

BARTNICKI V. VOPPER

By Richard D. Shoop

Federal and state anti-wiretapping statutes expressly prohibit the dissemination of illegally intercepted communications, even by third parties who played no role in the interception.¹ In *Bartnicki v. Vopper*,² the Supreme Court held that anti-wiretapping laws violate the First Amendment by prohibiting all disclosures of intercepted information, particularly when the banned information is of significant public concern.³ *Bartnicki* is one of several recent cases questioning the constitutionality of prohibitions against publishing illegally acquired information.⁴

The *Bartnicki* decision is consistent with the substantial First Amendment protection that the Court has historically allowed publishers of truthful information.⁵ However, there are serious concerns about applying *Bartnicki*'s holding. First, the Court did not define the crucial elements of "publication" and "public interest." Second, the Court expressly limited *Bartnicki*'s relevance and did not adequately justify using strict scrutiny. Furthermore, the concurring opinion by Justices Breyer and O'Connor significantly reinterpreted the majority's holding. Finally, these issues are exacerbated by political and public sentiment that is increasingly wary of expanding the First Amendment rights of the press. Although *Bartnicki* could have had a profound effect on the rights of traditional mass media as well as on the expanding field of electronic publishing, the ambiguity and fragility of the holding suggest that it will only be of limited utility to either courts or lawmakers.

This Note first examines the federal and state wiretapping statutes at issue in *Bartnicki* and describes the factual and legal background of the case, with an emphasis on the *Daily Mail* line of cases that the Court relied

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1. 18 U.S.C. § 2511 (2001); 18 PA. CONS. STAT. § 5703 (2001) (the federal and Pennsylvania state "anti-wiretap statutes").

2. 53 U.S. 514 (2001).

3. *Id.* at 518.

4. *See, e.g.*, *Boehner v. McDermott*, 191 F.3d 463 (D.C. Cir 1999), *cert. granted*, 532 U.S. 1050; *Peavy v. WFAA-TV, Inc.*, 37 F. Supp. 2d 495 (N.D. Tex. 1999), *aff'd in part, rev'd in part*, 221 F.3d 158 (5th Cir. 2001).

5. *See, e.g.*, *Fla. Star v. B.J.F.*, 491 U.S. 524 (1989); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979); *Okla. Publ'g Co. v. Dist. Ct.*, 430 U.S. 308 (1977); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975) (discussing cases involving "publication of truthful, lawfully obtained information").

on.⁶ The analysis then explores the implications of *Bartnicki's* holding. Finally, the paper critiques the standard of review applied and the significance of Breyer and O'Connor's narrow concurrence.

I. BACKGROUND: ANTI-WIRETAPPING STATUTES

By the mid-1900s, telephone, wire, and radio communication was widely used in the United States, and political attention had become focused on growing concerns about the privacy rights of private citizens.⁷ In 1968, Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act ("Title III").⁸ Title III was enacted to protect the privacy of wire and oral communications and to establish standards authorizing restrictions on the interception of private communications.⁹ By 1985, however, advances in telecommunications and electronic surveillance technology had frustrated many of the protections of Title III.¹⁰ Congress responded, enhancing Title III by passing the Electronic Communications Privacy Act of 1986 ("ECPA").¹¹

The ECPA modified Title III to include virtually every type of electronic communication, specifically cellular telecommunications, within scope of the Act.¹² Title III prohibits the interception of wire, oral, and electronic communications, except where expressly authorized by war-

6. The *Daily Mail* line of cases are named for *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979), and also includes *New York Times Co. v. United States*, 403 U.S. 713 (1971), *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978), and *Florida Star v. B.J.F.*, 491 U.S. 524 (1989).

7. See Stephen L. Sapp, *Private Interceptions of Wire and Oral Communications Under Title III: Rethinking Congressional Intent*, 16 AM. J. CRIM. L. 181, 184 (1989).

8. See *id.* at 181. Title III replaced the Federal Communications Act of 1934 (the "FCA"), which governed only law-enforcement electronic surveillance. The FCA was enacted partly in response to Supreme Court decisions such as *Katz v. United States*, 389 U.S. 347 (1967), in which the Court held that warrantless wiretapping was a violation of the Fourth Amendment. See Sapp, *supra* note 7, at 183-84.

9. See *supra* note 7, at 183-84; see also Francis M. Hamilton III, *Should 'Clean Hands' Protect the Government Against §2515 Suppression Under Title III of the Omnibus Crime Control and Safe Streets Act of 1968?* 53 WASH. & LEE L. REV. 1473, 1476-79 (1996).

10. See Thomas R. Greenberg, *Email and Voicemail: Employee Privacy and the Federal Wiretap Statute*, 44 AM. U. L. REV. 219, 231 (1994). For example, it was uncertain if "private" cellular phone calls were protected by the Act. John R. Kresse, *Privacy of Conversations Over Cordless and Cellular Telephones: Federal Protection Under the Electronic Communications Privacy Act of 1986*, 9 GEO. MASON U. L. REV. 335, 337 (1987).

11. See Greenburg, *supra* note 10, at 232.

12. 18 U.S.C. § 2510(12) (2001).

rant.¹³ Violation can invoke criminal and civil penalties.¹⁴ Furthermore, the statute forbids dissemination of illegally acquired information, including publication by a third party who is innocent of intercepting the information.¹⁵

In addition to the federal statute, most states have anti-wiretapping provisions similar to Title III.¹⁶ For example, Pennsylvania Statute Title 18, section 5703, also at issue in *Bartnicki*, is nearly identical to the federal anti-wiretapping statute. Both the federal and Pennsylvania anti-wiretapping statutes outlaw the dissemination of illegally intercepted communications.¹⁷ Under both statutes, it is irrelevant that the defendant did not participate in the wiretapping activity;¹⁸ a person who disseminates information violates the anti-wiretapping statutes so long as she “knew or had reason to know” that the communication was illegally acquired.¹⁹ This is precisely the issue in *Bartnicki*.

II. CASE SUMMARY

In May of 1993, teacher’s union negotiator, Gloria Bartnicki, called union president, Anthony Kane, on a cellular phone and engaged in a colorful conversation about ongoing negotiations with the local school board.²⁰ At one point, Kane suggested “blow[ing] up the front porches” of school board members to motivate negotiations.²¹ An unidentified party intercepted and recorded the call and anonymously delivered a tape to Jack Yocum, the president of a taxpayers association opposed to the demands of the teacher’s union.²² Yocum then distributed the recorded con-

13. 18 U.S.C. 2511(2) (2001).

14. 18 U.S.C. 2511(4) and (5) (2001).

15. Specifically, §2511(1)(c) prohibits “intentional[ly] disclos[ing], or endeavor[ing] to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection . . .” 18 U.S.C. 2511(1)(c).

16. Brief for Petitioner at addendum, *Bartnicki v. Vopper*, 53 U.S. 514 (2001) (Nos. 99-1687 and 99-1728) (listing the homologous statutes in all 50 U.S. states).

17. *Bartnicki*, 53 U.S. at 526.

18. 18 U.S.C. § 2511(1)(c) (2001) and 18 PA. CONS. STAT. § 5703(a) (2001).

19. Other sections of the statutes qualify the prohibition against use and dissemination to make limited exceptions in the case of law enforcement. *See, e.g.*, 18 U.S.C. § 2516(1) (“ . . . judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation . . .”).

20. *Bartnicki*, 53 U.S. at 517.

21. *Id.*

22. *Id.* at 518.

versation to two members of the media, including radio talk-show host Fredrick Vopper.²³ Vopper later broadcast the intercepted conversation during a radio program discussing the school board negotiations.²⁴

Bartnicki and Kane brought an action against Yocum, Vopper, and other representatives of the media, alleging a violation of federal and state anti-wiretapping statutes.²⁵ The District Court denied both sides' motions for summary judgment, holding that imposing liability on Vopper and other media defendants would not violate the First Amendment.²⁶ However, the District Court certified two questions for appeal: first, whether the anti-wiretapping statutes violate the First Amendment by prohibiting broadcast of newsworthy information, when the information was illegally intercepted but not by agents of the broadcasters. Second, do the anti-wiretapping statutes violate Yocum's First Amendment rights by prohibiting him from distributing the anonymously intercepted information to media defendants?²⁷

On appeal, the Third Circuit Court of Appeals reversed, finding that the anti-wiretapping statutes deterred significantly more speech than necessary to protect the privacy interests at stake.²⁸ The Supreme Court granted certiorari.²⁹

A. Supreme Court's Analysis

In a six to three decision, the Supreme Court affirmed the Appellate Court's decision, holding that First Amendment protection extends to the dissemination of illegally intercepted communications if they were lawfully obtained and relate to a matter of public concern.³⁰ First, the Court determined that strict scrutiny was the most appropriate standard of review for a First Amendment analysis of the anti-wiretapping statutes.³¹ Second, the Court placed *Bartnicki* in the context of the *Daily Mail* line of cases that limit restrictions on the publication of matters of public concern.

23. *Id.* Vopper's talk-show persona is Fred Williams.

24. *Id.*

25. *Id.* The state statute is 18 PA. CONS. STAT. § 5703 (2001). Both state and federal statutes are also known as wiretapping statutes or anti-wiretapping statutes.

26. *Bartnicki v. Vopper*, 200 F.3d 109, 113 (3d Cir. 1999).

27. *Id.* at 113-14.

28. *Id.* at 129.

29. *Bartnicki v. Vopper*, 530 U.S. 1260 (2000) *cert. granted*.

30. *See Bartnicki*, 53 U.S. at 533-34.

31. The First Amendment of the U.S. Constitution provides in part that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I.

1. *Strict scrutiny is appropriate for "pure speech."*

Two standards of review determine if a particular statute unconstitutionally restricts speech under the First Amendment: strict scrutiny and intermediate scrutiny.³² A statute is subject to strict scrutiny when it is either facially discriminatory or was enacted with a discriminatory motivation of singling out and restricting constitutionally protected speech.³³ This test is often described as looking for "content-based" restrictions on free speech.³⁴ A statute subject to strict scrutiny is only valid if it is "necessary to serve a compelling state interest and. . . [it is] narrowly drawn to that end."³⁵

Intermediate scrutiny, on the other hand, does not have a presumption of First Amendment invalidity, but is instead a balancing test. Courts applying intermediate scrutiny seek to balance explicit government interests against the right of free expression.³⁶ Intermediate scrutiny is generally appropriate where the government aims to regulate the non-communicative effect of an act,³⁷ such as a statute aimed at reducing littering by banning the distribution of handbills.³⁸ Thus, intermediate scrutiny is appropriate for so-called "content neutral" restrictions on speech.³⁹ In such cases, "the correct result. . . reflects some 'balancing' of the competing interests."⁴⁰

Determining the appropriate level of scrutiny is important and often difficult. As a further complication, the Court has irregularly supplemented the content-neutral/content-based test with a distinction between laws that regulate "speech" and laws that regulate "conduct."⁴¹ Unfortunately, the Court has not consistently explained exactly what this distinction means.⁴² "Conduct" is usually described as physical actions, and

32. LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW*, 794. (2d ed. 1988).

33. *See id.*

34. *See Bartnicki*, 53 U.S. at 525-26.

35. TRIBE, *supra* note 32, at 799 (quoting from *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)).

36. *Id.* at 791.

37. *See* TRIBE, *supra* note 32, at 798 n.17 (intermediate scrutiny is appropriate when the government is regulating the speech *regardless* of the content).

38. *See, e.g., Schneider v. State*, 308 U.S. 147 (1939) (purpose of keeping streets clean is insufficient grounds for prohibiting public distribution of handbills).

39. *See Bartnicki*, 53 U.S. at 543-45 (Rehnquist, C.J., dissenting).

40. TRIBE, *supra* note 32, at 791.

41. *See id.* at 825-32.

42. Professor Tribe vehemently criticizes the speech/action distinction as having no analytical substance, and being *impossible* for the Court to ever clearly define. *Id.* at 830.

“pure speech” is usually described as a communicated idea.⁴³ Generally, the more a statute impinges on “pure speech,” the more likely strict scrutiny applies.⁴⁴ Electing either strict or intermediate scrutiny can critically sway the Court’s determination of the validity of a statute.

The *Bartnicki* Court agreed with the petitioners that the anti-wiretapping statutes were “content neutral,” but still applied strict scrutiny.⁴⁵ The majority affirmed the Third Circuit’s finding that the wiretapping statutes were prohibitions of “pure speech,” similar to “the delivery of a handbill or pamphlet,” and thus are the kind of speech that the First Amendment is intended to protect.⁴⁶ Furthermore, the Court concluded that *Bartnicki* fit within existing case law where strict scrutiny was appropriate.⁴⁷

2. *Bartnicki* fits within the *Daily Mail* Line of Cases

The second step in the Court’s analysis was to examine related case law. The majority relied on *New York Times Co. v. United States*⁴⁸ and the *Daily Mail* cases.⁴⁹ The *Daily Mail* line of cases expanded the media’s First Amendment protections when publishing truthful information concerning a matter of public significance—even when state law protects the information.⁵⁰ Following the *Daily Mail* line of cases, the Court held that the anti-wiretapping statute at issue in *Bartnicki* was too restrictive in prohibiting publication of truthful information on matters of significant public concern.⁵¹

In *New York Times*, the Court held that the government could not prohibit the publication of information of public concern, even when the information had been stolen by a third party.⁵² The *New York Times* and the *Washington Post* violated an injunction against publishing excerpts of the “Pentagon Papers” that had been illegally leaked to them by a former gov-

43. *See id.* at 826.

44. *See Note, The Content Distinction in Free Speech Analysis after Renton*, 102 HARV. L. REV. 1904 (1989).

45. *See Bartnicki v. Vopper*, 53 U.S. 514, 525-27 (2001).

46. *Id.* at 526-27.

47. *See id.*

48. 403 U.S. 713 (1971).

49. *See supra* note 6.

50. *See Bartnicki*, 53 U.S. at 526-28. The “protection” applied in each case is different. In *Florida*, it was statutory protection of the identity of rape victims; in *Landmark* it was statutory protection of a state judicial inquiry; and in *Daily Mail* it was statutory protection of the identity of juvenile criminal offenders. *Bartnicki* is the statutory protection of illegally acquired information.

51. *See id.* at 528-31.

52. 403 U.S. at 714.

ernment employee.⁵³ *New York Times* was concerned predominantly with prior restraints on free speech. The case enhanced the press' First Amendment protections when publishing truthful information of public concern.⁵⁴

This theme was extended in *Landmark Communications, Inc. v. Virginia*.⁵⁵ The *Landmark* Court held unconstitutional a Virginia statute that made it illegal to divulge information regarding the proceedings of a state judicial inquiry.⁵⁶ The Virginia-Pilot Newspaper had published an article that accurately reported on a pending inquiry by the Virginia Judicial Inquiry and Review Commission.⁵⁷ The Court subjected the Virginia statute to strict scrutiny and held that only a showing of "clear and present" danger to the administration of justice could justify the restriction on free speech that the statute created.⁵⁸ The Court again held that it was unconstitutional to penalize a third party for publishing truthful information of public interest.⁵⁹

Similarly, in *Smith v. Daily Mail Publishing Co.*,⁶⁰ the Court invalidated a West Virginia statute making it a crime for a newspaper to disclose the name of any youth charged as a juvenile offender.⁶¹ Under strict scrutiny, the Court held that when "a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order."⁶² This is known as the *Daily Mail* principle.⁶³

Finally, the Court in *Florida Star v. B.J.F.*⁶⁴ explicitly reaffirmed *Daily Mail* and *Landmark*, overturning a state law that made it illegal to publish a rape victim's name in "any instrument of mass communica-

53. The "Pentagon Papers" revealed classified government material on policy-making in Viet Nam. See RONALD D. ROTUNDA AND JOHN E. NOWAK, 4 TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 20.17 (3d ed. 1999).

54. See *id.*

55. 435 U.S. 829 (1978).

56. See *id.* at 845-46.

57. *Id.* at 831.

58. See *id.* at 837-38, 844.

59. See *id.* at 839.

60. 443 U.S. 97 (1979).

61. *Id.* at 105-6.

62. *Id.* at 103.

63. Cherly M. Sheinkopf, *Balancing Free Speech, Privacy and Open Government: Why Government Should Not Restrict the Truthful Reporting of Public Record Information*, 44 U.C.L.A. LAW REV 1567, 1574 (1997).

64. 491 U.S. 524 (1989).

tion."⁶⁵ The Florida newspaper had obtained and published a rape victim's name from the police as a result of an administrative error.⁶⁶ The Court, applying the same strict scrutiny standard and rationale as in *Daily Mail*, held that a flat prohibition on publishing such information was unconstitutional because it was not a narrowly tailored means of achieving the state's interest in protecting the rape victims.⁶⁷

3. *The Holding of Bartnicki*

The Court found the anti-wiretapping statutes unconstitutional because the state's asserted interests in enforcing the statutes did not sufficiently justify the prohibitions against free speech.⁶⁸ First, the Court was unconvinced that applying the anti-wiretapping sanctions against publishers innocent of the wiretapping would deter the unlawful conduct by the party that actually intercepted the communication.⁶⁹ The punishment is too remote to the offending eavesdropper.⁷⁰ Furthermore, the Court found no empirical evidence that the statute had actually deterred illegal wiretapping.⁷¹ Second, although the Court acknowledged that privacy is an important interest, it declared that privacy concerns may give way to a compelling public interest in the illegally acquired information.⁷² This is supported by the *Daily Mail* principle, as well as by an implicit belief that public figures, even limited public figures as in *Bartnicki*, are subject to a higher level of public interest.⁷³

Under *Bartnicki*, when a publisher has obtained an illegal communication in a manner lawful in itself, but from a source who has obtained it

65. *Id.* at 526.

66. *Id.* at 526-28.

67. *See id.* at 541.

68. *See Bartnicki v. Vopper*, 53 U.S. 514, 529-32. Under strict scrutiny, a statute is constitutional under the First Amendment if the state's interest that justifies the statute outweighs the restrictions on free speech, and only when the statute is narrowly drawn to achieve those interests. *Id.*

69. *See id.* at 531.

70. *Id.* at 529-30.

71. *Id.* The Court rejected the argument that the anti-wiretapping law would "dry up the market" for illegally intercepted communications by making disclosing them illegal. *Id.* at 526.

72. *Id.* at 532-34. The Court does not explicitly define what matters are of public or general interest, a lack that the dissent criticizes. *Id.* at 542 (Rehnquist, C.J., dissenting).

73. *See id.* at 527-28 (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) and related cases); *see also id.* at 534 ("[M]onths of negotiations over the proper level of compensation for teachers at the Wyoming Valley West High School were unquestionably a matter of public concern, and respondents were clearly engaged in a debate about that concern."); *Id.* at 535 (Breyer, J., concurring).

unlawfully, the government may *not* punish the ensuing publication of that information based on a defect in the chain.⁷⁴ The *Bartnicki* Court limited its holding in four ways: (1) the publisher must have played no part in intercepting the conversation; (2) the publisher must have acquired the information lawfully; (3) the published information must concern a matter of public concern; and (4) the information must be truthful.⁷⁵ In a strongly worded concurring opinion, Justice Breyer agreed with the majority's limitations, but narrowed the holding even further.⁷⁶

4. *Breyer's concurrence and Rehnquist's dissent: reinterpreting Bartnicki*

Justices Breyer and O'Connor concurred with the majority, while Chief Justice Rehnquist, joined by Justices Scalia and Thomas, dissented.⁷⁷ Breyer's concurrence calls for the application of a more equitable test than the majority applied, balancing "speech-restricting and speech-enhancing consequences" of the statute.⁷⁸ The concurrence repeatedly emphasizes that *Bartnicki* must be limited to the facts of the case, and specifically to instances where the disclosed communication exposed a threat of personal harm.⁷⁹ Thus, the concurrence recasts *Bartnicki's* holding quite narrowly.

In his dissent, Chief Justice Rehnquist argued that the majority blatantly misapplied the standard of review, and thus reached the wrong conclusion. He asserted that the anti-wiretapping statutes should have been found constitutional under intermediate scrutiny.⁸⁰ The dissent found no justification for strict scrutiny, and distinguished the *Daily Mail* cases.⁸¹ Unlike *Bartnicki*, the *Daily Mail* cases concerned content based censorship, and the information in the *Daily Mail* cases was publicly available and was lawfully obtained.⁸² Thus, the anti-wiretapping statutes should

74. *Id.* at 527 (quoting from *Boehner v. McDermott*, 191 F.3d 463, 484-85 (1999) (Sentelle, J., dissenting)).

75. *Id.* at 525-28.

76. *See id.* at 540-42 (Breyer, J. concurring).

77. *Id.* at 535-36 (Breyer, J. concurring), 541 (Rehnquist, C.J., dissenting).

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

79. *See id.*

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

81. *Id.* at 541-46 (Rehnquist, C.J., dissenting).

82. *Id.* The third point (censorship of the media) arguably does not distinguish the *Daily Mail* cases from *Bartnicki*, as it was also about censorship of the media. Rehnquist's point may be a more sophisticated argument about scienter. The anti-wiretap laws of *Bartnicki* only circumscribes a publisher when she is aware that the information was illegally acquired. Thus, it is not absolute censorship, as in the *Daily Mail* cases, but it is qualified censorship.

have been subjected to intermediate, not strict, scrutiny since *Bartnicki* dealt with content-neutral regulations of speech.⁸³ Under intermediate scrutiny, the state's interest in protecting privacy by the anti-wiretapping statutes outweighs the publisher's interests in disseminating the information.⁸⁴ Therefore the anti-wiretapping statutes should have been found constitutional.

The dissent predicted that *Bartnicki* would have a profound chilling effect on the speech of "millions of Americans who rely upon electronic technology to communicate each day."⁸⁵ However, an analysis of *Bartnicki* does not support this dire prediction.

III. ANALYSIS

This section of the paper will argue that *Bartnicki*'s decision is limited utility for a variety of reasons. First, *Bartnicki* gives only minimal guidance to lawmakers and courts. Two key terms in the *Bartnicki* holding are left undefined: the class of information that is of "public concern" and the type of "publication" justifying First Amendment protection. Second, the *Bartnicki* Court intentionally restricted the scope of the holding. *Bartnicki* could have broadly extended First Amendment protection to all downstream publishers of protected information. For example, trade secrets are protected by statutes that are quite similar in scope and language to the anti-wiretapping statutes found unconstitutional by *Bartnicki*.

Finally, the *Bartnicki* decision is fragile because the Court fails to adequately justify its choice of strict scrutiny and because Justice Breyer's concurrence narrowly recasts the holding. *Bartnicki* rests on unstable ground in the current political climate calling for increased media accountability. Taken together, the ambiguity, limited scope, and fragility of the *Bartnicki* decision result in a holding that is of questionable long-term utility to courts and lawmakers.

A. What constitutes "public concern," and who is a publisher under *Bartnicki*?

Bartnicki may give First Amendment protection to a publisher who played no part in illegally acquiring information if the published informa-

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

84. *Id.* at 549-53 (Rehnquist, C.J., dissenting). The statute "dries up the market" for illegal wiretaps. The dissent also argues that the state's interest was even greater given the clandestine nature of wiretap activity, and the difficulty of enforcing the statute against those directly responsible for the activity. *Id.* at 551.

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

tion is of public concern. But *Bartnicki* gives little guidance in understanding what constitutes “public concern,” and who is a publisher. The Court alternatively used the terms “public interest,” “public importance,” and “general interest” to describe public concern.⁸⁶ It was obvious to the Court that the intercepted conversation discussing the teacher’s union negotiations was of public concern, but it is not so obvious how the Court reached this conclusion. There are legal frameworks that a court could adapt to determine if speech is of public concern, including newsworthy speech, and private speech or right-to-publicity speech.⁸⁷ However, the majority did not clearly define this crucial term, a lack the dissent was quick to note.⁸⁸

Furthermore, it is not at all apparent that the “public concern” standard in *Bartnicki* should in fact be identical to the “newsworthy” standard alluded to by the *Daily Mail* line of cases. The information at issue in *Bartnicki* was fundamentally different from the information at issue in the *Daily Mail* cases because it was illegally acquired. It is impossible to separate the fact that the information was illegally acquired from the essence of the information.⁸⁹ Some information is “newsworthy” only because it was illegally acquired from a speaker who thought that he was speaking privately.

Justice Breyer’s concurring opinion heightens the confusion. The concurrence recast *Bartnicki*’s holding by restricting the definition of “public concern” to “a threat of potential physical harm to others.”⁹⁰ This suggests that information of “public concern” should be limited to disclosures regarding public health or safety such as the commission of a crime or a tort.⁹¹ Significantly, these limitations are only articulated by Breyer’s concurring opinion, and not by the majority.⁹²

86. *Id.* at 533-34. (reserving the question of whether “trade secrets” or pure “gossip” are matters of significant enough concern to merit first amendment protection).

87. *See generally* William E. Lee, *The Usual Suspects: Journalists as Thieves*, 8 WM. & MARY BILL RTS. J. 53 (1999) (describing newsworthy and public speech); Justin H. Wertman, *The Newsworthiness Requirement of the Privilege of Neutral Reportage is a Matter of Public Concern*, 65 FORDHAM L. REV. 789 (1996) (discussing constitutional classifications of speech).

88. *See Bartnicki*, 53 U.S. at 542 (Rehnquist, C.J., dissenting).

89. *See id.* at 545 (Rehnquist, C.J., dissenting).

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

91. *See id.* at 537-38 (Breyer, J., concurring). Breyer’s definition of “public concern” is much more restrictive than a “newsworthy” test for speech of “public concern.”

92. *See id.* The strong wording of Breyer’s concurring opinion on this matter is noteworthy. The outcome of *Bartnicki* might have been much different had Stevens been more explicit in defining “public concern” more broadly.

The second undefined element of *Bartnicki* is the publication requirement. Knowing what constitutes adequate publication is critical, because the *Bartnicki* Court asserted that publishing matters of public importance could outweigh privacy concerns.⁹³ This implies that First Amendment protection is appropriate only because the public is informed of an especially relevant matter. It remains unclear whether First Amendment protection only extends to those who disseminate information broadly.⁹⁴

Clearly, the *Bartnicki* holding is not limited to traditional media publishers.⁹⁵ The Court “dr[ew] no distinction between the media respondents and Yocum [the private citizen who anonymously received the illegally intercepted phone call].”⁹⁶ Yocum cannot be considered a “publisher” in the traditional sense, although he did provide the press with copies of the illegal communication. If Yocum is a publisher under *Bartnicki*, his distribution of the illegal information was extremely limited.⁹⁷

Unlike the *Daily Mail* cases, the published information in *Bartnicki* was inherently illegal, by action of the anti-wiretapping statutes, and dissemination was *also* outlawed.⁹⁸ Ironically, under *Bartnicki*, publication “cleanses” the illegal status of the intercepted information, assuming that it meets the “public interest” test. As a consequence, *Bartnicki* might require some minimum audience in order for First Amendment protection to forgive the dissemination of the illegal communication.

Until *Bartnicki*, the *Daily Mail* principle was consistently restricted to traditional news media. Although Yocum is not clearly a “publisher,” it is likely that the Court still grants him the First Amendment protections offered to traditional publishers because his actions led directly to publica-

93. *Id.* at 534-35.

94. Under *Bartnicki*, how broad is broad enough to justify First Amendment protection over an individual’s privacy rights? The answer to this question depends on the definition of “public concern” chosen. For example, under the “threat of physical harm” test for “public concern” of Justice Breyer’s dissent, adequate publication might be simply informing the threatened parties.

95. The Internet has eliminated most barriers to entry in the publication arena. Virtually anyone can become a “web publisher” by posting a web page. The role that the *Daily Mail* principle and *Bartnicki* may play in the first amendment protections of a web publisher are discussed *infra*.

96. *Bartnicki* at 525 n.8. Note that the anti-wiretapping statutes make disclosure to anyone (even a single individual) illegal. 18 U.S.C. § 2511 (2001).

97. Yocum distributed the tape only to Vopper, though he played it for other members of the school board. *Bartnicki*, 53 U.S. at 518-519. It is unclear under *Bartnicki* if Yocum would be entitled to First Amendment protection had Vopper not played it on the air and given it to other media defendants.

98. 18 U.S.C. § 2511(1)(c) (2001); 18 PA. CONS. STAT. § 5703 (2001).

tion.⁹⁹ Thus, in the wake of *Bartnicki*, enforcement of anti-wiretapping statutes will require a case-by-case analysis, balancing the public interest in the disclosure of illegally intercepted information against the privacy rights of the individual speaker. A court or legislature must decide to whom *Bartnicki* applies (particularly, who is the “publisher”), the nature of the “public interest” served by disseminating the illegal information, and possibly how effectively the information was disclosed. *Bartnicki* does not give clear guidance in these areas.

Despite these problems, the *Bartnicki* test does have advantages. First, the ambiguity of the holding makes it more adaptable; the lack of clear instructions from the Court allows lawmakers and lower courts greater freedom to interpret the meaning of “public concern” and “publisher.” Assessing the public interest in the illegally acquired information on a case-by-case basis may be the best way to resolve such cases.¹⁰⁰ Further, the holding is sufficiently flexible to handle technological developments in communications and publishing technologies. But these benefits may be outweighed by further problems with *Bartnicki*’s holding.

Bartnicki raises questions about the meaning of “publisher” and the importance of the publication audience in determining the application of First Amendment protections. Internet publishing makes these questions particularly poignant. Virtually anyone with access to a computer can publish a web page with a potential audience numbering in the millions.¹⁰¹ *Bartnicki* does not tell us if web publishers are eligible for the same protection under the First Amendment that is granted to traditional publishers.¹⁰²

99. *Bartnicki*, 53 U.S. at 525 n.8. It is interesting to speculate on Yocum’s status had his communication in *Bartnicki* not led to publication. (Indeed, this was almost the case, as Vopper waited months until broadcasting the intercepted conversation.) Although widespread publication might not have occurred, Yocum did immediately play the tape for the other school board members (the ones “threatened” in the tape). Is this an adequate “publication” (particularly in light of the fact that the target audience was the public most likely to be interested in the illegal information)?

100. Paul M. Smith and Nory Miller, *When can the Courts Penalize the Press Based on Newsgathering Misconduct?* 19 COMM. LAW. 1, 29 (2001).

101. See Dick Morris, *Symposium: Democracy and the Internet*, 34 LOY. L.A. L. REV. 1033, 1033 (2001).

102. Web “publications” act and look like traditional media, and often serve the same functions of informing and entertaining. See generally Robert M. O’Neil, *The Drudge Case: A look At Cyberspace Defamation*, 73 WASH. L. REV. 623 (1998) (questioning legal ramifications of online publishing). But applying the “special” press privileges to web pages raises concerns about eroding the right to privacy. When each citizen can be his own “press,” it is conceivable that First Amendment protections like the *Daily Mail* principle and the *Bartnicki* holding will swallow the right to privacy. See Floyd Abrams,

B. The Court explicitly limited *Bartnicki*.

The Court intentionally restricted *Bartnicki*'s holding so that it would not expand the *Daily Mail* principle or affect trade secret law. *Bartnicki* presented a question that was reserved in the *Daily Mail* line of cases: is publication of truthful, yet illegally acquired information protected by the First Amendment when the publishing party played no part in the illegal acquisition? The *Bartnicki* Court could have powerfully restated the *Daily Mail* principle, but declined to hold so broadly.

In *Bartnicki*, the Court revisited the *Daily Mail* principle, but only expanded it in the narrowest possible manner. Abstracted, *Bartnicki* fits within the bounds of the *Daily Mail* line of cases in which a publisher is held statutorily liable for publication of "protected" information.¹⁰³ *Bartnicki* adapts the *Daily Mail* principle to the subset of cases where the published information was illegally acquired by a third party. Thus, the ultimate origin of the information does not matter under the *Bartnicki* enhancement of the *Daily Mail* principle. The Court intentionally rejected the broad interpretation that publication of truthful information is *always* protected by the first amendment.¹⁰⁴ Instead, *Bartnicki* is a small addition to the class of protections that that *Daily Mail* principle embraces.¹⁰⁵

Under a slightly more expansive holding, *Bartnicki* could have invalidated provisions of many states' trade secret laws on constitutional grounds. Anti-wiretapping statutes and trade secret statutes are remarkably similar in their downstream treatment of information that they make ille-

Transcript of the 1999-2000 Oliver Wendell Holmes Lecturer, 51 MERCER L. REV. 833, 843-845 (2000) (observing that expanding "press" privileges to internet publishers could (ironically) lead to a restriction of the First Amendment protections of the press, thereby inflicting serious harm to the public). Although the *Bartnicki* decision has been heralded as a victory for media advocates, there are serious questions about its effectiveness. See, e.g., Tony Mauro, *Defining the Limits; Supreme Court to Rule on Broadcast of Illegally Taped Conversations*, THE QUILL, September 1, 2000, at 73.

103. As mentioned *infra*, the Dissent clearly disagrees with this logic, holding that *Bartnicki* is clearly distinguishable from the *Daily Mail* line of cases. The dissent holds a different view of the *Daily Mail* principle, and distinguishes *Bartnicki* on factual difference from the general fact of the *Daily Mail* line of cases. Ultimately, the Majority focuses on the more general principles involved. For example, a publisher is punished under state statute for publishing protected information. The Dissent declines to make this generalization. See *Bartnicki*, 53 U.S. at 545-46 (Rehnquist, C.J., dissenting).

104. *Bartnicki*, 53 U.S. at 529. Even this broad holding could have been modified by a requirement that the information be both truthful and "of public concern" or "public interest."

105. Prior to the *Bartnicki* decision, there was some speculation that the court's holding could dramatically expand the *Daily Mail* principle, perhaps by protecting the publication of *all* truthful information, regardless of its origin. Mauro, *supra* note 102, at 73.

gal. For example, the California version of the Uniform Trade Secret Act, like the anti-wiretapping act, prohibits the disclosure of trade secret information by a third party who “knew or had reason to know” that the information was illegally acquired.¹⁰⁶ Like the anti-wiretapping statute, the trade secret statute prohibits the publication of information that was illegally acquired even by otherwise innocent parties.¹⁰⁷ However, the *Bartnicki* Court explicitly set aside the issue of trade secrets.¹⁰⁸ Thus, *Bartnicki* was inapplicable in a recent California appellate trade secret case, *DVD Copy Control Ass’n v. Bunner*.¹⁰⁹

C. *Bartnicki* is a Fragile Holding.

The vagueness of the holding in *Bartnicki* may eventually lead to its downfall. Because courts and legislatures may be uncertain as how best to apply *Bartnicki*, similar challenges are likely to occur. Furthermore, the Court, looking at a *Bartnicki*-like case, might reach a different outcome for numerous reasons. First, the majority opinion is weakened by the lack of a clear justification for the application of strict scrutiny in *Bartnicki*.¹¹⁰ Although the anti-wiretapping statutes are admittedly “content neutral,” the Court concludes that intercepted conversations are “pure speech” and therefore deserve strict scrutiny.¹¹¹ Only scant support is given for this conclusion.¹¹² It seems more likely that the Court is applying strict scrutiny because the facts of *Bartnicki* comport with the *Daily Mail* line of cases.¹¹³ However, this is troublesome both procedurally and because

106. Uniform Trade Secret Act of the California Civil Code §3426.1 (b) defines “misappropriation” as “Disclosure or use of a trade secret of another without express or implied consent by a person who. . . (B) At the time of disclosure. . . knew or had reason to know that his or her knowledge of the trade secret was: (i) Derived from or though a person who had utilized improper means to acquire it. . . “ 5 CAL. CIV. CODE § 3426.1 (2001).

107. The anti-wiretapping statutes prevent disclosure of information from one who “know[s] or ha[s] reason to know that the information was obtained” illegally (through interception). 18 U.S.C. § 2511(1)(c) (2001).

108. *Bartnicki*, 53 U.S. at 533 (“We need not decide whether that interest is strong enough to justify the application of [the anti-wiretap statute] to disclosures of trade secrets. . .”).

109. *DVD Copy Control Ass’n v. Bunner*, 93 Cal. App. 4th 648 n.7 (Cal. Ct. App. 2001) (finding that the *Bartnicki* was not applicable both because the Court in *Bartnicki* expressly declined to consider trade secret information and because *Bartnicki* was not a trade secret case).

110. *See Bartnicki*, 53 U.S. at 543-44 (Rehnquist, C.J., dissenting).

111. *Id.* at 525-26.

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

113. This is never explicitly stated in *Bartnicki*. After holding that *Bartnicki* fit with the *Daily Mail* line of cases, the Court immediately applied strict scrutiny to *Bartnicki*

questions remain about the appropriateness of this categorization.¹¹⁴ Moreover, the application of strict scrutiny in *Bartnicki* was arguably dispositive.¹¹⁵

Second, the concurring justices only conditionally agreed with the majority. Breyer and O'Connor's two votes were critical in achieving the majority. Had the majority opinion more explicitly embraced a broader definition of public concern, it seems likely that Breyer and O'Connor would have joined the dissent, and Rehnquist's opinion would have carried the *Bartnicki* decision.¹¹⁶

Finally, political and public opinion may be against First Amendment protection for the press. In the years immediately following the Watergate scandal, the public and political climate favored strengthening the rights of the press and making government less "opaque."¹¹⁷ This is the atmosphere that helped engender the *Daily Mail* principle.¹¹⁸ In recent years, however, this trend has been subsiding.¹¹⁹ Following the September 11, 2001 terrorist attacks on the Pentagon and the World Trade Center, public support for limiting the access and the immunity of the press has increased.¹²⁰ Congress and the Executive Branch appear to be responding. For example, on October 26, 2001, the President signed into law a comprehensive anti-terrorism bill (USA Patriot Act of 2001) that includes provisions for increased governmental wiretapping and heightened penalties for security

despite acknowledging that the anti-wiretapping statutes were content-neutral. *Id.* at 525-26 and n.9.

114. *See id.* at 543-47 (Rehnquist, C.J., dissenting).

115. Certainly the dissent found it dispositive. *Id.* at 544-45 (Rehnquist, C.J., dissenting)

116. Indeed, it has been suggested that Stevens' published opinion was modified to accommodate Justices O'Connor and Breyer. This may be why Stevens's opinion does not explicitly state his standard of review (justifying strict scrutiny) as well as the uncertainty in describing "public interest." Cynthia Cotts, *Supremes Secretly Stiff the Press*, THE VILLAGE VOICE, June 12, 2001, at Nation 31.

117. *See Cotts, supra* note 116, at Nation 31; Symposium, *Undercover Newsgathering Techniques: Issues and Concerns: Media Misbehavior and the Wages of Sin: The Constitutionality of Consequential Damages for Publication of Ill-Gotten Information*, 4 WM. & MARY BILL OF RTS. J. 1111 (1996) (discussing the role of the media in the public realm).

118. *See generally* Sheinkopf, *supra* note 63 (examining legislative restrictions on speech and the public record).

119. Cotts, *supra* note 116, at Nation 31.

120. *See, e.g.*, James R. Lorence, Editorial, *Public Pulse: CNN Crosses line*, OMAHA WORLD-HERALD, October 22, 2001 Sunrise edition at 6B; Jeff Zeleny, *Print Media Asked to Edit bin Laden*, CHI. TRIB., October 12, 2001, at N2; Carolyn I. Jones, Letters to the Editor, *Press Was Irresponsible to Report Bush's Location*, THE COLUMBUS DISPATCH, September 28, 2001, at 10A.

“leaks.”¹²¹ In an atmosphere of heightening privacy, particularly governmental privacy, cases like *Bartnicki* that are on the borders of First Amendment protection may have to contract.

IV. CONCLUSION

Bartnicki provides that publishers who knowingly publish illegally intercepted communications, where they had no part in the interception, might be protected under the First Amendment so long as the published information is of significant public concern. However, this holding is likely to be of only limited value. The *Bartnicki* holding is vague and difficult to apply since the critical tests for “information of public concern” and “publication” are undefined. Moreover, although *Bartnicki* is an extension of the *Daily Mail* principle, the Court deliberately limited the scope of the holding. *Bartnicki*’s ultimate usefulness is limited because the vagueness of the holding invites future challenges likely to result in an even more restricted holding.

121. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, S. 1510, 107th Cong. (2001).

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