendants' claim that they did not engage in disclosure because there was substantial information contained within the WFAA-TV broadcasts that had not been broadcast on any other station.[249] The appellate court held, however, that "the district court erred in holding *as a matter of law* that . . . [the] defendants intentionally *disclosed* the contents of the Peavys' conversations" because "a reasonable jury *could* [have] conclude[d] that . . . defendants did *not* intentionally *disclose* the intercepted contents, but instead disclosed information obtained from sources independent of them."[250]

Furthermore, the defendants argued that their disclosure of the intercepted conversations to WFAA-TV employees for investigation and newsgathering purposes was not a violation of the wiretapping statutes, and, even if it were, imposing liability would violate the First Amendment.[251] The court responded that this type of disclosure was proscribed by the wiretapping statutes because WFAA-TV could "cite *no* authority for holding intra-organization disclosures are *not* violative of the Wiretap Acts" and because this type of disclosure was not one of the certain specified disclosures authorized by the wiretapping statutes.[252]

The defendants contended that even if the wiretapping statutes did in fact prohibit their intra-office use and disclosure of the intercepted conversations, they did not *intentionally* disclose the contents of the communications as required for a finding of liability under the statutes.[253] This was so, according to WFAA-TV and Riggs, because "they did *not* know, or have reason to know, the conversations were intercepted illegally."[254] The court rejected this claim, however, because the defendants knew that the information they used in their broadcasts came from

246. *Id.* at 174-75.
247. *Id.* at 174.
248. *Id.* at 174-75.
249. *Id.* at 175.
250. *Id.*
251. *Id.* at 175-76.
252. *Id.* at 176.
253. *Id.* at 178.
254. *Id.*

interceptions, they knew of the circumstances surrounding the interceptions, and because ignorance or mistake of law is not a defense to liability under the wiretapping statutes.[255]

Finally, the court of appeals addressed the holding by the district court that the First Amendment protected the media defendants from liability because they did not participate in the interceptions or procure Harman to conduct them.[256] The court asked whether the First Amendment shields from liability persons who knowingly disclose the contents of an illegally intercepted conversation that they "*did not* themselves make[,] . . . but who *did* have undisputed participation concerning the interceptions to the extent [these media] defendants did."[257]

WFAA-TV and Riggs argued that they were protected from liability because they lawfully obtained the information contained in the intercepted conversations, and, under the *Daily Mail* principle, the government cannot punish the media for publishing lawfully obtained truthful information of public concern without a state interest or need of the highest order.[258] The court declared, however, that it was "quite questionable . . . that defendants 'lawfully received' the intercepted contents,"[259] and "'[t]he *Daily Mail* principle does *not* settle the issue whether, in cases where information has been acquired *unlawfully by a newspaper or by a source*, government may ever punish not only the unlawful acquisition, but the ensuing publication as well.'"[260]

Furthermore, the court noted that the Supreme Court has declared that while the publication of lawfully obtained information of public concern is protected by the First Amendment, "'truthful publication is [not always] automatically constitutionally protected.'"[261] The First Amendment does not allow a reporter or his source to violate the law.[262] Although wiretapping could provide a reporter with newsworthy information, "'neither reporter nor source is immune from conviction for such conduct . . . [because] [t]he [First] Amendment does not reach so far as to override the interest of the public in ensuring that neither reporter nor source is invading the rights of

255. *Id.* at 178-79.
256. *Id.* at 179.
257. *Id.* at 180.
258. *Id.* at 181.
259. *Id.*
260. *Id.* at 183 (quoting Florida Star v. B.J.F., 491 U.S. 524, 535 n.8 (1989)).
261. *Id.* (quoting *Florida Star*, 491 U.S. at 541).
262. *Id.* at 185 (citing Branzburg v. Hayes, 408 U.S. 665, 691-92 (1972)).

other citizens through reprehensible conduct forbidden to all other persons.'"[263]

The court also discussed the appellate court's holding in *Bartnicki v. Vopper* and distinguished that decision on the ground that, unlike Vopper, who had not participated in the interception and had no idea as to who originally intercepted the conversation, WFAA-TV and Riggs knew that Harman had recorded the conversations and actually participated to some degree in the interceptions.[264] Since "it [was] quite arguable that [the] defendants did *not lawfully* receive the contents of the tapes," the holding in *Bartnicki* was not controlling.[265]

Finally, the court held that the government has "a substantial interest in protecting the confidentiality of private wire, oral, and electronic communications"[266] that outweighs the "incidental" burden that wiretapping statutes place on newsgathering and reporting.[267] "The use and disclosure proscriptions do *not* burden substantially more speech than is necessary to further governmental interests in protecting the privacy of communications."[268]

The court of appeals reversed the holding of the district court insofar as it held that the First Amendment shielded defendants from liability for "use" and "disclosure" of the intercepted communications, vacated the district court decision insofar as it held that the defendants did not procure or obtain Harman to make illegal interceptions, and remanded the case back to the district court for further proceedings.[269]

3. The Supreme Court Declined to Review *Peavy*

The Supreme Court decided to let the court of appeal's decision in *Peavy v. WFAA-TV, Inc.* stand and denied certiorari.[270] Comments made by Justice Breyer and Justice O'Connor in their concurring opinion in *Bartnicki v. Vopper* may provide some insight into why the Court denied certiorari in this case.[271] The concurring Justices made it clear that, in their opinion, Vopper was shielded from liability because the broadcaster had not "ordered, counseled, encouraged, or otherwise aided or abetted the interception."[272] *Bartnicki* held that a reporter can publish the contents of an

263. *Id.* (emphasis omitted) (quoting *Branzburg*, 408 U.S. at 691-92).
264. *See id.* at 188-90.
265. *Id.* at 189.
266. *Id.* at 192.
267. *Id.* at 191.
268. *Id.* at 192.
269. *Id.* at 194.
270. Peavy v. WFAA-TV, Inc., 532 U.S. 1051 (2001), *settled*, No. 3-96-CV-2945-R, 2001 U.S. Dist. LEXIS 21405, at *2 (N.D. Tex. Dec. 26, 2001).
271. *See* Bartnicki v. Vopper, 532 U.S. 514, 535-41 (2001) (Breyer, J., concurring).
272. *Id.* at 538 (Breyer, J., concurring).

illegally intercepted conversation if the information is of public importance and was obtained lawfully; however, no case has ever held "that reporters can actually intercept, or aid in the interception of, telephone conversations without the consent of one of the speakers."[273]

If it was not for the fact that Peavy and WFAA-TV settled their case in October of 2001,[274] the ruling of the district court on remand would have been a crucial decision "set[ting] precedents that could have [had] repercussions for the media for decades to come."[275] If it had found that WFAA-TV and Riggs had procured or obtained the illegal interception of Peavy's conversations, the court could have established the general rule that a reporter can, and will, be held liable if he "merely knows the interception is occurring and has contact with the third party making the recordings."[276]

V. CONCLUSION

While the opinion in *Bartnicki v. Vopper* may not provide the media with clear-cut guidelines for determining when a publication stemming from an illegally intercepted conversation will be protected under the First Amendment, the Court did establish one general rule that will provide some measure of security to the press: "where the news story involves a matter of public importance (*as opposed to 'trade secrets' or 'domestic gossip'*) and the press was *not* involved in the original illegal wiretap, the First Amendment always requires that the press be allowed to publish free of governmental restraint or penalty."[277]

In the end, because the Court did not agree with the dissent, which was prepared to allow the government to punish the media for disclosing *any* information derived from *any* illegal interception, *Bartnicki v. Vopper* is a significant victory for the press, and the media is free to continue to raise First Amendment defenses to new or different situations as they arise in the future.[278] The Court may shift and side with privacy in the future, but for now, the media seems to be protected by *Bartnicki v. Vopper* as long as the media defendant does not participate in the interception and the information published is truthful and clearly of public concern.

273. Frederiksen, *supra* note 172, at 19.
274. Peavy v. WFAA-TV, Inc., No. 3-96-CV-2945-R, 2001 U.S. Dist. LEXIS 21405, at *2 (N.D. Tex. Dec. 26, 2001).
275. Klein, *supra* note 27.
276. Frederiksen, *supra* note 172, at 19.
277. Smith & Miller, *supra* note 141, at 29 (emphasis added).
278. *Id.* at 30.

Taken together, *Bartnicki*, *Boehner*, and *Peavy* "represent a spectrum on which the involvement of the person claiming First Amendment protection varies."[279] In *Bartnicki*, the media defendant did not participate in the interception and had no idea where the tape of the recorded conversation originated.[280] In *Boehner*, McDermott did not participate in the interception, but delivered the tape to the media after receiving it from the interceptors.[281] Finally, in *Peavy*, Riggs and WFAA-TV knew the interceptions were occurring and advised Harman about recording techniques.[282] Although *Boehner* remains unresolved and *Peavy* was settled before the district court could reach a decision on remand, it appears "clear that the closer journalists get to the end of the spectrum representing involvement in the illegal recording, the more likely they won't be protected by the reasoning in *Bartnicki*."[283]

Jennifer Nichole Hunt[284]

279. Klein, *supra* note 27.
280. *Id.*
281. *Id.*
282. *Id.*
283. *Id.*
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