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The Electronic Communications Privacy Act Protects Individual Privacy but Not at the Expense of the Media's Free Press Right

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THE ELECTRONIC COMMUNICATIONS PRIVACY ACT PROTECTS INDIVIDUAL PRIVACY BUT NOT AT THE EXPENSE OF THE MEDIA'S FREE PRESS RIGHT: *BARTNICKI V. VOPPER*, 532 U.S. 514 (2001).

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I. INTRODUCTION

Our founding fathers drafted the United States Constitution keeping one basic premise in mind: individual liberty. Individual liberty is the idea that citizens of this country have the freedom to express their thoughts and ideas without fear of regulation and ridicule. Conversely, individual liberty also permits individuals to refrain from expressing their ideas in public, choosing instead to keep those matters private. Desirous of enhancing the protection of an individual's right to privacy, Congress enacted the Electronic Communications Privacy Act ("ECPA").[1] The ECPA states in pertinent part that it is "unlawful for any person to intentionally disclose . . . the contents of any wire, oral, or electronic communication, knowing ... that the information was obtained . . . in violation of this subsection."[2] In 1996, Gloria Bartnicki ("Bartnicki") and Anthony Kane ("Kane") filed a civil action against Frederick Vopper ("Vopper") for violating their right to privacy under the ECPA and its Pennsylvania equivalent (collectively the "Wiretap Acts") alleging that their cellular phone conversation was illegally intercepted by an unknown party, and that Vopper intentionally played their conversation repeatedly during his radio talk show segments.[3]

The Supreme Court was correct in determining that the Wiretap Acts are

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[1] 18 U.S.C. § 2511 (West 1968 & Supp. 2001). When it was originally enacted this statute was Title III of the Omnibus Crime Control and Safe Streets Act of 1968, however, in 1986 the statute was amended as the Electronic Communications Privacy Act of 1986. In response to the terrorist attacks of September 11, 2001, Congress has amended the ECPA and has proposed several other amendments. The latest amendment and the proposed legislation deal with the government's authority to wiretap and intercept communications made by suspected terrorists. These amendments have no bearing on § 2511(1), which restricts private interceptions and is the focus of this Note.

[2] *Id.* The violation referred to in the text is a violation of subsection (1)(a) which states that "any person who intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication" violates the statute. 18 U.S.C. § 2511(1)(a).

[3] *Bartnicki v. Vopper*, 532 U.S. 514, 517 (2001) (determining that the ECPA is an unconstitutional limit on the defendant's First Amendment rights because the plaintiffs' right to privacy does not satisfy the court's "need of the highest order" standard). *Id.* at 1763. The defendant, Frederick Vopper, was the host of a local public affairs radio talk show and was openly critical of the union's efforts. The District Court for the Middle District of Pennsylvania held that the defendants violated the Wiretap Acts but on appeal, the Third Circuit Court of Appeals reversed and remanded because the Wiretap Acts unduly infringed on the defendant's First Amendment rights. *Id.* at 1758.

content-neutral laws, normally subject to an intermediate level of review.[4] The Court, however, incorrectly applied the strict scrutiny standard and subsequently held that the Wiretap Acts were unconstitutional as applied in this case.[5] The Court was concerned with chilling the media's First Amendment free press right to disclose truthful information, rather than considering the chilling effect on an individual's First Amendment right not to speak.[6] Seemingly, in order to protect the media's free press rights, the Court decided to deviate from the normal intermediate scrutiny test and applied the "need of the highest order" test, which is essentially the strict scrutiny test.

Had the Court used the intermediate scrutiny standard, the Wiretap Acts would have been upheld, preserving Bartnicki's and Kane's right to privacy. Though the Court only intended to strike down the application of the Wiretap Acts to this case, the Court's decision has effectively struck down the law, rendering the applicable portion of the Wiretap Acts virtually useless.[7] The Court's decision has further created a chilling effect on individual free speech rights because it will lead to timidity and self-censorship of individuals' expressions of ideas and beliefs in private.

Part II of this Note discusses the development of the ECPA through amendments and case law, the factual and procedural background of *Bartnicki v. Vopper* and the reasoning of the Court's holding. Part III of this Note discusses the Court's refusal to follow precedent by using the strict scrutiny test, and then examines the Wiretap Acts' decreased validity and the increased invasion on the right to privacy after this decision.

II. BACKGROUND

The *Bartnicki* case focused on the Wiretap Acts and their constitutionality as applied to the facts of the case. The Background section of this Note will first look at the development of the Wiretap Acts and why they are applicable to the case. Next, the Background will illustrate the factual circumstances of the *Bartnicki* case. This section will also explain the Supreme Court's decision and the rational behind its

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[4] *Id.* at 524; for situations where courts will apply strict scrutiny to content-neutral laws see *infra* n. 77 and accompanying text.

[5] *Bartnicki*, 532 U.S. at 524.

[6] The competing interests at stake in this case are the media's interest in preserving its First Amendment free press right versus the individual right of privacy.

[7] The portion of the ECPA and its state equivalent that was central to this case is § 2511(1)(c). This note argues that this section of the ECPA is virtually useless after this case because the Court's use of strict scrutiny makes it too easy for individuals participating in the interception and disclosure of the information to circumvent the regulations of the ECPA.

decision. Finally, this section will discuss the dissenting opinion of the *Bartnicki* case and the reasons for the dissent.

A. Background of the ECPA's Development

In 1968, the 90th Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act of 1968 to protect "the privacy of wire and oral communications."[8] At the time of enactment, new technologies such as cordless phones and electronic mail did not exist; therefore, Congress amended Title III in 1986 to keep pace with advances in communications technologies and renamed it the ECPA.[9] The purpose of the 1986 Amendment was to update the Wiretap Acts so that they covered new electronic communication technologies such as "electronic mail operations, computer-to-computer data transmissions, cellular and cordless telephones, paging devices and video teleconferencing."[10]

While this amendment extended the coverage of the ECPA to all electronic communications, Congress felt the need for another amendment in 1994 to account for newly developed technologies.[11] The 1994 Amendment's purpose was to expand the ECPA to cover new electronic technologies, including "digital telephony."[12] Essentially, the central purpose of the ECPA is "to protect privacy in the face of increasingly powerful and personally revealing technologies ..."[13] The ECPA protects that privacy by prohibiting actions such as illegally listening in on and recording a cellular telephone conversation between two private individuals.[14]

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[8] Sen. Rpt. 1097, at 2153 (May 24, 1968).

[9] Sen. Rpt. 99-541, at 3555 (Oct. 17, 1986).

[10] *Id.* at 3556 (This amendment effectively changed the wording of the statute to include electronic communications along with wire and oral communications).

[11] H.R. Rpt. 827, at 3489 (Oct. 4, 1994).

[12] *Id.* at 3492.

[13] *Id.* at 3493. It appears that the actual purpose of the 1994 Amendment was to make it easier for law enforcement agencies to perform legal wiretapping surveillances for enforcement purposes. In terms of prohibiting electronic interceptions, the primary purpose seems to be to enhance privacy protection.

[14] *See supra* n. 11; *infra* n. 30 for the applicable text of § 2511.

B. Bartnicki v. Vopper

1. Factual Background

Bartnicki and Kane were significant participants in an intense union negotiation between the Pennsylvania State Education Association, representing the teachers at the Wyoming Valley West High School, and the local school board.[15] Bartnicki was the chief negotiator for the union and Kane was the current union president.[16] In May 1993, Bartnicki called Kane on her cellular phone to discuss the progress of the negotiation[17] and the possibility of a strike.[18] While this conversation was taking place, an unknown person intercepted and recorded the conversation. This unknown person then forwarded the recording to Jack Yocum ("Yocum"), who openly opposed the union's tactics during the negotiations.[19]

Upon receipt of the recording, Yocum played it for members of the local school board and then sent a copy of the recording to Vopper, host of a local political forum radio talk show.[20] Vopper proceeded to play the recorded conversation several times on his political affairs radio talk show.[21] Following Vopper's initial radio broadcast of the conversation, several other media sources published the contents of the recording.[22] Subsequent to Vopper's disclosure, Bartnicki and Kane filed a civil action against Vopper and Yocum alleging that both had violated the Wiretap Acts because they "knew or had reason to know" that the interception of

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[15] *Bartnicki*, 532 U.S. at 517.

[16] *Id.*

[17] *Id.* at 518-19. The full content of the conversation was not disclosed in the opinion, however, an excerpt of the conversation is as follows: "If they're not gonna move for three percent, we're gonna have to go their, their homes . . . To blow off their front porches, we'll have to do some work on some of those guys. (PAUSE). Really, uh, really and truthfully because this is, you know, this is bad news. (UNDECIPHERABLE)." *Id.*

[18] *Id.* at 517.

[19] *Id.* at 519. Jack Yocum was the "head of a local taxpayers' organization" and was added as a defendant to this case when, through discovery, the plaintiffs learned that Vopper received the recording from Yocum. *Id.* Yocum claimed to be unaware of the interceptor's identity, however, the validity of that claim was never challenged in court. *Id.* It was somewhat suspicious that Yocum had been very outspoken about the union's tactics but he just happened to anonymously receive a tape of the conversation one day. *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

the conversation was illegally performed.[23]

The District Court for the Middle District of Pennsylvania held that Vopper and Yocum violated the Wiretap Acts when they disclosed the conversation, but the court also granted the Defendants' motion for an interlocutory appeal.[24] The District Court further held that the First Amendment did not protect Vopper because the Wiretap Acts are content-neutral laws of general applicability that did not have a chilling effect on Vopper's free press rights.[25] In a majority decision, the Third Circuit Court of Appeals held that the statutes failed the intermediate scrutiny test applied to content-neutral statutes because "they deterred significantly more speech than necessary to protect the privacy interests at stake."[26] The Supreme Court granted *certiorari* to resolve the conflict between the Third Circuit decision and the District of Columbia Circuit decision in *Boehner v. McDermott*.[27]

2. The Majority Opinion

Justice Stevens, writing for the Court, first addressed the Wiretap Acts and whether they were content-neutral or content-based laws.[28] The Court determined that the Wiretap Acts are content-neutral because "[t]he statute does not distinguish based on the content of the intercepted conversations, . . . [r]ather the communications are singled out . . . by virtue of the source, rather than the subject matter."[29] Justice Stevens then distinguished 18

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[23] *Id.* Section 2511(1)(c) requires that an individual that discloses illegally intercepted information "knew or had reason to know" that the information was illegally obtained. 18 U.S.C. § 2511 (1968). *See infra* n. 30 (full language of § 2511(1)(c)).

[24] *Id.* at 521. The District Court granted the interlocutory appeal on two questions of law: "(1) whether the imposition of liability on the media Defendants under the [wiretapping statutes] solely for broadcasting the newsworthy tape on the Defendant [Vopper's] radio/public affairs program, when the tape was illegally intercepted and recorded by unknown persons who were not agents of [the] Defendants, violates the First Amendment; and (2) whether imposition of liability under the aforesaid [wiretapping] statutes on Defendant Jack Yocum solely for providing the anonymously intercepted and recorded tape to the media Defendants violates the First Amendment." *Id.*

[25] *Id.*

[26] *Id.* The Circuit Court then remanded the case back to the District Court with instructions to enter judgment for the defendants. *Id.* In his dissent, Senior Judge Pollack stated that the majority's decision would remove any deterrence for illegal interceptions. *Id.* at 522.

[27] *Id*; *Boehner v. McDermott*, 191 F.3d 463, 478 (D.C. Cir. 1999), *vacated*, 121 S. Ct. 2190 (2001) (holding that the defendant had an affirmative duty of nondisclosure in accordance with § 2511(1)(c), which clearly prohibits the disclosure of illegally intercepted conversations).

[28] *Bartnicki*, 532 U.S. at 526.

[29] *Id.* at 526-27. In order to distinguish between the two types of statutes the Court defined content-based statutes as "laws that by their terms distinguish favored speech from disfavored speech

U.S.C. § 2511(1)(c) from the content-neutral application in stating that "the naked prohibition against disclosures is fairly characterized as a regulation of pure speech" and not so much a regulation of conduct.[30] Thus, Justice Stevens was implying that, while § 2511(1)(c) is content-neutral on it's face, it is content-based in its application.[31] The Court then addressed the conflicting interests of the defendant's First Amendment free press rights and the government interests served by the statute.[32]

The Court established the precedent in *Smith v. Daily Mail Publishing Co.*,[33] as the basis for weighing the media's free press rights against the government interests.[34] In *Daily Mail*, the Court established that government interests served by the statute would have to satisfy the "need . . . of the highest order [test]" to outweigh the defendant's First Amendment free press rights.[35] The Court then noted that the two government interests served by the Wiretap Acts were the removal of incentive for people to illegally intercept "private conversations" and to further protect

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on the basis of the ideas or views expressed" and defined content-neutral statutes as " [g]overnment regulation of expressive activity . . . so long as it is *justified* without reference to the content of the regulated speech." *Id.* (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

[30] *Bartnicki*, 532 U.S. at 526-27. Justice Stevens made a distinction between § 2511(1)(c) and (d) by stating that (c) is based on speech but (d), which regulates use, is based on conduct. *Id.* Section 2511 states in pertinent part:

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

[31] *See Bartnicki*, 532 U.S. at 526-27.

[32] *Bartnicki*, 532 U.S. at 528.

[33] 443 U.S. 97 (1979). In *Daily Mail*, reporters obtained the names of the victim and assailant to a school shooting in West Virginia. *Id.* at 99. The reporters obtained the names legally through interviews with witnesses, police and a prosecuting attorney. *Id.* The reporter from the Charleston Gazette decided to put the name of the assailant in his report. *Id.* After publication of the Charleston Gazette article, the Charleston Daily Mail reporter published a similar report with the name of the assailant contained within. *Id.* at 100. The Court decided that the West Virginia statute must be reviewed with the "most exacting scrutiny." *Id.* at 102. The Court determined that the state interest in protecting the assailant's identity was not of a high enough order to "punish the truthful publication of an alleged juvenile delinquent's name lawfully obtained by a newspaper." *Id.* at 105-106.

[34] *Bartnicki*, 532 U.S. at 527-28.

[35] *Id.*; *see Daily Mail*, 443 U.S. at 103.

individual's privacy in the face of advancing technology.[36] Justice Stevens weighed each government interest separately against the defendant's First Amendment free press rights.

The Court recognized that exceptions exist where the interest of deterring criminal conduct justifies suppressing free speech; the Court, however, determined that this was not such a case.[37] The Court reasoned that neither the petitioners nor Congress provided any empirical evidence that the Wiretap Acts' disclosure provision would reduce the number of illegal interceptions.[38] Thus, the Court held that the government's interest in deterring illegal interceptions was not a "need of the highest order" where it impedes the media's freedom of press rights.[39] Next, the majority analyzed the government's interest in protecting an individual's right to privacy versus the right to freedom of the press.[40] The Court acknowledged the important interest in protecting privacy and stated that unlawful intrusions into the citizens' private lives could have a "chilling effect" on individual First Amendment freedom of speech rights.[41]

The Court further stated that prohibiting disclosure of private conversations justifies limitations on First Amendment free press rights in some situations.[42] The Court distinguished those situations from the case at bar by stating that the prohibitions upon disclosure impose too great a burden on the media's free press right because the information contained in the conversation was of public concern.[43] Therefore, the Court held that even though the conversation was illegally intercepted it does not "remove the First Amendment shield from speech about a matter of public concern."[44] Thus, in determining that the media's First Amendment right to free press outweighed the government's two interests in the Wiretap Acts, the Court held that the Wiretap Acts were unconstitutional as applied to this case and affirmed the Third Circuit judgment.[45]

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[36] *Bartnicki*, 532 U.S. at 529.

[37] *Id.*

[38] *Id.* at 531.

[39] *Id.* at 532.

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.* at 532-35.

[44] *Id.* at 535.

[45] *Id.* This decision appears to have resolved the circuit split; however, the Supreme Court has not yet adjudicated the *Boehner* case.

3. The Dissenting Opinion

Chief Justice Rehnquist and Justices Scalia and Thomas essentially disagreed with the entire majority opinion but chose to focus on the majority's use of the *Daily Mail* case.[46] The dissenters briefly discussed the majority's misuse of the strict scrutiny test, which this Note will expand upon below, and then moved to dismiss the use of *Daily Mail*. They attacked the use of *Daily Mail* on three main principles: 1) the information in *Daily Mail* was lawfully obtained from the government, whereas *Bartnicki* concerned an unlawful interception; 2) unlike *Bartnicki*, the information in *Daily Mail* was already "publicly available"; and 3) *Daily Mail* was concerned with "timidity and self-censorship" of the media, whereas *Bartnicki* dealt with invading the privacy of individuals.[47] The dissenters determined that following *Daily Mail* was improper because it did not address the issue of unlawful acquisitions of private information.[48]

The dissenters next addressed the majority's dismissal of the governmental interest in deterring unlawful interception and disclosure of private communications.[49] They argued that there was no basis for the majority to require that Congress provide empirical evidence to uphold the government's interest in deterring interceptions.[50] The dissenters stated that "[c]ourts must accord substantial deference to the predictive judgments of Congress," and the Court failed to do so in this case.[51] In support of the government's interest in deterring illegal interceptions, the dissenters suggest that a "dry up the market" theory would serve to further such an interest.[52] The "dry up the market" theory suggests that by preventing the criminal from "enjoying the fruits of the crime" there will be no market or desire for criminals to engage in such activities.[53] Finally, the dissenters attacked the majority by suggesting that the Court acted as a super legislature and characterized the majority as a "bald substitution of its own prognostications in place of the reasoned judgment of forty-one legislative bodies and the United States Congress."[54]

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[46] *Id.* at 544-48.

[47] *Bartnicki*, 532 U.S. 546-48.

[48] *Id.* at 548.

[49] *Id.* at 549-50.

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*; *see also* Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 8.10(a), 765 (2d ed., West 1986).

[54] *Bartnicki*, 532 U.S. at 550 (the forty-one legislative bodies refer to the legislatures of the forty-one states that have adopted state equivalents to the ECPA).

III. ANALYSIS

The Supreme Court in *Bartnicki* correctly recognized that the Wiretap Acts are content neutral laws of general applicability. The Court, however, mistakenly used the strict scrutiny standard of judicial review. The Court should have used the intermediate scrutiny test that is the precedential standard for reviewing content neutral statutes.[55] The Court struck down the Wiretap Acts as applied to this case because they did not pass the strict scrutiny requirements. If the Court used intermediate scrutiny, however, the Wiretap Acts would have satisfied the standard. The Court's decision to strike down the Wiretap Acts' application to this case renders § 2511(1)(c) virtually useless and creates a chilling effect on the individual's free speech right not to speak. Therefore, this Note focuses on the ramifications *Bartnicki* will have on an individual's First Amendment free speech rights.

A. The Majority in Bartnicki Incorrectly Applied the Strict Scrutiny Test to the Wiretap Acts, Which are Content-Neutral Laws of General Applicability.

1. The *Bartnicki* Dissent Correctly Argued That the *Daily Mail* Case Was Inapplicable to the Present Case Because the Statute in *Daily Mail* Was a Content-Based Statute[56]

In following *Daily Mail*, the Court struck down the Wiretap Acts' application to media defendant's disclosure of illegally intercepted information.[57] Chief Justice Rehnquist attacked the majority's application of *Daily Mail* to *Bartnicki* on the basis that the two cases are factually dissimilar and that *Daily Mail* involved a content-based statute.[58] Content-based laws are generally laws that distinguish between favored and

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[55] *See e.g. City of Erie v. Pap's A.M.*, 529 U.S. 277 (2001) ("ordinance is valid if it satisfies the *O'Brien* standard"); *U.S. v. Virginia*, 518 U.S. 515 (1996) ("intermediate scrutiny' . . . applied to content-neutral restrictions"); *Turner Broad. Sys., Inc. v. Fed. Commun. Commn.*, 512 U.S. 622, 662 (1994) ("[I]ntermediate level of scrutiny to content neutral restrictions that impose an incidental burden on speech"); *Ward v. Rock Against Racism*, 491 U.S. 781, 804 (1989) ("[c]ontent neutral, serve a significant government interest"); *U.S. v. O'Brien*, 391 U.S. 367, 377 (1968) ("[i]f it furthers an important or substantial governmental interest").

[56] *Bartnicki*, 532 U.S. at 545.

[57] *Id.*

[58] *Id.*

disfavored speech.[59] Courts hold that content-neutral laws are content-based when those laws, on their face, attempt to regulate the content of speech.[60] The West Virginia statute in *Daily Mail* regulates the specific content of a publication, i.e. a child's name in connection with a court proceeding. Because this statute regulates the content of speech, the Court subjected the statute to strict scrutiny.[61] Conversely, the majority and the dissent in *Bartnicki* agreed that the Wiretap Acts are content-neutral laws because they do not regulate the content of a communication on their face.[62] The dissent aptly argued that not only was the *Daily Mail* principle inapplicable in this case, but also the facts of that case had no bearing on *Bartnicki*.[63]

As the dissent pointed out, the *Daily Mail* defendant lawfully obtained the published information from a government agency.[64] To justify applying the *Daily Mail* principle, the Court implied that the defendants in that case lawfully obtained the recording of the plaintiff's conversation.[65] The dissent countered this justification in correctly noting that the facts in *Bartnicki* and *Daily Mail* are irreconcilable. The primary difference between *Daily Mail* and *Bartnicki* is the information in *Bartnicki* was obtained through illegal means.[66] Making legal an individual's intentional disclosure of information, knowing that the information was obtained by illegal means, would be the same as allowing that same individual to knowingly purchase stolen goods, which the government considers a crime.[67]

The purpose behind making such activity a crime is to punish those individuals that are parties to a crime, but do not actually participate in the

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[59] *Turner*, 512 U.S. at 643 (holding that the "must carry" provisions of the Cable Television Consumer Protection and Competition Act of 1992 were meant to be content-neutral and should be subject to intermediate scrutiny rather than strict scrutiny because they only impose an incidental burden on free speech).

[60] *Turner*, 512 U.S. at 642-43.

[61] *Daily Mail*, 443 U.S. at 103. W. Va. Code § 49-7-3 (2001) states in pertinent part that "... nor shall the name of any child, in connection with any proceedings under this chapter, be published in any newspaper without a written order of the court ..."

[62] *Bartnicki*, 532 U.S. at 544.

[63] *Id.* at 546; *see also Daily Mail*, 443 U.S. at 103.

[64] *See Bartnicki*, 532 U.S. at 548.

[65] *Id.* at 525. The Court twisted the facts to fit *Daily Mail* by implying that the defendant's non-participation in the interception of the conversation removed the inherent illegality from the information obtained.

[66] *Id.* at 548.

[67] *Id.* at 550. A person commits a crime when he intends to and does purchase stolen goods that he knows or believes have probably been stolen. Model Penal Code, art. 223, § 223.6; *see e.g. U.S. v. Koran*, 453 F.2d 144 (10th Cir. 1972); *U.S. v. Kraw*, 194 F.2d 78 (7th Cir. 1952).

crime itself.[68] Additionally, prosecution of such individuals will reduce some incentive in some criminals to commit criminal acts.[69] Similar to that criminal law principle is the idea behind prohibiting the disclosure of intercepted information that the discloser knows or has reason to know the illegality of the information. Prohibiting these disclosures removes the incentive for individuals to make illegal interceptions or commission others to make such interceptions.[70] The Court acknowledged that the defendants violated the Wiretap Acts because they knew the information was obtained illegally.[71] To circumvent the fact that the defendants did violate the statutes, the Court applied the same strict scrutiny test normally reserved only for content-based laws.[72] To imply that the ECPA is deserving of such scrutiny would be giving the statute a meaning it will not bear.

2. The Court in *Bartnicki* Should Have Applied Intermediate Scrutiny to the Wiretap Acts Because Precedent Has Established That Regulations That are Unrelated to the Content of Speech are Subject to Intermediate Scrutiny

Chief Justice Warren, in *U.S. v. O'Brien*,[73] conveyed the idea that restriction of conduct that combines "speech" and "nonspeech" elements to further a significant government interest justifies "incidental limitations on First Amendment freedoms."[74] According to Justice Warren, such restrictions will be upheld as long as "the government interest is unrelated to the suppression of free expression; and the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[75] This standard set by Justice Warren is the basic premise of intermediate scrutiny. The Supreme Court has determined that content-neutral laws are subject to an intermediate level of scrutiny

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[68] *See* Sen. Rpt. 90-1097 (Apr. 29, 1968) (reprinted in 1968 U.S.C.C.A.N. 2112, 2153).

[69] *Id.*

[70] *See id.*

[71] *Bartnicki*, 532 U.S. at 525.

[72] *See supra* nn. 33-34 and accompanying text.

[73] 391 U.S. 367, 376 (1968) (holding that amendment to Universal Military Training and Service Act justifiably infringes upon the defendant's right of expression in burning his Selective Service registration card because to allow such activity would unduly interfere with the government interest in assuring the continual and efficient process of the Selective Service System).

[74] *Id.*

[75] *Id.* at 377. The *O'Brien* standard is the earliest form of the intermediate scrutiny test. *See Peavy v. WFAA-TV, Inc.*, 221 F.3d 158, 184 (5th Cir. 2000) (stating that "[P]ursuant to *U.S. v. O'Brien*, the Peavys and the United States claim the Wiretap Acts are subject only to intermediate scrutiny").

because they impose a lesser burden on First Amendment freedoms.[76] A more exacting scrutiny has only been applied in cases where regulations "suppress, disadvantage, or impose differential burdens upon speech because of its content."[77] Before *Bartnicki*, the Supreme Court would only apply a heightened level of scrutiny to content-neutral laws that target or disproportionately burden the press.[78] Applying strict scrutiny to all content-neutral laws would cause an "intolerable disruption" of individual free speech and privacy rights.[79]

Following Supreme Court precedent, the court in *Boehner v. McDermott* applied the intermediate scrutiny test and upheld the Wiretap Acts in the face of a First Amendment challenge to its validity.[80] The court determined that the government interest furthered by the Wiretap Acts was the promotion of the freedom to speak publicly or privately and that the Acts did not suppress free expression.[81] In applying intermediate scrutiny, the court determined that the incidental restriction on the First Amendment is no greater than necessary to further the government interest because allowing distribution of illegally intercepted communications "with impunity" would severely damage free speech.[82] The court held that to prevent illegal interceptions, it is "essential" that disclosure of such illegal interceptions be regulated so as not to allow the interceptors from enjoying the fruits of their criminal activities.[83] Finally, the court determined that the Wiretap Acts imposed a duty upon the defendant to refrain from

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[76] *Turner Broad. Sys.*, 512 U.S. at 642; *see Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

[77] *Turner Broad. Sys.*, 512 U.S. at 642.

[78] *Adventure Commun., Inc. v. Ky. Registry of Election Finance*, 191 F.3d 429, 442 (4th Cir. 1999) (holding that Kentucky statute regulating broadcast media that sells advertising time to political candidates is constitutional under any level of scrutiny because it is a "narrowly tailored means to further a compelling state interest").

[79] *See* Alan E. Brownstein, *State RFRA Statutes and Freedom of Speech*, 32 U.C. Davis L. Rev. 605, 631 (Spring, 1999).

[80] 191 F.3d at 476. In 1996, Rep. John A. Boehner used his cellular phone while driving in Florida to participate in a conference call with Rep. Dick Armey, Rep. Tom DeLay, and Speaker of the House Newt Gingrich regarding an investigation of Mr. Gingrich. *Id.* at 465. John and Alice Martin, Florida residents, intercepted and tape-recorded the conversation. *Id.* The Martins met with Karen Thurman (D. Rep.-Fla.) and upon her request, personally delivered the tape to James A. McDermott, the ranking Democratic member of the House Ethics Committee. *Id.* Upon hearing the tape, McDermott gave copies of the tapes to the New York Times, the Atlanta Journal-Constitution, and Roll Call. *Id.* After reports appeared in the newspapers, the Martins admitted to the interception and giving the tape to McDermott. McDermott resigned from the Ethics Committee and gave copies of the tape to the remaining members of the Ethics Committee. *Id.* The Martins were prosecuted and Boehner filed a civil suit against McDermott for violations of 18 U.S.C. § 2511(1)(c). *Id.*

[81] *Id.* at 468.

[82] *Id.*

[83] *Id.* at 470.

disclosing illegally obtained information.[84]

Approximately eight days after the Supreme Court decided the *Bartnicki* case, the Court vacated the *Boehner* decision on appeal and remanded the case back to the D. C. Circuit for further proceedings in light of *Bartnicki v. Vopper*.[85] While the Supreme Court's action will have an impact on *Boehner*, it has no impact for purposes of analysis in this Note. The Supreme Court has simply furthered the principles of *Bartnicki*, which this note shall analyze.

The facts in *Bartnicki* are virtually identical to the facts in *Boehner*, except that the identity of the interceptor was known in *Boehner* and unknown in *Bartnicki*.[86] The Court rationalized its departure from *Boehner* by concluding that the identity, or lack thereof, of the interceptor was controlling.[87] Apparently, the Court's reasoning was that the information was a matter of such great public concern that the public had a right to hear the information, regardless of how the media obtained the information.[88] The Court's reasoning is unpersuasive because there is no language in the text or legislative history of the ECPA or its predecessor indicating that the identity of the interceptor must be known to the person disclosing the communication in order to find the interceptor in violation of § 2511(1)(c).[89] Additionally, the text of the ECPA is plain and unambiguous. It broadly prohibits any person from disclosing illegally intercepted communications, and does not consider the content of the information obtained.[90]

The duty of nondisclosure alluded to in *Boehner* is applicable to every person who intentionally discloses illegally intercepted information. The text of § 2511(1)(c) makes no express or implied distinction between named or anonymous interceptors.[91] The court in *Boehner* correctly applied intermediate scrutiny to the Wiretap Acts and upheld their validity

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[84] *Id.* at 478.

[85] *McDermott v. Boehner*, 121 S. Ct. 2190 (2001).

[86] 532 U.S. at 517.

[87] *Id.* at 535. The Court stated that "a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern." *Id.* It is not clear why the Court footnoted to *Florida Star v. B.J.F.* to emphasize that the unknown identity of the interceptor was important. 491 U.S. 524 (1989) *Florida Star* did not deal with an unknown interceptor. While *Florida Star* did involve a matter of public concern, the information was already publicly available; in *Bartnicki*, it was not.

[88] *Bartnicki*, 532 U.S. at 518.

[89] 18 U.S.C. § 2511(1)(c); *See* Sen. Rpt. 90-1097 at ___ (Apr. 29, 1968) (reprinted in 1968 U.S.C.C.A.N. 2112, 2181); Sen. Rpt. 99-541 (Oct. 17, 1986) (reprinted in 1986 U.S.C.C.A.N. at 3555) ; H.R. Rpt. 827 (Oct. 4, 1994) (reprinted in 1994 U.S.C.C.A.N at 3555).

[90] 18 U.S.C. § 2511(1)(c).

[91] *Id.*

because they promote a "substantial government interest."[92] The Supreme Court should have followed precedent and applied intermediate scrutiny in *Bartnicki*, which would have affirmed the validity of the Wiretap Acts.

B. The Court's Refusal to Use Intermediate Scrutiny Has Allowed It to Give the Wiretap Acts a Meaning That Congress Did Not Intend and Has Allowed Application of the Wiretap Acts to be Struck Down Because of a Government Interest That Only Slightly Impinges the First Amendment's Freedom of the Press.

1. The Interest That Congress Intended the ECPA to Advance is the Protection of an Individual's Right to Privacy in the Face of Advancing Technological Breakthroughs

The 90th Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act in order to protect "the privacy of wire and oral communications."[93] Congress further specified that to protect privacy, the statute must attack all aspects of the problem including the interception, disclosure and use of private communications.[94] Additionally, Congress intended these statutes to provide comprehensive protection for private communications, excluding no aspect of a communication from protection.[95] Under the 1986 amendment, the only exception to the statute was for the President of the United States, which provided an exemption for interceptions of communications that are "readily accessible to the general public."[96] Neither the legislative history nor the text of the ECPA make any exemptions for intentional disclosures of information obtained illegally.

Despite the fact that Congress only allowed for two exceptions for interceptions, the Court in *Bartnicki* decided to create two new exceptions for disclosures of intercepted information. First, the Court created an exception to the ECPA for individuals who disclose intercepted information where they do not know the identity of the interceptor.[97] The Court created a second exception for persons who have knowledge of the

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[92] 191 F.3d at 468.

[93] *Id.* In essence, the 1986 and 1994 amendments do not substantively change the purpose of the statute but rather expand its coverage to include new electronic and digital communications.

[94] *Id.* at 2156.

[95] *Id.* at 2179.

[96] Sen. Rpt. 99-541 (Oct. 17, 1986) (reprinted in 1986 U.S.C.C.A.N. at 3572).

[97] *Id.*

illegality of the interception but who take no part in that illegal act.[98] This completely contradicts Congress' intent, which made only one exception to the enforcement of the statute.[99] The Court's decision is fundamentally a form of judicial law making.[100]

One of the principles of the Constitution is the idea of separation of powers as enunciated in the 48th and 51st Federalist Papers.[101] Through separation of powers, the Constitution grants the Legislative Branch the power to draft and enact statutes. It does not, however, permit the Judicial Branch, acting as a super-legislature, to create a new meaning for a statute in derivation of Congress' intent.[102] The Supreme Court in *Bartnicki* did exactly what the Constitution does not permit it to do. It created two new exceptions to a statute, exceptions that Congress refused to add in the thirty-three year existence of the Wiretap Acts. When Congress enacted the original statute, there was no direct textual or legislative history indicating that the Wiretap Acts exempted defendants such as those in this case from its purview.[103] Neither the 1986 nor the 1994 Amendments to the Wiretap Acts create an exemption to the statutes that would include the defendants in this case.[104] The Supreme Court decided to ignore not only precedent applied to content-neutral laws, but also the intention of several Congressional bodies who refused to give the Wiretap Acts exemptions that the Supreme Court chose to create in this case.

2. The Wiretap Acts Satisfy Intermediate Scrutiny Review Because the Acts Further a Substantial Government Interest That is Unrelated to Free Speech and Their Restrictions Are No Greater Than Necessary to

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[98] *Bartnicki*, 532 U.S. at 534-35.

[99] Sen. Rpt. 90-1097 at ____ (Apr. 29, 1968) (reprinted in 1968 U.S.C.C.A.N. at 2153). The only exception to the prohibitions of § 2511 is "the power of the President to obtain information by such means as he may deem necessary to protect the Nation." *Id.*

[100] Judicial law-making is an action taken by a court that creates a new statute that Congress has not created or that gives an existing law a meaning that it was not intended to bear. *See e.g. Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982).

[101] James Madison, *These Departments Should not be so Far Separated as to have No Constitutional Control Over Each Other*, The Federalist Papers No. 48 (1788) ("For this reason, that convention which passed the ordinance of government, laid its foundation on this basis, that the legislative, executive, and judiciary departments should be separate and distinct, so that no person should exercise the powers of more than one of them at the same time."); Alexander Hamilton & James Madison, *The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments*, The Federalist Papers No. 51 (1788).

[102] U.S. Const. art. II, III.

[103] *See generally* 18 U.S.C. § 2511; Sen. Rpt. 90-1097 (Apr. 29,1968) (reprinted in 1968 U.S.S.C.A.N. 2112).

[104] *See generally* Sen. Rpt. 99-541 (Oct. 17, 1986) (reprinted in 1986 U.S.S.C.A.N. at 3555); H.R. Rpt. 827 (Oct. 4, 1994) (reprinted in 1994 U.S.S.C.A.N. at 3489).

Further That Interest

Applying intermediate scrutiny to statutes in previous cases, the Supreme Court has followed the standard set forth in *U.S. v. O'Brien*.[105] The standard is a four-part test that permits a statute to pass constitutionality in the face of a First Amendment challenge when 1) the statute "is within the Constitutional power of the government;" 2) it furthers a "substantial government interest;" 3) that interest is unrelated to suppressing free speech and 4) the First Amendment restrictions are no greater than necessary to further that interest.[106] The Supreme Court created a separate test for regulation of commercial speech.[107] The Court in *Central Gas* determined that commercial speech that involves lawful activities, and is not misleading, has First Amendment protection from governmental regulations unless the regulations satisfy the four-part standard.[108] Further, the Supreme Court has traditionally allowed "more intrusive regulation[s of] the broadcast media."[109] Thus, the Court has applied a less-than-intermediate level of scrutiny to general regulations of "over-the-air broadcasters."[110] Therefore, the Court affords less protection to the broadcast media because it has limited availability to those who want to express their thoughts over the air.[111]

In *Turner Broad. Sys.*, the Supreme Court ruled that the provision of the Cable Act passed the four-part intermediate scrutiny test.[112] The Court held that while the provision intruded upon the First Amendment, there were no other means available that would adequately advance the substantial government interest facilitated.[113] The Court determined that it would not nullify a content-neutral regulation merely because there was an alternative

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[105] 391 U.S. 367 at 376.

[106] *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 567 (1991) (citing *O'Brien*, 391 U.S. at 376-377).

[107] *C. Hudson Gas & Elec. Corp. v. Pub. Serv. Commn. of N.Y.*, 447 U.S. 557, 562 (1980) (defining commercial speech as "speech proposing a commercial transaction"); *Id.*; *see e.g., Va. St. Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976); *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 66 (1983); *Adventure Commun.*, 191 F.3d 429, 440 (4th Cir. 1999).

[108] 447 U.S. at 564 (holding that the government's interest in energy conservation was substantial but the complete advertising ban exceeded that which was necessary to further that interest).

[109] *Adventure Commun.*, 191 F.3d at 439 (citing *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 387-401 (1969)).

[110] *Id.* at 440.

[111] *Id.*

[112] 520 U.S. at 217-18. The relevant provision of the Cable Act was the "must carry" provision, which requires cable providers to carry local broadcast stations on their cable networks. *Id.* at 185. Justice O'Connor, in her dissent, determined that the alternative means available to cable operators were less intrusive and adequately furthered the government interest. *Id.* at 251 (O'Connor, dissenting).

[113] *Turner Broad. Sys.*, 520 U.S. at 185.

that was marginally less intrusive to the First Amendment.[114] The Supreme Court determined, in *Florida Bar v. Went for It, Inc.*, that the state's interest in protecting the privacy of an individual is "of the highest order in a free and civilized society."[115] The Court in *Barnes* held that the government interest of preserving morality through public indecency statutes is unrelated to suppressing free expression because it does not affect the message conveyed, but rather makes the message less offensive.[116] According to the Court, public indecency statutes are the least restrictive means to further the government's interest because they are an end to curing a societal problem, and not a means to a greater end that will further restrict First Amendment rights.[117]

If the Supreme Court had applied intermediate scrutiny to the Wiretap Acts in *Bartnicki*, the statutes would have passed the four-part intermediate scrutiny test. The first part of the test is satisfied because Article I of the Constitution permits Congress to create all laws "necessary and proper" to carry out the powers of the federal government.[118] The Wiretap Acts also satisfy the second part of the test, which requires that government regulations further a significant government interest. The intent of the Wiretap Acts was to protect the interest of an individual's right to privacy and right to speak in private without fear of public invasion. Samuel D. Warren and Louis D. Brandeis (later Justice Brandeis) first recognized the importance of this right in the face of media abuse and expansion.[119] Warren and Brandeis stated the principle that, "[t]he intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world . . . so that solitude and privacy have become more essential to the individual."[120]

Furthering that principle, the Supreme Court conceded in *Florida Bar* that the right of privacy is one of the fundamental aspects of American society and deserves protection of the highest degree.[121] Likewise, the

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[114] *Id.* at 217-18.

[115] 515 U.S. at 625.

[116] 501 U.S. at 570-71.

[117] *Id.* at 572. When the Court referred to the statutes as "not a means to some greater end," the greater end would probably be an eventual absolute ban on nude dancing. *Id.* Thus, the public indecency statutes would be a step toward that absolute ban and that would be a greater infringement upon the First Amendment rights of nude dancers than necessary to further the government interest present in that case.

[118] U.S. Const., art. I, § 8, cl. 18.

[119] Samuel D. Warren & Louis D. Brandeis, *The Right To Privacy*, 4 Harv. L. Rev. 193, 196 (1890).

[120] *Id.*

[121] 515 U.S. at 624.

California Appellate Court in *Miller v. NBC* determined that protecting the right to privacy does not have a chilling effect on the media's First Amendment free press right.[122] Additionally, the Ninth Circuit has determined that "[t]he First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering [sic]. The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office."[123] Thus, the Ninth Circuit is saying that in certain circumstances, the right to privacy outweighs the media's First Amendment Free Press right. Therefore, various courts have acknowledged that preserving the right to privacy satisfies at least a substantial governmental interest.

More importantly, the Wiretap Acts are unrelated to the suppression of First Amendment rights.[124] The Wiretap Acts have an effect on the First Amendment similar to the effect the public decency statutes had in *Barnes*.[125] In *Bartnicki*, the Court held that the First Amendment protects disclosure as a form of expression.[126] While the Wiretap Acts do regulate and control the disclosure of illegally obtained information, the government's interest in protecting individual privacy is unrelated to that regulation. The primary means that justify the privacy ends are the prohibitions of unauthorized interceptions of wire, oral, or electronic communications.[127]

The restriction on disclosure of illegal information is necessary to ensure enforcement of prohibitions on unauthorized interceptions. Interceptions such as the one involved in *Bartnicki* would largely go undetected but for the disclosure of such interceptions into the public arena via the media. If the defendants in *Bartnicki* wanted to express their opinions about the Union's handling of the negotiations, they were free to do so; they just could not use information obtained through an illegal, unauthorized interception. Thus, the Wiretap Acts do not infringe on the rights of free press in banning disclosure of important information: They simply require that the defendant obtain the information in a legal fashion or have ignorance as to the illegality of it. In fact, the Wiretap Acts promote First Amendment free speech rights of private individuals. Enforcement of the

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[122] 187 Cal. App. 3d 1463, 1492-93 (Cal. App. 1986).

[123] *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (1971).

[124] *See generally, supra* nn. 107-109. In these cases the Court specifically stated certain First Amendment rights, however, it is likely that when the Court said suppression of free speech or free expression, they meant the First Amendment in general.

[125] 501 U.S. at 567.

[126] 532 U.S. at 534.

[127] 18 U.S.C. § 2511.

Wiretap Acts preserves an individual's freedom to decide what speech he wants publicized and what speech he wants kept to himself.

The final and most significant part of the test is whether the Wiretap Acts impose no greater restriction on the defendant's First Amendment rights than necessary to further the government interest.[128] In past cases the Supreme Court has examined restrictions and determined whether they were overbroad or whether there were alternative measures available that were less intrusive on the First Amendment.[129] To be overbroad, the restriction must encompass more than the intended goal of the statute.[130] Despite the fact that the Wiretap Acts restrict more than just interceptions of communications, the statutes are not overbroad because the added restrictions are essential to furthering the individual right of privacy. To give the statute enforceability, Congress had to attack all aspects of the evil of illegally intercepting private communications, including: the interception, the endeavor to procure an interception, the intentional disclosure, and the intentional use of such communications.[131] Thus, it is necessary to restrict disclosures of illegally intercepted information because if it were legal to disclose that information there would be no deterrent to those who intercept private communications.

Another indication that a statute may impose too great a burden on First Amendment freedoms is the availability of less restrictive alternatives. In *Bartnicki*, the Court's holding restricting the defendant's free press right to disclose the contents of the *Bartnicki* conversation was unconstitutional.[132] This implies that the Court suggested a less restrictive alternative to the Wiretap Acts would be the same acts, less the restriction on disclosure.[133] The Court failed, however, to see the value of prohibiting the disclosure of illegally intercepted information. While the Court's holding may be an alternative to the current restrictions, that alternative is far from adequate. Without restrictions on disclosure, there would be free reign for individuals and the media alike to publish private information knowing it was illegally obtained.[134] Warren and Brandeis determined that, regardless of how a

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[128] *Barnes v. Glen Theatre, Inc.*, 501 U.S. at 567.

[129] *See e.g. Turner Broad. Sys.*, 520 U.S. at 217- 218; *C. Hudson Gas & Elec.*, 447 U.S. 557.

[130] *Turner Broad. Sys.*, 520 U.S. at 251 (O'Connor, dissenting).

[131] 18 U.S.C. § 2511. It is important to note that when discussing disclosure, the party that discloses must have knowledge or a reason to know that the information that they are disclosing was illegally intercepted. *Id.*

[132] *Bartnicki*, 532 U.S. at 545; *see Turner Broad. Sys.*, 520 U.S. at 217- 218. It appears that the Court contradicted its prior determination in *Turner*.

[133] *Bartnicki*, 532 U.S at 545.

[134] This is, of course, assuming that the defendant's satisfy the Court's requirements that they neither knew the identity of the interceptor nor took a direct role in the interception.

person obtained the information, possession of private information does not give that person the right to publish that information.[135] Therefore, there are no alternatives short of restriction on the disclosure of illegally intercepted information that would be adequate to further the interest of individual right of privacy.

C. Because the Court Incorrectly Applied the Strict Scrutiny Test to the Wiretap Acts, it has Created a Chilling Effect on Individual's Free Speech Rights and it has Rendered § 2511(1)(c) of the Wiretap Acts Virtually Useless.

1. The *Bartnicki* Decision Has a Chilling Effect on Our Individual First Amendment Privacy Rights Because it Leads to Self-Censorship of Freely Expressing One's Ideas and Opinions in Private

While the fundamental idea of the First Amendment is to protect the free and voluntary expression of ideas, the First Amendment also provides an umbrella of protection of the freedom not to express thoughts and ideas.[136] This allows each individual the freedom and comfort to choose to keep certain aspects of his life in a private sanctuary where only he decides who is privy to those aspects. One of these aspects of life in our society that is generally regarded as private is personal, one-on-one communications. These private communications include a conversation in the privacy of a home, a conversation on the telephone, a conversation on a cellular phone, or an electronic mail communication.[137] It is natural for individuals to expect and assume that when they enter into a private conversation, the contents of the conversation will remain private. When the Supreme Court, however, declares unconstitutional the application of a statute that attempts to preserve that sense of privacy, individuals can no longer make this assumption. Thus, a chilling effect occurs because individuals might refrain from speaking for fear that their conversations could be publicly disclosed.

Several statutes have been overturned or deemed unconstitutional based on the fear that the over deterrence of disseminating information would lead to media "timidity and self-censorship" when considering publishing

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[135] *Supra* n. 120, at 201(stating that "[n]o one into whose hands those papers fall could publish them to the world, even if possession of the documents had been obtained rightfully").

[136] *Boehner*, 191 F.3d at 469.

[137] *See generally* Sen. Rpt. 99-541 (Oct. 17, 1986) (reprinted in 1986 U.S.C.C.A.N. 3555).

truthful information.[138] Apparently, the Court was apprehensive about the timidity and self-censorship of the media, but it never considered the probability of timidity and self-censorship incurred upon individual citizens from the *Bartnicki* decision. The Court's decision is more likely to create timidity and self-censorship of individuals because they will not have the confidence to speak freely and candidly. After this decision, individuals will now think twice before speaking openly in private because they cannot be sure that what they are saying will remain in private.

Protective laws, such as the Wiretap Acts, are necessary in American society to maintain order and protect individual liberties.[139] Striking down these laws under the strict scrutiny test will blur the clear line between what is private and public. The *Bartnicki* decision has broadened the First Amendment's protection of the media in a way that will "turn people's homes [and other private sanctuaries] . . . into completely open forums in which anyone may freely engage in [F]irst [A]mendment expression."[140] Thus, people will feel compelled to avoid any mode of communication that has the slightest possibility of interception for fear of publication. The *Bartnicki* decision has the potential to create a certain level of paranoia in society because individuals will constantly wonder who is listening in or looking into their private lives. Potential paranoia arises from the chilling effect that the *Bartnicki* decision created.

2. The *Bartnicki* Decision Has Rendered All of § 2511 of the Wiretap Acts Virtually Useless Because Allowing Public Disclosures of Illegally Intercepted Information Eliminates the Ability to Prevent the Interceptions Themselves

The central purpose of the Wiretap Acts is to preserve the privacy of private communications.[141] To satisfy this purpose, Congress recognized that there was a specific market for private and intimate information

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[138] *Florida Star*, 491 U.S. at 535 (holding that a Florida content-based statute violated the media's First Amendment rights because it singled out the mass media and it was not narrowly tailored to a state interest of the highest order).

[139] Alan E. Brownstein, *State RFRA Statutes and Freedom of Speech*, 32 U.C. Davis L. Rev. 605, 631 (Spring, 1999). "[T]he state retains a legitimate concern in ensuring that some individuals' unruly assertion of their rights of free expression does not imperil other citizens' rights of free association and discussion. . . . Freedom of everyone to talk at once can destroy the right of anyone to effectively talk at all. Free expression can expire as tragically in the tumult of license as in the silence of censorship." *Id.* (quoting *In re Kay*, 464 P.2d 142, 149 (Cal. 1970)).

[140] *Id.* (quoting Geoffrey R. Stone, *Content Neutral Restrictions*, 54 U. Chi. L. Rev. 46 (1987)).

[141] *See supra* n. 8 and accompanying text.

obtained illegally.[142] Thus, to make the Wiretap Acts effective, Congress created legislation to work against all areas of the intercepted information market.[143] By striking at all functions of the crime, the Wiretap Acts prevent the entire evil of making public information that individuals desire to keep private.[144] The disclosure provision of § 2511 is the key "dry up the market" component for illegally intercepted information because without disclosure, the illegal actors have no avenue to profit from the fruits of their crime.[145]

Therefore, the Court's decision in making unconstitutional the disclosure provision of § 2511 has rendered all of § 2511 useless. The governmental interest in the Wiretap Acts is to protect the privacy of "covered communications."[146] The primary avenue for protecting private communications is through a comprehensive prohibition on the disclosure of private information. The Court in *Bartnicki* even admitted that many interceptions go unnoticed but for the fact that those interceptions get publicly disclosed.[147] The Court, however, in preventing courts to enforce restrictions on illegally intercepted information disclosure, has opened a door for rewarding illegal interceptions without the slightest possibility of detecting or preventing them. Because of the virtual impossibility of detecting illegal interceptions, what is to stop the widespread theft of private information through interceptions? Additionally, what will stop an interceptor from enjoying the fruits of his crime when his discloser claims that the information was obtained from an anonymous source? After the *Bartnicki* decision, the answer is *nothing*.

IV. CONCLUSION

The Supreme Court's decision to strike down the application of the Wiretap Acts to the *Bartnicki* case is disappointing. The Court correctly noted that the Wiretap Acts are content-neutral laws, but went out of its way to create a new standard of review for these types of laws. By using strict scrutiny where it clearly does not belong, the Court made it impossible for future enforcement of § 2511 of the Wiretap Acts. Had the

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[142] *See generally* Sen. Rpt. 90-1097 (Apr. 29, 1968) (reprinted in 1968 U.S.C.C.A.N. 2112, 2181).

[143] *Id.*

[144] *Id.* This concept is parallel to the dry up the market theory. *See Bartnicki*, 121 U.S. at 1773.

[145] *Bartnicki*, 532 U.S at 550.

[146] 9 CommLaw Conspectus 131, 133 (2001) (citing *Peavy v. WFAA-TV, Inc.*, 221 F.3d 158, 183 (5th Cir. 2000) (holding that the Wiretap Acts survived intermediate scrutiny because they created only an incidental burden on the First Amendment and they further the important government interest in protecting the individual freedom to keep speech private)).

[147] *Bartnicki*, 532 U.S at 544.

Court logically followed its own precedent and used intermediate scrutiny in this case, it would have enforced the Wiretap Acts' protection of an individual's privacy rights. Instead, the Court's decision has created a chilling effect on individual free speech rights at the expense of the media's free press rights.

Additionally, this decision has rendered enforcement of the Wiretap Acts to private interceptions and disclosures of information virtually useless. In the face of advancing technology, where individual privacy rights are shrinking with each advance, the Court should not assist in the extinguishment of privacy rights by allowing the media free reign to disclose private information. The Court should reevaluate this decision because, as it stands now, the Court has placed another nail in the coffin of individual privacy rights.