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THE CONSTITUTIONAL LEGITIMACY OF THE CIVIL
PROVISIONS OF THE FEDERAL WIRETAP ACT – A
SUGGESTION TO THE SUPREME COURT IN THE CASE OF
BARTNICKI v. VOPPER

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I. INTRODUCTION

If knowledge is power, then certainly the secret and unlimited acquisition of the most detailed knowledge about the most intimate aspects of a person’s thoughts and actions conveys extraordinary power over that

person's life and reputation to the snooper who possesses the highly personal information. And by vastly expanding the range and power of the snooper's eyes, ears, and brains, the new technology facilitates and magnifies the acquisition and use of such information. Moreover, as long as surveillance technology remains unregulated and continues to grow at an accelerated rate, the free and enriching exercise of the rights guaranteed by the Constitution and the Bill of Rights will inevitably be chilled to the point of immobility by the general awareness that Big Brother commands the tools of omniscience.¹

Modern technological advancements have sparked an increased level of caution as individuals seek to guard private information. As cellular phones, scanners, scramblers and the like become more common in average American households, it becomes obvious that high tech devices have become readily attainable by the public at large. Accordingly, protection of information once held private by merely "shutting the door" or "whispering" has, perhaps, become a luxury of the past. Accordingly, while technology provides more efficient methods of completing everyday tasks, it may also serve as one of this generation's most formidable foes. Absent appropriate regulation, technologies pertaining to surveillance may encroach upon individual privacy in ways not contemplated by current legislation.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968² (hereinafter "Federal Wiretap Act"), as amended by the Electronic Communications Privacy Act of 1986³ (hereinafter "ECPA") and the Communications Assistance for Law Enforcement Act⁴ (hereinafter "1994 Amendments"), serves as the primary federal law with respect to the regulation of surveillance activity. More specifically, Title III of the Federal Wiretap Act, as amended, remains the "primary law guarding the privacy of personal communication [among private citizens] in the United States."⁵ This piece of legislation will serve as the focal point of this Note.

Currently before the Supreme Court of the United States⁶ is the case of *Bartnicki v. Vopper*.⁷ In this case, the Third Circuit Court of Appeals found that the appellants had successfully demonstrated the unconstitutionality of the portion of Title III which grants a civil cause of action to anyone whose ". . . [illegally intercepted] wire,

¹STAFF OF SENATE COMM. ON THE JUDICIARY, 94th CONG., SURVEILLANCE TECHNOLOGY III (Comm. Print 1976).

²Pub. L. No. 90-351, 82 Stat. 197 (1968). (codified in 18 U.S.C. §§ 2510-2520).

³Pub. L. No. 99-508, 101(c)(1)(A), 100 Stat. 1851 (1986). (codified in 18 U.S.C. §§ 2510-2521).

⁴Pub. L. No. 103-414, § 202(a), 108 Stat. 4279 (1994). (codified in 18 U.S.C. §§ 2510).

⁵S. REP. NO. 99-541, at 2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3556 [hereinafter S. REP. NO. 541].

⁶David L. Hudson Jr., staff attorney for the First amendment Center at Vanderbilt University, in an article written for the ABA Journal, stated that this case might "arguably [be] the most important First Amendment case this term." David L. Hudson, *Speaking of Firsts ... First Amendment Free-Speech Cases May Turn Into Blockbusters*, 86 A.B.A. J., Oct. 2000, at 30.

⁷200 F.3d 109 (3d Cir. 1999), *cert. denied*, 530 U.S. 1260 (2000).

oral, or electronic communication . . . [is] disclosed”⁸ on the premise that such regulation violates the discloser’s free speech rights under the First Amendment.⁹ This holding in support of the First Amendment rights of the discloser stands in direct opposition to the D.C. Circuit Court of Appeals’ holding in support of the victim’s privacy rights in the similar case of *Boehner v. McDermott*.¹⁰

This Note will first discuss the history and context of the statute under which these cases have arisen. It will then survey various Supreme Court cases addressing the tension between the First Amendment and the right to privacy so as to provide the reader with a better understanding of the conflict between these two constitutional rights. Then it will outline and analyze the positions held by the Third and D.C. Circuit Courts of Appeals. Since the Supreme Court has elected to resolve the conflict among the federal circuits, this Note will ultimately attempt to provide a solution that best honors the opposing interests and establishes a uniform rule with respect to the federal government’s ability to regulate in this area.¹¹

II. THE STATUTE IN GENERAL – HISTORY AND DEVELOPMENT OF THE FEDERAL WIRETAP ACT

The advent of modern technology allows law enforcement agencies and private citizens to eavesdrop with ease, making it imperative for the Court to expand the meaning of the Fourth Amendment so as to protect individuals from misuse of such technologies. According to its original interpretation, the Fourth Amendment was literally limited in its application to unreasonable intrusions into a citizen’s “houses, papers and effects.”¹² Accordingly, arguments have been made that electronic surveillance devices do not violate the provisions of the Fourth Amendment because no actual physical intrusion necessarily occurs. This view was aptly illustrated in *Olmstead v. United States*,¹³ wherein the United States Supreme Court held that merely tapping someone’s telephone line without actually entering his property was not a violation of the person’s Fourth Amendment rights because “those who intercepted the projected voices were not in the house of either party to the conversation.”¹⁴ Justice Brandeis, dissenting in *Olmstead*, however, stated that:

Ways may some day be developed by which the [g]overnment, without removing papers from secret drawers, can reproduce them in court, and by

⁸18 U.S.C. § 2520 (2000).

⁹The statute does require that the discloser of the information “[know] or [have] reason to know that the information was obtained [using an illegal wiretap as defined by the statute.]” Wire and Electronic Communications Interception and Interception of Oral Communications 18 U.S.C. § 2511(1)(c).

¹⁰191 F.3d 463 (D.C. Cir. 1999), *rev’d by, remanded by*, No. 98-7156, 2001 U.S. App. LEXIS 27798, at *1 (D.C. Cir. Dec. 21, 2001).

¹¹At the time this Note was authored the Court had not yet ruled in *Bartnicki*. It’s ruling, however, will pre-date the publication date of this Note due to the time delay involved in the publication process.

¹²U.S. CONST. amend IV.

¹³277 U.S. 438, 466 (1928).

¹⁴*Id.*

which it will be enabled to expose to a jury the most intimate occurrences of the home ... Can it be that the Constitution affords no protection against such invasions of individual security?¹⁵

Some thirty-nine years later, in *Katz v. United States*,¹⁶ the Court accepted the view expressed by Brandeis in his *Olmstead* dissent. In *Katz*, the defendant had been convicted under a federal statute prohibiting transmission of wagering information by telephone.¹⁷ The conviction, however, resulted from the introduction of surveillance evidence acquired by law enforcement officials.¹⁸ FBI agents had “attached an electronic listening . . . device to the outside of the public telephone booth from which the defendant had placed his calls.”¹⁹ Overturning the lower court’s ruling that no Fourth Amendment violation had occurred,²⁰ the Supreme Court concluded that “[t]he [g]overnment’s activities in electronically listening to and recording [the defendant’s] words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a ‘search and seizure’ within the meaning of the Fourth Amendment.”²¹ This finding by the Court marked a significant expansion of Fourth Amendment applicability as it afforded protection to “people – and not simply ‘areas’ – against unreasonable searches and seizures.”²² The Court noted that application of the Fourth Amendment could no longer turn upon the “presence or absence of a physical intrusion into any given enclosure.”²³ This decision set the stage for the Congressional enactment of legislation affording statutory protection against the unreasonable use of surveillance technology.

In the year following *Katz*, Congress passed the Omnibus Crime Control and Safe Streets Act of 1968,²⁴ the partial purpose of which was “to deal with increasing threats to privacy resulting from the growing use of sophisticated electronic devices.”²⁵ Title III of the Act²⁶ placed restrictions (absent a warrant to the contrary)

¹⁵*Id.* at 474.

¹⁶389 U.S. 347 (1967).

¹⁷Generally speaking, the statute imposes criminal penalties upon those “engaged in the business of betting or wagering [who] knowingly use[] a wire communication facility for the transmission . . . of bets or wagers” 18 U.S.C. § 1084 (2002).

¹⁸*Katz*, 389 U.S. at 348.

¹⁹*Id.*

²⁰*See Katz v. United States*, 369 F.2d 130, 134 (9th Cir. 1966), *rev’d by*, 389 U.S. 347 (1967). The court of appeals rejected the Fourth Amendment claim stating that “[t]here was no physical entrance into the area occupied by [the petitioner].”

²¹*Katz*, 389 U.S. at 353.

²²*Id.*

²³*Id.*

²⁴This Act attempted to update the Federal Communications Act of 1934. *See S. REP. NO. 90-1097*, at 70 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2154 [hereinafter *S. REP. NO. 1097*].

²⁵*State v. Howard*, 679 P.2d 197, 201 (Kan. 1984) (*citing United States v. Carroll*, 332 F. Supp. 1299 (D.C. Cir. 1971)).

upon the interception and disclosure of information obtained through wiretapping or other means of interception. Despite Congress' efforts to adequately update the law, the provisions of the Federal Wiretap Act soon became outdated as well. For example, under its original terms, the Act's applicability did not reach the interception of conversations using electronic equipment.²⁷ Recognizing that its original provisions had not kept up with technological advancements, Senator Leahy²⁸ commented that the existing law was "hopelessly out of date,"²⁹ and proposed the EPCA in 1986.

Surprisingly, even the amended provisions of the EPCA failed to accurately define Congress' intent for an extended period of time.³⁰ Under its original provisions, the Federal Wiretap Act failed to protect conversations made on cordless or cellular phones (and the like).³¹ As was the case previously, technology continued to advance making cordless and cell phones common household commodities. It was not until 1994 that Congress once again amended the Federal Wiretap Act so as to include cordless and cellular phones.³²

In its current form, pursuant to the 1986 and 1994 Amendments, the Federal Wiretap Act, provides in relevant part:

Except as otherwise specifically provided in this chapter any person who—

...

(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;

(d) intentionally uses, or endeavors to use, the contents of any wire, oral or electronic communication, knowingly or having reason to know that the information was obtained through the interception of a wire, oral or electronic communication in violation of this subsection . . . shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).³³

Furthermore, it goes on to provide:

(a) In general. Except as provided in § 2511(2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or

²⁶18 U.S.C. §§ 2510-2522 et seq. (2002).

²⁷See S. REP. NO. 1097, *supra* note 24, at 70. Under its original terms the Act only applied to interceptions that could be heard by the human ear.

²⁸The bill was co-sponsored in 1986 with Senator Mathias.

²⁹S. REP. NO. 541, *supra* note 5, at 2.

³⁰*McKamey v. Roach*, 55 F.3d 1236, 1240 (6th Cir. 1995).

³¹*Id.*

³²See *supra* note 4.

³³18 U.S.C. § 2511(1) (c) – (d) (2000).

intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in the violation such relief as may be appropriate.³⁴

Ardent First Amendment advocates seem to find these sections offensive due to the limitations placed on the discloser's ability to disseminate acquired information. While the statute does seem to avoid a *carte blanche* restriction by imposing liability only when the discloser "knows" or has "reason to know" that the information was obtained in violation of the statute, free speech advocates presumably feel that any limitation on an individual's ability to disseminate information is inappropriate. Conversely, advocates of the right to privacy may argue that, while free speech is an important constitutional privilege, its use, under appropriate guidelines, may be curtailed so as to protect the interests of the citizenry. Obviously, both viewpoints are well taken and arguable on many different fronts. However, co-existence of these interests, unless carefully defined, seems to be improbable.

It is these provisions, and the constitutional quandary they present, that serves as the point of contention in the *Bartnicki* and *Boehner* cases discussed in Section III. It is important to realize that, while not indicated anywhere in the statute itself, the Senate may have foreseen the potential conflicts between the First Amendment and the right of privacy.³⁵ Nevertheless Congress' failure to expressly address the issue has produced the litigation now before the United States Supreme Court.

III. HISTORICAL DEVELOPMENT OF CASE LAW ADDRESSING THE TENSION BETWEEN THE FIRST AMENDMENT AND THE RIGHT TO PRIVACY

Whether Congress foresaw the possibility of conflict between the First Amendment and the right to privacy or not, while interesting, provides no significant assistance in resolving the conflicts now before the Supreme Court. Furthermore, while it may appear that these conflicts are only now arising (in the form of the *Bartnicki* case), such an assumption would be a far cry from reality. In fact, as discussed *infra*, the Supreme Court has pondered these issues, and how they relate, numerous times over the past thirty years. Consequently, an assessment of such considerations will greatly assist the reader in understanding the direction in which the Court has been moving over the past three decades, in addition to the fervor with which it has sought to protect both of these paramount constitutional rights. This section will survey the most significant cases that the Supreme Court has heard with respect to these issues.

In June of 1971 the Supreme Court, in *New York Times Co. v. United States*,³⁶ made a bold ruling with regard to the government's ability to restrict the press. This case involved the possible publication of a classified study entitled "History of U.S. Decision-Making Process on Viet Nam Policy" that had been illegally acquired by *The New York Times* and the *Washington Post*.³⁷ Finding the study to be of significant public interest, the two newspapers prepared to publish the contents of the

³⁴18 U.S.C. § 2520(a) (2000) (amended 2001).

³⁵See S. REP. NO. 1097, *supra* note 24, at 2181.

³⁶403 U.S. 713 (1971). These cases have often been called the "Pentagon Papers" cases due to the fact the classified documents had been removed from the Pentagon.

³⁷*United State v. Wash. Post Co.*, 446 F.3d 1327, 1328 (D.C. Cir. 1971).

report.³⁸ In an effort to prevent disclosure of this classified information, the government unsuccessfully sought injunctions from the district courts of both the District of Columbia and the Southern District of New York.³⁹ On appeal, the Court of Appeals for the District of Columbia affirmed the lower court's refusal to grant an injunction while the Court of Appeals for the Second Circuit remanded the case for further hearings.⁴⁰

The United States Supreme Court held, in a *per curiam* opinion, that the government had failed to meet the burden of showing ample justification for the imposition of prior restraint of expression.⁴¹ In his concurrence, Justice Douglas, quoting the First Amendment, determined that according to the text alone there is "no room for governmental restraint on press."⁴² Further illustrating his point, he noted that no federal statute forbade the publication of such information.⁴³ The Court, however, did recognize that restraint may not always be inappropriate. Justice Brennan, in his concurrence, wrote "our judgments in the present cases may not be taken to indicate the propriety, in the future, of issuing temporary stays and restraining orders to block publication of material sought to be suppressed by the Government."⁴⁴ Curiously, no mention was made of the fact that the information was obtained illegally. The Court's only concern seemed to be the prevention of unbridled suppression of the newspapers. Justice Burger, however, in his dissent, felt that the Court did not know the facts and was in no better position than were the lower courts to resolve the conflict.⁴⁵ Accordingly, he felt these cases were anything but "simple."⁴⁶ Even if the facts had been known, though, he still reasoned that the First Amendment is not an "absolute."⁴⁷ Justices Harlan and Blackmun also wrote dissenting opinions further illustrating the Court's division with respect to the application of the First Amendment in cases where it offends privacy. Thus began the Supreme Court's thirty-year debate regarding the tension between the First Amendment and the right to privacy.

Four years later, in *Cox Broadcasting Corp. v. Cohn*,⁴⁸ the Court considered, in light of the First Amendment, the constitutionality of a Georgia statute which made it

³⁸*Id.*

³⁹*Id.*

⁴⁰*See* U.S. v. N.Y. Times Co., 444 F.2d 544, 544 (2d Cir. 1971), *rev'd*, 403 U.S. 713 (1971). *Wash. Post Co.*, 446 F.2d 1327, 1328 (D.C. Cir. 1971), *aff'd*, 403 U.S. 713 (1971).

⁴¹*N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (*citing* *Bantam Books v. Sullivan*, 372 U.S. 58, 70 (1963) noting that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity")

⁴²*N.Y. Times Co.*, 403 U.S. at 720 (Douglas, J., concurring).

⁴³*Id.*

⁴⁴*Id.* at 724-25.

⁴⁵*Id.* at 748 (Burger, J., dissenting).

⁴⁶*Id.*

⁴⁷*N.Y. Times Co.*, 403 U.S. at 748.

⁴⁸420 U.S. 469 (1975).

a misdemeanor “to publish or broadcast the name or identity of a rape victim.”⁴⁹ In that case, the appellee’s seventeen-year-old daughter had been raped and killed.⁵⁰ Six months after the incident hearings were held in which five of six defendants pled guilty to the alleged crimes.⁵¹ During the course of the proceedings, a reporter learned the identity of the victim by reading the indictments that were made available to him by the court.⁵² He subsequently broadcasted the victim’s identity on a local television station (Cox Broadcasting).⁵³ Soon thereafter, the appellee filed suit.

On appeal, the Georgia Supreme Court determined that the lower court had erroneously found a cause of action arising from the statute at issue.⁵⁴ Instead, the proper cause of action, according to the Georgia Supreme Court, lay in the common law torts of “public disclosure” or “invasion of privacy.”⁵⁵ The court did, however, address the First Amendment issue holding that the statute did not violate the Constitution.⁵⁶ Citing *Briscoe v. Reader’s Digest Association*,⁵⁷ the court stated that “the rights guaranteed by the First Amendment do not require total abrogation of the right to privacy. The goals sought by each may be achieved with a minimum of intrusion upon the other.”⁵⁸ Accordingly, the court sustained the statute as a “legitimate limitation on the right of freedom of expression contained in the First Amendment.”⁵⁹

The United States Supreme Court reversed the Georgia Supreme Court, holding that “[s]tates may not impose sanctions on the publication of truthful information contained in official court records open to public inspection.”⁶⁰ This ruling did not come at the total expense of privacy interests. The Court provided exhaustive comments on the importance of the right to privacy and its development over the past century of American jurisprudence.⁶¹ However, recognizing the importance of public awareness of public activities in the context of political activity, the Court highlighted the fact that the information at issue came from public records.⁶² Therefore, despite their importance, “[privacy interests] fade when the information

⁴⁹*Id.* at 471 (citing GA. CODE ANN. § 26-9901 (1972)).

⁵⁰*Cox Broad. Corp.*, 420 U.S. at 471.

⁵¹*Id.* at 472.

⁵²*Id.*

⁵³*Id.* at 473-74.

⁵⁴*Id.* at 474.

⁵⁵*Cox Broad. Corp.*, 420 U.S. at 474.

⁵⁶*Id.* at 475.

⁵⁷483 P.2d 34 (Cal. 1971).

⁵⁸*Cox Broad. Corp.*, 420 U.S. at 475.

⁵⁹*Id.*

⁶⁰*Id.* at 495.

⁶¹*Id.* at 487 (citing Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890)).

⁶²*Cox Broad. Corp.*, 420 U.S. at 493.

involved already appears on the public record.”⁶³ The Court also feared the “chilling” effect that might result by validating sanctions for the publication of “certain public information.”⁶⁴ Such a ruling, in the eyes of the Court, “would invite timidity and self-censorship and very likely lead to the suppression of many items that would otherwise be published”⁶⁵

The Court’s next decision in this area arose two years later in *Oklahoma Publishing Co. v. Oklahoma County*.⁶⁶ In that case, the District Court of Oklahoma County enjoined members of the media from publishing the identity of an eleven-year-old boy who had appeared before the court on second-degree murder charges.⁶⁷ Having not held the hearings in private, as was permissible under Oklahoma law, the judge sought to maintain the minor’s privacy by enjoining, any disclosure by the media after the fact.⁶⁸ Such restrictions were not well received by the media and resulted in the filing of an “application for prohibition and mandamus challenging the order as a prior restraint on the press” in violation of the First Amendment.⁶⁹ This challenge was subsequently denied by the Oklahoma Supreme Court.⁷⁰

Recalling *Cox*, as well as its then most recent decision in *Nebraska Press Association v. Stuart*,⁷¹ the Court affirmed its belief that information in the public domain should not be suppressed.⁷² Because the district court judge failed to conduct private hearings that would have prevented the information from entering the public record, the information passed beyond the reach of suppression and became protected under the First Amendment.⁷³ Accordingly, the Court reversed.⁷⁴

Following *Oklahoma Publishing*, the Court heard *Landmark Communications v. Virginia*.⁷⁵ This case differed from the previous cases in that the disclosed

⁶³*Id.* at 494-95. Note, however, that while this ruling does strike a blow to privacy interests, the Court’s holding is quite narrow. Refusing to state a broad rule, the Court plainly stated that “it is appropriate to focus [only] on the narrow[] interface between press and privacy that this case presents, namely, whether the State may impose sanctions on the accurate publication of the name of a rape victim obtained from public records. . . .” *Id.* at 491.

⁶⁴*Id.* at 496.

⁶⁵*Id.*

⁶⁶430 U.S. 308 (1977).

⁶⁷*Id.* at 308-09.

⁶⁸*Id.* at 309.

⁶⁹*Id.* at 308.

⁷⁰*Id.* at 309.

⁷¹427 U.S. 539 (1976).

⁷²*Oklahoma Publ’g Co.*, 430 U.S. at 310-11 (quoting *Sheppard v. Maxwell*, 384 U.S. 333, 362-63 (1966) (“[T]here is nothing that proscribes the press from reporting events that transpire in the courtroom.”); *Craig v. Harney*, 331 U.S. 367, 374 (1947) (“Those who see and hear what transpired [in the courtroom] can report it with impunity.”)).

⁷³*Oklahoma Publ’g Co.*, 430 U.S. at 311.

⁷⁴*Id.* at 312.

⁷⁵435 U.S. 829 (1978).

information in question was not acquired from review of documents in the public domain. In this case, a newspaper (Landmark) reported on a pending judicial inquiry⁷⁶ identifying the state judge whose conduct was under investigation.⁷⁷ The newspaper's conduct was held to be a violation of Virginia law which made it illegal to "[divulge] the identification of a Judge of a Court not of record, which said Judge was the subject of an investigation and hearing. ..."⁷⁸ Rejecting, *inter alia*, the newspaper's First Amendment defense, the trial court found the newspaper guilty and ordered payment of a fine and court costs.⁷⁹ The Supreme Court of Virginia affirmed the lower court by resolving the First Amendment question through application of the "clear and present danger" test.⁸⁰ It concluded that the three main functions that the statute sought to accomplish⁸¹ justified the belief that, "absent a requirement of confidentiality, the Judicial Inquiry and Review Commission could not function properly or discharge effectively its intended purpose."⁸²

The United States Supreme Court, rejecting the Supreme Court of Virginia's application of the "clear and present danger" test,⁸³ determined that the "narrow and limited question presented ... is whether the First Amendment permits the criminal punishment of third persons who are strangers to the inquiry ... for divulging or publishing truthful information regarding confidential proceedings. ..."⁸⁴ Because the information contained in the article was factually accurate and pertained to a "legislatively authorized inquiry," the Court considered it to be of public significance.⁸⁵ Citing *Mills v. Alabama*, the Court noted that "a major purpose of

⁷⁶The judicial inquiry was being conducted by the Virginia Judicial Inquiry and Review Commission. *Id.* at 831.

⁷⁷*Id.*

⁷⁸*Id.* (quoting VA. CODE ANN. § 2.1-37.13 (Michie 1973) (internal quotation marks omitted). Because such hearings were confidential it was apparent that the paper's acquisition of the information arose from a "leak." Someone had violated the Commission's confidentiality and provided the paper with the information. *Id.*

⁷⁹*Id.*

⁸⁰*Landmark Communications*, 435 U.S. at 833.

⁸¹The three functions identified by the Court were:

[1] protection of a judge's reputation from the adverse publicity which might flow from frivolous complaints, [2] maintenance of confidence in the judicial system by preventing the premature disclosure of a complaint before the Commission has determined that the charge is well founded, and [3] protection of complainants and witnesses from possible recrimination by prohibiting disclosure until the validity of the complaint has been ascertained. *Id.*

⁸²*Id.*

⁸³*Id.* at 842.

⁸⁴*Id.* at 837. In doing so, the Court drew attention to its refusal to consider a situation in which someone illegally obtains information and then divulges it. *Id.* This marks a major distinction between *Landmark* and *Bartnicki*.

⁸⁵*Landmark Communications*, 435 U.S. at 839.

[the First] Amendment [is] to protect the free discussion of governmental affairs.”⁸⁶ Accordingly, the Court found that the “[c]ommonwealth’s interests advanced by the imposition of criminal sanctions [were] insufficient to justify the actual and potential encroachments on freedom of speech and of the press.”⁸⁷

Landmark is distinguishable from the Court’s previous ruling in *Cox*. In *Landmark*, the statute in question provided criminal penalties rather than civil relief for the dissemination of information not yet in the public domain.⁸⁸ Continuing its conservative interpretive approach, the *Landmark* Court provided yet another limited holding, answering only the narrow question presented by the specific facts of the case.⁸⁹

Only one year later the Court again granted review to a case involving the First Amendment and the right to privacy. In *Smith v. Daily Mail Publishing Co.*, the Court considered “whether a West Virginia statute violat[ed] the First Amendment[] . . . by making it a crime for a newspaper to publish, without the written approval of the juvenile court, the name of any youth charged as a juvenile offender.”⁹⁰ In this case, a fourteen-year-old youth shot and killed a fellow classmate at a local school.⁹¹ Having been identified by seven of his classmates, he was arrested by police.⁹² Hearing the report on a police radio, reporters from the *Charleston Daily Mail* and the *Charleston Gazette* went to the school where they learned the assailant’s identity.⁹³ Aware of the statute, the *Daily Mail* refrained from releasing the youth’s name in the story.⁹⁴ The *Gazette*, however, published his name and picture.⁹⁵ Assuming the information to now be “public information” the *Daily Mail* subsequently published the name as well.⁹⁶

Following an indictment against them, the newspapers immediately sought a writ of prohibition against the prosecuting attorney and the circuit court judges claiming that the indictment was based on charges arising from statutes that oppose, *inter alia*, the First Amendment.⁹⁷ Considering the Supreme Court’s previous rulings on this issue, the West Virginia Supreme Court reasoned “that the statute operated as a prior restraint on speech and that the State’s interest in protecting the identity of the

⁸⁶*Id.* at 838 (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966) (internal quotation marks omitted)).

⁸⁷*Id.*

⁸⁸*Id.* at 840.

⁸⁹*Id.* at 838.

⁹⁰*Smith*, 443 U.S. 97, 98 (1979).

⁹¹*Id.* at 99.

⁹²*Id.*

⁹³*Id.*

⁹⁴*Id.*

⁹⁵*Smith*, 443 U.S. at 99.

⁹⁶*Id.* at 100.

⁹⁷They filed an original jurisdiction petition directly with the West Virginia Supreme Court. *Id.*

juvenile offender did not overcome the heavy presumption against the constitutionality of such prior restraints” and issued the writ of prohibition.⁹⁸

On appeal, the United States Supreme Court affirmed with a typical, narrow holding limited only to the specific facts of the case.⁹⁹ Again refusing to set a broad-based standard, the Court looked only to the facts, the disclosure of a juvenile offender’s identity, and held that the State’s interests in protecting the anonymity of the juvenile is not sufficient to justify criminal sanctions against those who disseminate such information.¹⁰⁰ Recognizing that no prior ruling specifically controlled, the Court did acknowledge that “recent decisions demonstrate that state action to punish the publication of truthful information seldom can satisfy constitutional standards.”¹⁰¹ Distinguishing *Cox*, *Landmark* and *Oklahoma Publishing*, the Court still determined that “if the information is lawfully obtained . . . the state may not punish its publication except when necessary to further an interest more substantial than is present here.”¹⁰² It is important to note, however, that such a ruling, while seemingly detrimental to privacy interests, remains extremely limited in its applicability.¹⁰³ Justice Rehnquist’s concurrence in *Smith v. Daily Mail Publishing Co.*, stated that “recognition [of the importance of free speech] has not meant that [it] always prevails over competing interests of the public So valued is the liberty of speech . . . there is a tendency in cases such as this to accept virtually any contention supported by a claim of interference with speech or press.”¹⁰⁴ Clearly, this leaves the door open to the possibility that privacy interests, properly protected by a statute, may withstand First Amendment scrutiny.¹⁰⁵

The steady progression of cases until to this point was followed by a ten year dry spell of judicial activity in this area. It was not until 1989 that the Supreme Court, in *The Florida Star v. B.J.F.*,¹⁰⁶ considered the clash between the First Amendment and privacy, holding that a Florida statute, which made it unlawful to “print, publish or broadcast . . . in any instrument of mass communication”¹⁰⁷ the name of a sexual assault victim, did not comport with the First Amendment.¹⁰⁸

⁹⁸*Id.*

⁹⁹*Id.* at 105.

¹⁰⁰*Smith*, 443 U.S. at 106.

¹⁰¹*Id.* at 102.

¹⁰²*Id.* at 104.

¹⁰³Despite continued rulings in favor of the First Amendment, the United States Supreme Court has, in every case, been clear that its rulings are not to be interpreted broadly. *See* *Landmark Communications v. Virginia*, 435 U.S. 829 (1978); *Oklahoma Publ’g Co. v. Oklahoma*, 430 U.S. 308 (1977); *Cox Broad. Corp., v. Cohn*, 420 U.S. 469 (1975).

¹⁰⁴*Smith*, 443 U.S. at 106-07.

¹⁰⁵*Bartnicki v. Vopper*, *see infra* Section IV, poses a situation that may justify such suppression.

¹⁰⁶491 U.S. 524 (1989).

¹⁰⁷FLA. STAT. ANN. § 794.03 (West 1987).

¹⁰⁸*The Florida Star*, 491 U.S. at 526.

In that case, the appellee, B.J.F., reported that she had been robbed and sexually assaulted.¹⁰⁹ The report generated from her interview with police included her identity and was placed in the police department's pressroom where a reporter-trainee of *The Florida Star* copied it.¹¹⁰ In violation of its own policy, *The Florida Star* then included the victim's identity in an article it published.¹¹¹ Subsequently, B.J.F. filed suit claiming that *The Florida Star* had violated Florida law by publishing her identity.¹¹² After rejecting *The Florida Star's* motion to dismiss on First Amendment grounds, the trial judge ruled that "§ 794.03 [the statute in question] was constitutional because it reflected a proper balance between the First Amendment and privacy rights, as it applied only to a narrow set of 'rather sensitive . . . criminal offenses.'" ¹¹³ The First District Court of Appeals affirmed and the Supreme Court of Florida denied discretionary review.¹¹⁴ Consequently, the United States Supreme Court granted review.

Once again recognizing the "narrow holdings" of the past,¹¹⁵ the Court ultimately held in favor of the First Amendment and reversed the lower court's imposition of damages against *The Florida Star*.¹¹⁶ Because the information had not yet "entered the public domain," the Court distinguished the case from *Cox* and determined that the *Smith v. Daily Mail Publishing Co.* mode of analysis should apply.¹¹⁷

Applying this test, the Court first found that the newspaper had "lawfully obtained" the information because it was readily made available by the police.¹¹⁸ The Court did not, determine that the "state's interests" (protection of a victim's anonymity) justified suppression under the facts of this case. The Court did clearly state, though, that "[it does] not rule out the possibility that, in a proper case, imposing civil sanctions for publication of the name of a rape victim might be so overwhelmingly necessary to advance these interests as to satisfy the *Daily Mail* standard."¹¹⁹ Additionally, the Court called into question the actual effectiveness of

¹⁰⁹*Id.* at 527.

¹¹⁰*Id.*

¹¹¹*Id.* at 528.

¹¹²*Id.*

¹¹³*The Florida Star*, 491 U.S. at 528.

¹¹⁴*Id.* at 529.

¹¹⁵"Our cases have carefully eschewed reaching this ultimate question, mindful that the future may bring scenarios which prudence counsels our not resolving anticipatorily." *Id.* at 532. Such a position by the Court may prove beneficial for privacy interests in *Barnicki*, *infra* Section IV.

¹¹⁶*Id.* at 541.

¹¹⁷*Id.* at 533. The Court was referring to the *Daily Mail* standard which holds that "[I]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." *Smith*, 433 U.S. at 103.

¹¹⁸*The Florida Star*, 491 U.S. at 536.

¹¹⁹*Id.* at 537.

the Florida law because it only limited disclosure in the context of “instrument[s] of mass communication.”¹²⁰

Last, but certainly not least, in 1991 the Court heard *Cohen v. Cowles Media Co.*¹²¹ Unlike many of the Court’s prior rulings, the media defendant in *Cohen* was held liable for damages, notwithstanding First Amendment protection.¹²² In this case, Dan Cohen, a Republican associated with the Republican gubernatorial campaign of 1982, approached members of the press of two different newspapers with information regarding one of the candidates.¹²³ In doing so, he made it abundantly clear that disclosure of this information was premised on a promise of confidentiality.¹²⁴ Despite a promise to the contrary, the editorial staffs of the two newspapers decided to disclose Cohen’s identity in their stories.¹²⁵ Subsequently, Cohen sued claiming fraudulent misrepresentation and breach of contract.¹²⁶

Rejecting the newspapers’ First Amendment argument, the trial court awarded a verdict in favor of Cohen.¹²⁷ The Minnesota Court of Appeals reversed the fraudulent misrepresentation claim but upheld the breach of contract claim.¹²⁸ Subsequently, the Minnesota Supreme Court reversed the breach of contract claim (under promissory estoppel) reasoning that it is still necessary to weigh the competing First Amendment interests when determining whether a free speech violation has occurred.¹²⁹ In so doing, the court concluded that the “enforcement of the promise of confidentiality under a promissory estoppel theory would violate [the] defendant’s First Amendment rights.”¹³⁰

Surprisingly, in light of the previous cases discussed, the United States Supreme Court reversed the Minnesota Supreme Court finding no First Amendment violation.¹³¹ The Court determined that the *Daily Mail* rule, generally allowing publication of lawfully obtained information absent a need to further a state interest of the highest order, was inapplicable in this case.¹³² Rather, the Court classified the promissory estoppel cause of action as a law of “general applicability.”¹³³ In short,

¹²⁰*Id.* at 540.

¹²¹501 U.S. at 663 (1991).

¹²²*Cohen*, 501 U.S. at 663.

¹²³*Id.*

¹²⁴*Id.*

¹²⁵*Id.* at 666.

¹²⁶*Id.*

¹²⁷*Cohen*, 501 U.S. at 666.

¹²⁸*Cohen v. Cowles Media Co.*, 445 N.W.2d 248, 260 (Minn. Ct. App. 1989), *aff’d in part, rev’d in part*, 457 N.W.2d 199, 205 (Minn. 1990).

¹²⁹*Cohen v. Cowles Media Co.*, 457 N.W.2d 199, 205 (Minn. 1990), *rev’d*, 501 U.S. 663 (1991).

¹³⁰*Id.*

¹³¹*Cohen*, 501 U.S. at 669.

¹³²*Id.*

¹³³*Id.* at 670.

“generally applicable” laws fail to single out a particular entity; rather, they equally restrict the citizenry at large.¹³⁴ Consequently, a separate line of case law was determined to govern the facts of this case.¹³⁵

It has been held that “generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news.”¹³⁶ Accordingly, the press has remained limited in its newsgathering activities in many areas.¹³⁷ This being the case, the Court determined that “enforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations.”¹³⁸ Accordingly, the Court distinguished *Florida Star* and *Daily Mail* by pointing out the fact that they involved statutes that specifically limited the content of publications.¹³⁹ Here, however, the only question at issue was whether the press should be held to its promise of confidentiality. Such a requirement in no way attempts to specifically limit speech, and, therefore, escapes the strict scrutiny test of *Florida Star* and *Daily Mail*.¹⁴⁰

IV. THE CURRENT CLASH BETWEEN THE FIRST AMENDMENT AND PRIVACY

Against this thirty-year background of case law, the Supreme Court has chosen, in *Bartnicki v. Vopper*, to once again address this controversial issue. Only this time it will do so in the context of a federal statute and as a result of a split in decisions among the federal circuit courts of appeals. Perhaps it is time for the Court to provide some finality in this area rather than crafting its holding as narrowly as it has chosen to do in the past.

A. *State of the Law in the D.C. Circuit – Bartnicki v. Vopper*

From 1992 to 1994 the Wyoming Valley West School District was in contract negotiations with the Wyoming Valley West School District Teacher’s Union.¹⁴¹ The negotiations were of significant public interest and served to generate frequent

¹³⁴*See id.*

¹³⁵*Id.* at 669.

¹³⁶*Cohen*, 501 U.S. at 669.

¹³⁷*See Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977) (stating that press may not publish copyrighted materials); *Branzburg v. Hayes*, 408 U.S. 665 (1972) (stating that reporters must respond to grand jury subpoena and reveal confidential source if asked to do so); *Associated Press v. NLRB*, 301 U.S. 103 (1937) (stating that media must obey the National Labor Relations Act).

¹³⁸*Cohen*, 501 U.S. at 670.

¹³⁹*Id.*

¹⁴⁰The dissent in *Cohen* stated that this case was not one of “generally applicable laws.” *Cohen*, 501 U.S. at 674 (Blackmun, J., dissenting). However, even if it were, the dissenters felt the result should differ. *Id.* The dissent, citing *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), reminded the majority that *Hustler* involved “generally applicable laws” as well. *Id.* Yet, it was held that suppression of a satirical critique violated the First Amendment. *Cohen*, 501 U.S. at 674.

¹⁴¹*Bartnicki v. Vopper*, 200 F.3d 109, 112-13 (3d Cir. 1999), *aff’d*, 532 U.S. 514 (2001).

media attention. Gloria Bartnicki (plaintiff), the chief negotiator, and Anthony Kane (plaintiff), a teacher, served as the primary negotiators.¹⁴² Jack Yocum, one of several defendants, served as president of a local taxpayer organization opposing the union proposals.¹⁴³ In 1993, Bartnicki and Kane participated in a phone conversation that was intercepted and recorded by an anonymous individual who subsequently left the recording in Yocum's mailbox.¹⁴⁴ Because the tape contained statements amounting to the use of violence against the School Board, Yocum seized the opportunity and passed the tape along to the local media who, in turn, disseminated it over the radio, on television and in some newspapers.¹⁴⁵

Bartnicki and Kane sued Yocum and several media defendants alleging violations of the Federal Wiretap Act¹⁴⁶ and several state laws.¹⁴⁷ The district court denied each party's motion for summary judgment and determined that the federal statute in question did not violate the First Amendment.¹⁴⁸ On appeal to the Third Circuit Court of Appeals, the defendants successfully argued that application of §§ 2511 and 2520,¹⁴⁹ in relevant part, violated their First Amendment rights¹⁵⁰ by imposing upon them civil liability for disclosure of communications intercepted in violation of the Act.

Recognizing the inapplicability and limited nature of past holdings,¹⁵¹ the court declined to "apply[] a test gleaned from *Cox* and its progeny, [but elected to review] First Amendment principles in light of the unique facts and circumstances of this case."¹⁵² First, the court questioned the district court's "general applicability" analysis, but failed to address it at length because, even if correct, the court felt that the district court applied the *Cohen* rule far too broadly, thus reaching an immature conclusion.¹⁵³ A finding of "generally applicable" status does not, per *Cohen*, justify suppression of speech, as the district court's quick resolution of the issue implies. Rather, in *Cohen*, the Court stated that, "enforcement of such general laws against the press is *not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations*" (emphasis added).¹⁵⁴ Therefore, a balancing

¹⁴²*Id.* at 113.

¹⁴³*Id.*

¹⁴⁴*Id.*

¹⁴⁵*Id.*

¹⁴⁶28 U.S.C. § 2510 et seq. (2000).

¹⁴⁷For purposes of this Note, only the federal law claims will be addressed.

¹⁴⁸*Bartnicki*, 200 F.3d at 113. In so doing the district court held, in reliance upon *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), that the statutes are laws of "general applicability" and of no offense to the First Amendment. *Id.*

¹⁴⁹*See supra* Section I for relevant text of the statutes.

¹⁵⁰*Bartnicki*, 200 F.3d at 129.

¹⁵¹*See supra* notes 36-139, and accompanying text.

¹⁵²*Bartnicki*, 200 F.3d at 117.

¹⁵³*Id.* at 118.

¹⁵⁴*Id.* (citing *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669-70 (1991)).

of interests is still necessary. The primary question then became whether to use the standard of “strict” or “intermediate” scrutiny.¹⁵⁵

Finding intermediate scrutiny applicable, the court considered two arguments posed by the government.¹⁵⁶ The first argument attempted to classify the defendant’s actions as “expressive conduct” rather than “pure speech,” thus justifying its evasion of strict First Amendment scrutiny.¹⁵⁷ So categorized, the conduct would fall under intermediate scrutiny analysis as expressed in *United States v. O’Brien*.¹⁵⁸ In that case, the Court reasoned that “when ‘speech’ and ‘nonspeech’ [sic] elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech [sic] elements can justify incidental limitations on First Amendment freedoms.”¹⁵⁹ Rejecting this argument, the *Bartnicki* court found that the acts of “disclosing” and “publishing” constitute speech and not expressive conduct, thus invalidating the government’s intermediate scrutiny argument.¹⁶⁰

The court did accept the government’s second argument favoring the use of intermediate scrutiny based on “content-neutral” regulation.¹⁶¹ Citing *Clark v. Community for Creative Non-Violence*,¹⁶² the court recognized that such restrictions are valid provided they “are [1] justified without reference to the content of the regulated speech, [2] that they are narrowly tailored to serve a significant governmental interest, and [3] that they leave open ample alternative channels for communication of information.”¹⁶³ Such a determination, however, is only half the battle. In balancing state interests (defined by the purpose of the law) against First Amendment concerns, the court ultimately determined that (1) the manner in which the government claimed the statute serves its interests is too “indirect” to justify suppression,¹⁶⁴ and (2) the statute is not sufficiently narrow to accomplish state interests without unnecessarily interfering with the First Amendment.¹⁶⁵ Accordingly, the Third Circuit held that the statute in question violated the First Amendment.¹⁶⁶

Dissenting in *Bartnicki*, Judge Pollak voiced disagreement only with the majority’s application of intermediate scrutiny.¹⁶⁷ Feeling the “state’s interests” and

¹⁵⁵*Id.* at 119.

¹⁵⁶*Id.*

¹⁵⁷*Bartnicki*, 200 F.3d at 119.

¹⁵⁸391 U.S. 367 (1968).

¹⁵⁹*Id.* at 376.

¹⁶⁰*Bartnicki*, 200 F.3d at 120-21.

¹⁶¹*Id.* at 121.

¹⁶²468 U.S. 288, 293 (1984).

¹⁶³*Bartnicki*, 200 F.3d at 121.

¹⁶⁴*Id.* at 126.

¹⁶⁵*See id.*

¹⁶⁶*Id.* at 129.

¹⁶⁷*Id.* at 130.

the “prohibition on third-party disclosures” to be substantially related, he reasoned that “[u]nless disclosure is prohibited, there will be an incentive for illegal interceptions [and] . . . the damage caused . . . will be compounded.”¹⁶⁸ He also recognized the substantial state legislative support (distinguishing *Landmark*) as evidence of widespread support for limited suppression of disclosure.¹⁶⁹

B. State of the Law in the 3rd Circuit – Boehner v. McDermott

In December of 1996 John Boehner, a plaintiff and a member of the House of Representatives, participated in a conference call with several other high-ranking Republicans regarding their strategy in response to an expected announcement by the Ethics Subcommittee that had been preparing to investigate ethics violations of then-Speaker Newt Gingrich.¹⁷⁰ Boehner’s participation in the call occurred from his cell phone while driving through northern Florida.¹⁷¹ Two Florida residents, using a radio scanner, intercepted and recorded the conversation.¹⁷² At the recommendation of local Democrats, the couple delivered the recording to Representative James McDermott, the defendant and ranking Democratic member of the House Ethics Committee, along with a letter indicating how the conversation had been intercepted.¹⁷³ Subsequently, McDermott gave copies to three national media sources that, in turn, published the “highly public [and] significant” information.¹⁷⁴

Following publication of the stories, the Florida couple was prosecuted under the criminal provisions of the Federal Wiretap Act.¹⁷⁵ One year later, Boehner filed a civil action against McDermott pursuant to § 2520 claiming McDermott had violated § 2511(1)(c).¹⁷⁶ McDermott successfully moved to dismiss, claiming the statute violated his First Amendment right against punishment for publication of truthful and lawfully obtained information of public significance.¹⁷⁷ Boehner then appealed to the D.C. Circuit Court of Appeals.¹⁷⁸

In reversing the trial court’s findings with regard to the First Amendment, Judge Randolph, in an extremely logical and well-reasoned opinion, began by simply

¹⁶⁸*Bartnicki*, 200 F.3d at 133.

¹⁶⁹Calling into question the wisdom behind the majority’s decision, Judge Pollak pointed out that the decision “spells the demise of a portion of more than twenty other state statutes.” *Bartnicki*, 200 F.3d at 134.

¹⁷⁰*Boehner v. McDermott*, 191 F.3d 463, 465 (D.C. Cir. 1999).

¹⁷¹*See id.*

¹⁷²*See id.*

¹⁷³*See id.*

¹⁷⁴This information was publicly and politically significant because Speaker Gingrich had agreed not to strategize regarding the possible investigation by the House Ethics Committee. This conversation indicated conduct that possibly violated that agreement. *See id.*

¹⁷⁵*See* 18 U.S.C. §§ 2511(1)(a) (2002), 2511(4)(b)(ii) (2002).

¹⁷⁶*See supra* Section I for text of statutes.

¹⁷⁷*See Boehner*, 191 F.3d at 466.

¹⁷⁸*See id.* at 463.

challenging McDermott's claim that his actions even amounted to "speech."¹⁷⁹ McDermott had claimed "this [to be] core political speech [lying] at the very heart of the First Amendment."¹⁸⁰ The court did not agree and noted that "the tape [did] . . . contain speech about political matters . . . [b]ut the speech is not McDermott's and § 2511(1)(c) does not render him liable for anything anyone said on the recording. [I]t is his conduct in delivering the tape that gives rise to his potential liability."¹⁸¹ Recognizing the possibility of "communicative elements" in his actions, the court concluded that the "*O'Brien* framework is the proper mode of First Amendment analysis."¹⁸² Recall that the *O'Brien* analysis applies to generally applicable laws containing content-neutral prohibitions that create incidental burdens on speech.¹⁸³ It holds that such prohibitions are justified if they further "an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the . . . restriction . . . is no greater than is essential to the furtherance of that interest."¹⁸⁴

Ultimately finding the state's interest to be "substantial," the court reasoned that the provisions of the statute actually promote free speech rather than detract from it.¹⁸⁵ By failing to insulate the discloser from liability, others may feel free to speak candidly.¹⁸⁶ Absent such a law, it is conceivable that people would refrain from readily speaking their minds for fear that their conversation is not "private."¹⁸⁷ Justification was also found in the deterrent effect the statute arguably provides.¹⁸⁸ Likening the recorded interception to stolen property, the court compared the statute in question to laws prohibiting the receipt of stolen goods.¹⁸⁹ Deterrence of the original offense as the common motivation, the court held such an interest as satisfying the *O'Brien* test.¹⁹⁰

Rejecting McDermott's contention that his "lawful" acquisition of the information placed him under the protection of the rule set forth in *Florida Star*, the court distinguished the two cases by noting that the respective statutes differed in scope, purpose, and content.¹⁹¹ More significantly, however, the court analyzed a

¹⁷⁹*Id.* at 466.

¹⁸⁰*Id.*

¹⁸¹*Id.* at 466-67.

¹⁸²*Boehner*, 191 F.3d at 467; *see also* United States v. O'Brien, 391 U.S. 367, 376 (1968).

¹⁸³*Boehner*, 191 F.3d at 467.

¹⁸⁴*Id.* at 468.

¹⁸⁵Recognizing that the interception of a conversation violates the "freedom not to speak publicly," the court concluded that laws prohibiting such conduct, in fact, bolster free speech. *Id.* at 469.

¹⁸⁶*See id.* at 470.

¹⁸⁷*Id.* at 468.

¹⁸⁸*Boehner*, 191 F.3d at 468-69.

¹⁸⁹*Id.* at 469-70.

¹⁹⁰*Id.*

¹⁹¹*See id.* at 471-72.

footnote provided by the Court in *Florida Star*. In relevant part, the footnote stated that “the *Daily Mail* principle does not settle the issue whether, in cases where information has been acquired unlawfully by a newspaper or by a source, [the] government may ever punish not only the unlawful acquisition, but the ensuing publication as well.”¹⁹² The court went on to reason that “regardless whether the illegality is committed by a newspaper’s reporter or by a source, if the newspaper publishes the illegally obtained information, the First Amendment may not shield it from punishment.”¹⁹³ This directly opposed McDermott’s argument that his “innocent” involvement protected him from liability.¹⁹⁴ According to the court, he was anything but “innocent.”¹⁹⁵ The fact that the Florida couple sought immunity in return for disclosing the tape implies that McDermott, or someone speaking on his behalf, led them to believe it could be granted.¹⁹⁶ Such conduct amounts, at least, to participation.¹⁹⁷

Citing various cases demonstrating instances in which suppression has been upheld based on a duty of confidentiality,¹⁹⁸ the court noted that a similar “duty” arose from § 2511(1)(c) of the Federal Wiretap Act.¹⁹⁹ McDermott obtained the information under the duty of nondisclosure imposed by the statute.²⁰⁰ In short, the *Boehner* court found ample “state interests” to justify suppression of this information, ever mindful of the possibility that McDermott’s “disclosure” may not even amount to “speech” protected under the First Amendment.²⁰¹ Accordingly, the D.C. Circuit has held the statute in question to be constitutional and not a violation of the First Amendment.²⁰²

V. WHO’S RIGHT – A SUGGESTION FOR THE SUPREME COURT

Like many cases that come before the Supreme Court, this one presents an extremely difficult question in that the opposing arguments are each grounded upon constitutional principles that most, if not all, Americans consider fundamental. Mindful of the First Amendment’s history²⁰³ and its evolution to its present day

¹⁹²*Id.* at 472 (citing *The Florida Star*, 491 U.S. at 535).

¹⁹³*Boehner*, 191 F.3d at 473.

¹⁹⁴*Id.* at 476.

¹⁹⁵*Id.*

¹⁹⁶*Id.*

¹⁹⁷*Id.*

¹⁹⁸*Boehner*, 191 F.3d at 476.

¹⁹⁹*Id.* at 477.

²⁰⁰*Id.*

²⁰¹*Id.*

²⁰²*Id.* at 478.

²⁰³The freedom of speech and press in the United States had its origins in the common law tradition of England. However, at the time of its inception (shortly after the Constitutional Convention in 1791) it was not clear as to the extent to which “free speech” should reach. In England, the freedom to speak and publish as one desired did exist; however, its limitations arose from its failure to protect the speaker/publisher from state action after the fact.

pinnacle as a quintessential symbol of freedom, many advocates of free speech argue that the slightest submission on their part to the State may serve as the slippery slope that will result in suppression of the Freedom of Speech. On the other hand, should advocacy of the right to speak come at the expense of yet another constitutionally protected right – privacy? Is not privacy a right most people consider paramount? After all, it is fairly safe to assume that the average citizen is more likely to fall into the category of people using cell phones (like Representative Boehner or Gloria Bartnicki) than the category of people intercepting phone conversations. It would stand to reason, then, that most would relate more readily to the privacy interest, rather than the free speech interest.

These assumptions, whether right or wrong, are not alone sufficient to resolve the conflict. They only attempt to illustrate the possible impression the general public may have with regard to this clash of constitutional norms. Ultimately, resolution of such conflicts must flow from the logical analysis of constitutional precedent and the rule of law upon which the rights in question are grounded. Accordingly, while emotional arguments may appear persuasive, this Note will base its conclusion primarily on the rule of law as interpreted by the Supreme Court.

Which of these rights, then, if any, transcends the other? Under what circumstances, if ever, might one take precedent over the other? Due to the broad number of arguments and cases supporting, in whole or in part, the many views in favor of both “privacy” and “free speech,” it is with deliberate caution that this Note will address only a few of them to demonstrate why privacy should supercede free speech in this situation. It would be impractical to address each and every tangential argument posed by advocates on either side, while attempting to maintain focus on the basic constitutional question involved. That question being, in its simplest form, whether the privacy interests held by a participant in a phone conversation outweigh the free speech interests (with respect to disclosure) held by a third party who has been given an illegally (pursuant to the Federal Wiretap Act) obtained recording of the phone conversation. This section will proffer a solution in favor of the right to privacy while attempting to sufficiently honor the First Amendment’s right to Free Speech.

A. The Constitutional Right to Privacy

As distinguished from the First Amendment’s guarantee of Free Speech, the right to privacy is nowhere mentioned in the text of the constitution. Even the youngest school child probably knows that all Americans presently enjoy such a right. If, however, such a right exists but is not directly contained within the text of the constitution, from where, then, does it derive its legitimacy? Furthermore, if legitimate, must such a non-textual right automatically be pre-empted by a right like Free Speech that clearly appears in the constitutional text?

Therefore, the citizenry were protected only from “prior restraint” by the state. While the government could not stop a person from speaking, it was perfectly legal to later punish the speaker for what was said. The Framers wrote the First Amendment in this context, never really distinguishing it from its English counterpart. See PAUL BREST ET AL., *PROCESSES OF CONSTITUTIONAL DECISION MAKING—CASES AND MATERIALS* 61 (Aspen Law & Business 2000).

It has been said that Americans, in general, favor the right to privacy far more than their European ancestors. Darien McWhirter and Jon Bible illustrate this phenomenon in the following example:

After the United States purchased the territory of Louisiana thousands of people from Kentucky floated down the Mississippi river to take up residence in New Orleans. These supposedly primitive Kentucky people were appalled by the architecture they encountered. The homes required people to walk through a bedroom to get to a living room, and in many cases the stairways joining sleeping and living quarters were outside the houses for everyone to see! The new Americans soon built homes with hallways and indoor stairways, even though by European standards such things were considered a waste of indoor space.

Other examples abound. Americans excelled at building fences and invented both barbed wire and chain link. When railroads became popular it was an American who came up with the private Pullman compartment. In America, even the cheapest motel provides each room with a “private” bathroom; indeed, many Americans consider the lack of such “private” facilities the worst part of travel in Europe. When Americans felt they could not get enough privacy in either small towns or cities, they invented suburbs. In short, Americans have a significant concern with privacy and in many cases have made sacrifices to satisfy this desire to “be let alone.”²⁰⁴

Such examples raise the question as to why such a right was not explicitly granted. Alternatively, however, such a seemingly gross “oversight” on the part of the framers may indicate their acceptance of such a right as inherent and in need of no constitutional affirmation. Judge Lambros, writing in *United States v. Perkins*,²⁰⁵ recognized that judicial protection of privacy rights are becoming more necessary with modern technological advancements. He wrote:

The authors of the Constitution were perhaps not as concerned with the protection of this right as they should have been. But there were so few in this vast land that expressed concern for protection of privacy [it] must have hardly seem justified. Through the Fourth and Fifth Amendments, however, all the protection needed was given; express delineation of a right to privacy was not, and is not necessary.²⁰⁶

Nevertheless, its textual absence required the Supreme Court to justify its existence via originalist theories of constitutional interpretation.

Justice Louis Brandeis is credited with bringing the privacy interest to the Court.²⁰⁷ Following his appointment by President Wilson in 1916, Brandeis became

²⁰⁴DARIEN A. MCWHIRTER & JON D. BIBLE, *PRIVACY AS A CONSTITUTIONAL RIGHT – SEX, DRUGS AND THE RIGHT TO LIFE* 9 (Quorum Books 1992).

²⁰⁵383 F. Supp. 922, 926 (N.D. Ohio 1974).

²⁰⁶*Id.* at 926.

²⁰⁷*See supra* note 15.

the occupant of what would become known as the Court's "privacy seat."²⁰⁸ As distinguishable from prior Supreme Court Justices, Brandeis' intent with regard to privacy was to establish its constitutional legitimacy. However, as is the case in American jurisprudence, judicial activism can only occur when a "case or controversy" is brought before the Court.²⁰⁹ Accordingly, Brandeis' agenda remained restrained until 1928 when the Court heard *Olmstead v. United States*.²¹⁰ As mentioned in Section I, *Olmstead* is primarily recognized for Brandeis' rigorous dissent to the majority's failure to honor privacy interests.²¹¹ Despite his efforts, though, Brandeis was unable to sway the Court to establish privacy as a constitutional right.

Following Brandeis' retirement, his replacement, William Douglas, continued to carry the torch while occupying the "privacy seat." Contrary to common occurrence, the incoming Justice shared the views of his outgoing counterpart.²¹² In 1965 Justice Douglas, writing for the majority in the seminal case of *Griswold v. Connecticut*,²¹³ finally established privacy as a constitutionally protected right. In that case, the defendants had been convicted under a law that prohibited, among other things, the use of a contraceptive.²¹⁴ Refusing to uphold the law in conformity with the *Lochner* line of precedent, the Court instead focused on the sacred institution of marriage in which the use of the contraceptive device took place.²¹⁵ Considering the circumstances, the Court felt that legislative intrusion by the state into the bedroom of a married couple violated a more fundamental right than the right held by the state legislature to regulate in this area. Finding no textual support in the Constitution, however, Douglas drew comparisons to peripheral rights accompanying various express rights granted under the Bill of Rights.

For example, he reasoned, that the "association of people" and "the right to educate a child in a school of the parent's choice" is nowhere found in the text of the Bill of Rights.²¹⁶ Nevertheless, such rights have been sustained under the First Amendment as being peripherally implied.²¹⁷ Accordingly, the First Amendment is said to have a "penumbra where privacy is protected from governmental intrusion."²¹⁸ Similar "penumbras," or "zones of privacy," were found to exist with

²⁰⁸See McWHIRTER & BIBLE, *supra* note 204, at 91.

²⁰⁹See U.S. CONST. ART. III, § 2, cl. 1.

²¹⁰277 U.S. 438 (1928). Recall that *Olmstead* involved the tapping of phone lines without any actual trespass onto the suspect's property.

²¹¹See *supra* notes 13-15.

²¹²See McWHIRTER & BIBLE, *supra* note 204, at 91.

²¹³381 U.S. 479 (1965).

²¹⁴See *id.* at 480 (referring to CONN. GEN. STAT. §§ 53-32, 54-196 (1958 rev.)).

²¹⁵*Id.* at 481.

²¹⁶*Id.* at 482.

²¹⁷See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

²¹⁸*Griswold*, 381 U.S. at 483.

regard to the Third, Fourth, and Fifth Amendments as well.²¹⁹ Accordingly, the Court concluded that the “right of privacy . . . is a legitimate one”²²⁰ and held that the law restricting the use of contraceptives violated the more sacred right of privacy as enjoyed within a marriage.

Two years after *Griswold* the Court, in *Katz v. United States*,²²¹ finally overturned *Olmstead* and adequately honored Brandeis’ dissent. The years following *Katz* marked a turning point in privacy jurisprudence particularly in the area of criminal prosecutions. The Fourth Amendment experienced heavy constitutional consideration with respect to the scope of the “search and seizure” provisions contained therein. In any event, the efforts of Justices Brandeis and Douglas ultimately served to provide the American people with the constitutional right to privacy. This right is now challenged by First Amendment jurisprudence.

B. A Threshold Question – Is this Speech?

Obviously, the easiest way to evade a First Amendment challenge is to find that the activity a statute seeks to regulate is not “speech.” While easy enough to assert, in practice such an undertaking may pose more problems than one might think. In so doing, however, the first step is to define “speech.” In its simplest form speech might be defined as any oral or written communication. In fact, such a definition was the only one that had ever been contemplated, until, in *Stromberg v. California*,²²² when the Court first considered a communicative action as speech protected under the First Amendment. In that case a nineteen-year-old camp counselor was charged with the crime of “raising the red flag.”²²³ California had outlawed such conduct due to the red flag’s association with communism.²²⁴ Finding her actions to be “symbolic speech” the Court struck down the law finding the state’s interest in forbidding such conduct insufficient to justify suppression.²²⁵ Since 1931, the Court has continued to expand that which it considers protected “speech” to now include conduct as offensive as desecration of the American flag.²²⁶ Accordingly, conduct having any sort of communicative or symbolic aspect has an excellent chance of qualifying as “speech” under the First Amendment.²²⁷ However, such a broad definition should not serve to eliminate asking the threshold question – “is this speech?”

²¹⁹*See id.* at 485.

²²⁰*Id.* at 486.

²²¹389 U.S. 347 (1967). *See also supra* Section I.

²²²283 U.S. 359 (1931).

²²³*Id.*

²²⁴*Id.*

²²⁵*Id.* at 535-36.

²²⁶*See Texas v. Johnson*, 491 U.S. 397 (1989).

²²⁷*See, e.g., Stromberg and Texas v. Johnson, supra.*

In fact, Judge Randolph, in *Boehner v. McDermott*,²²⁸ began his analysis by asking this very question. Recall that McDermott, a Democratic politician, had received and disclosed a tape-recorded conversation that had been obtained in violation of the Federal Wiretap Act.²²⁹ The conversation involved information that would prove detrimental to Republican interests if made public.²³⁰ Upon receiving the tape, he passed it along to several media sources who, in turn, published its contents.²³¹ His sole defense in the civil suit lodged against him was that he had a free speech right to do whatever he wished with the information.²³² Randolph's simple response was, "what speech?"²³³

In reality, all McDermott did was act as the middle-man. He received the information and passed it along to the next entity. He neither added anything to it nor removed anything from it. Accordingly, the disclosure of the illegally intercepted information did not, in and of itself, convey a view held by McDermott. How can it be said, then, that he attempted to express anything by his conduct? This proves significant because the Court, in *Clark v. Community for Creative Non-Violence*,²³⁴ held that only "expressive" conduct is to be afforded First Amendment protection. Expressive conduct had been determined to have a "communicative" aspect in that it attempts to convey a viewpoint of the speaker.²³⁵ Absent this communicative quality, conduct (even if in the form of spoken words) may not always warrant protection under the First Amendment.²³⁶ Perhaps the only way McDermott could have transmitted this information in a manner that clearly would have qualified as "speech" would have been to read it to the media rather than simply handing them the tape.²³⁷

This particular set of facts serves as the primary distinction between the *Boehner* and *Bartnicki* cases. While each case involves the same statute and the same circumstance involving the disclosure of an illegally obtained phone conversation, in *Bartnicki* one of the defendants is the media. Curiously enough, no media defendant was named in *Boehner* despite involvement not unlike the media defendant in *Bartnicki*. Nevertheless, the *Boehner* court refused to emphatically state how it would rule if a media defendant had been named.²³⁸

²²⁸191 F.3d 463 (1999).

²²⁹*See id.* at 466. The couple had intercepted the cell phone conversation in violation of the Federal Wiretap Act.

²³⁰*Id.* at 465.

²³¹*Id.*

²³²*Id.* at 466.

²³³*Boehner*, 191 F.3d at 466.

²³⁴468 U.S. 288, 294 (1984).

²³⁵*Id.*

²³⁶*Id.* at 294-95.

²³⁷*See Boehner*, 191 F.3d at 467.

²³⁸*See id.* at 471.

Since the Supreme Court has chosen to review *Bartnicki* rather than *Boehner*, undoubtedly due to media involvement, it is fair to assume that it will characterize the defendants' activities as "speech." Perhaps appropriately so - for once information is disseminated "in print" it is much more difficult to say that "speech" has not occurred. The question that arises is whether media involvement should greatly affect the analysis. Nevertheless, it is extremely significant that the "speech" in question in both these cases is suspect. It is not speech in the purest sense and, therefore, should not be treated as such.

C. A Prima Facie Case for the Constitutionality of the Federal Wiretap Act

Simply because a statute seems to oppose free speech on its face does not, *per se*, mean that it will fall prey to a First Amendment challenge. To believe so would be to hold that free speech is an absolute right. In reality, very few rights, if any, enjoy complete autonomy from all government regulation. Perhaps the most well known restriction on speech is the prohibition against shouting "fire" in a crowded theater and causing a panic.²³⁹ Basing its holding on the "clear and present" danger test, the Court has held that the result from such conduct justifies suppression. Accordingly, not all speech is protected.

Several Supreme Court decisions analogously demonstrate the inherent constitutional legitimacy of the Federal Wiretap Act.²⁴⁰ For example, in *Zacchini v. Scripps-Howard Broadcasting Co.*,²⁴¹ the Court upheld laws prohibiting the disclosure of lawfully obtained trade secrets. In *Harper & Row Publishers v. Nation Enters.*,²⁴² the Court authorized civil penalties against those who lawfully obtain but unlawfully publish copyrighted materials. More importantly, though, the Court acknowledged "a concomitant freedom not to speak publicly, which serves the same ultimate end as freedom of speech in its affirmative aspect."²⁴³ While it is true that these cases involve disclosure of information that was actively being protected by the law, it is important to note that the nature of the information was not necessarily "private." Accordingly, the personal and private nature of the information involved in cases like *Bartnicki* and *Boehner* should be considered even more sacred.

Perhaps the best argument against the applicability of these cases is that in each situation there was a preexisting duty to keep silent. Therefore, on their face, it would seem that this line of cases is distinguishable from *Bartnicki*. As noted by the court in *Boehner*, however, the Federal Wiretap Act provided notice to the

²³⁹*See, e.g.,* *Schneck v. United States*, 249 U.S. 47 (1919).

²⁴⁰*See generally In re Motion of Dow Jones & Co.*, 142 F.3d 496 (D.C. Cir. 1998) (stating that grand jurors who lawfully obtain knowledge of a witness' testimony may not disclose the information); *United States v. Aguilar*, 515 U.S. 593 (1995) (prohibiting disclosure of information contained in lawfully obtained wiretaps); *Cohen v. Cowles Media*, 501 U.S. 663 (1991) (enforcing a reporter's promise to maintain the confidentiality of an informant); *Seattle Times Co. v. Rhinehart*, 476 U.S. 20 (1984) (issuing a court order prohibiting disclosure of information obtained during discovery).

²⁴¹433 U.S. 562 (1977).

²⁴²471 U.S. 539 (1985).

²⁴³*Id.* at 559 (citing *Est. of Hemingway v. Random House, Inc.*, 244 N.E.2d 250, 255 (N.Y. 1968).

defendants that they had a statutorily imposed duty not to disclose the information.²⁴⁴ How does the duty imposed by the statute differ from the duty imposed in the above cases? It doesn't. The unauthorized publication of copyrighted materials is far less intrusive than publication of the contents of a private phone conversation. Logically, then, it should be exponentially easier to justify civil penalties for publication of the latter in light of the Court's willingness to uphold laws prohibiting the former.

Accordingly, congressional suppression of the type of "speech" found in the *Bartnicki* case should not necessarily offend the First Amendment. Perhaps, the manner in which the case arrived in court provides free speech advocates with the necessary zeal to oppose the Federal Wiretap Act.²⁴⁵ This is only to say that suppressing the media, as opposed to merely a private individual, tends to raise the eyebrows of First Amendment advocates more quickly.²⁴⁶ Additionally, the fact that the information involved in *Bartnicki* could be classified as "publicly significant" may serve to fan the First Amendment flame. Nevertheless, it is the privacy interest that should serve as the focal point of this dispute. It is a constitutional right equally deserving of protection. Free "speech" is not and has never been considered an impenetrable fortress. As the aforementioned cases demonstrate, its walls have been conquered in many different contexts, the least significant of which pales in comparison to the basic right to privacy in one's personal phone communications.

D. First Amendment Scrutiny – What Standard Applies?

Perhaps the more persuasive argument in favor of privacy lies not in the logical consideration of prior cases permitting various types of suppression, but in the constitutional precedents that focus on the scope and intent of the suppression a statute seeks to achieve. Recognizing that suppression is sometimes permissible, the Court has provided guidelines by which Congress, *via* legislation, may inadvertently restrict the dissemination of information.²⁴⁷ The key element, though, is "inadvertency." Once it is determined that the legislative intent is to specifically restrict speech (meaning its content), the most exacting scrutiny is applied by the Court when evaluating the constitutionality of the legislation.²⁴⁸ Such scrutiny, generally referred to as "strict scrutiny," holds that suppression cannot take place unless it "is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."²⁴⁹ While it is possible to satisfy such a high standard, imposition of strict scrutiny analysis generally spells the demise of the statute against which it is imposed.

²⁴⁴*Boehner*, 191 F.3d at 477.

²⁴⁵*See Bartnicki*, 200 F.3d at 113 (the intercepted information was broadcast on radio and television).

²⁴⁶Note however that the Supreme Court has generally held that the press does not have greater First Amendment rights than an average citizen. *See generally* *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978); *Davis v. Schuchat*, 510 F.2d 731, 734 (1975); *New York Times Co. v. Sullivan*, 376 U.S. 254, 265-66 (1964);

²⁴⁷*See generally*, *United States v. O'Brien*, 391 U.S. 367 (1968).

²⁴⁸*Boos v. Barry*, 485 U.S. 312, 321 (1988).

²⁴⁹*Id.* (quoting *Perry Education Assn. v. Perry Local Educator's Assn.*, 460 U.S. 37, 45 (1983)).

As illustrated by *Florida Star* and its progeny, this standard is extremely difficult to satisfy. Fortunately, it is not applicable here. Rather, a less restrictive level of scrutiny, “intermediate scrutiny,” is applicable in the *Bartnicki* case. Intermediate scrutiny is appropriate when a statute can be characterized as a “law of general applicability” or a “content-neutral law” – both of which describe the Federal Wiretap Act. However, before discussing the justification for and the applicability of “intermediate scrutiny,” it is important to specifically understand why the “strict scrutiny” analysis of *Florida Star* and *Daily Mail* does not apply to the *Bartnicki* case.

Recall for a moment the line of cases described in Section II whose holdings bore the general theme that lawfully obtained information could not be suppressed by the state.²⁵⁰ In those cases, the Court applied strict scrutiny analysis to strike down each of the laws restricting publication of certain information. Accordingly, a limited reading of those cases would suggest that the statute now in question should meet a similar end. However, several points of contention distinguish those cases from *Bartnicki*.

First, none of the cases in Section II dealt with information that was obtained in an improper manner. In each case, the information was gathered either through creative reporting or through some other legal method of newsgathering. Conversely, the information in *Bartnicki* was undoubtedly acquired, at least initially, illegally. This simple fact alone places *Bartnicki* well outside the scope of these cases. It is true that the defendants in *Bartnicki* could argue that their failure to participate in the actual act of interception makes their acquisition of the information “lawful.” However, § 2511(c)’s “knowing or having reason to know” provision places an onus of accountability on the defendants that may well characterize their acquisition as “unlawful.” While such a determination is ultimately for the finder of fact, the possibility of its presence amply serves to distinguish the facts in *Bartnicki*.

Secondly, each of the aforementioned cases either involved statutes that regulated the specific subject of the speech or dealt with information that had already entered the public domain.²⁵¹ Obviously, the information contained in the recording that Mr. Yocum gave to the media had not yet entered the public domain. More significantly, though, as will be discussed below, the Federal Wiretap Act does not make restrictions based on the content or subject matter of the speech involved. It is completely content-neutral and, thus, distinguishable from the laws these cases struck down.

Finally, and probably most importantly, the Court, in each of the aforementioned cases, expressly limited its holdings to the specific facts of each case.²⁵² Recognizing

²⁵⁰See generally *Cohen v. Cowles Media*, 501 U.S. 663 (1991); *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97 (1979); *Landmark Communications v. Virginia*, 435 U.S. 829 (1978); *Oklahoma Publ’g Co. v. District Court*, 430 U.S. 308 (1977); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975);

²⁵¹See *The Florida Star v. B.J.F.*, 491 U.S. 524, 526 (1989) (prohibiting publication of identity of victims of sexual offenses); *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 98 (1979) (prohibiting publication of juvenile offender’s identity); *Oklahoma Publ’g Co. v. District Court*, 430 U.S. 308 (1977) (prohibiting publication of juvenile’s identity who had been charged with crime); *Cox Broad. Corp., v. Cohn*, 420 U.S. 469, 471 (1975) (prohibiting publication of rape victim’s identity).

²⁵²*Bartnicki*, 200 F.3d at 117.

the Court's refusal to state broad-based rules, the *Bartnicki* court noted that such conduct "strongly suggests that a rule for undecided cases should not be derived by negative implication from [these] reported decisions."²⁵³ In fact, the *Florida Star* Court stated that "to the extent sensitive information rests in private hands, the government may under some circumstances forbid its nonconsensual acquisition, thereby bringing outside of the *Daily Mail* principle the publication of any information so acquired."²⁵⁴ Such assertions make clear the Court's belief that properly drafted legislation may permissibly restrict speech. Consequently, *Bartnicki* is not governed by these cases and strict scrutiny is not the applicable standard.

Rather, intermediate scrutiny is the appropriate standard of review when analyzing the civil provisions of the Federal Wiretap Act. Attempting to define "intermediate," the *Bartnicki* court commented that it "varies to some extent from context to context . . . [b]ut it always encompasses some balancing of the state interest and the means used to effectuate that interest."²⁵⁵ In effect, the sufficiency of the "state interest" is reduced from "compelling" to some lesser standard - perhaps "substantial." Dispelling the rationale for the imposition of strict scrutiny, however, is not alone sufficient to find intermediate scrutiny applicable. Independent justification must arise based either on the facts of the case or the manner in which the statute in question seeks to regulate.

Congress' intent, with respect to the disclosure provisions of the Federal Wiretap Act, was not to suppress "speech" *per se*, but, rather, to preserve the privacy rights of the citizenry as technological advancements were making it easier to impinge upon another's private life.²⁵⁶ Furthermore, the Act's restrictions are not applicable against a limited class as were several of the statutes in the *Florida Star* line of cases. Accordingly, the provisions in question can be characterized both as "generally applicable" and "content-neutral." These categorizations provide two justifications for the use of the intermediate scrutiny standard in the *Bartnicki* case.

1. Generally Applicable Laws

Laws of general applicability are simply laws that apply with equal force against everyone without, in this case, any specific relation to suppression of speech. Perhaps the best example was illustrated in *Cohen v. Cowles Media*, in Section II, where the Court held a newspaper liable under the doctrine of promissory estoppel for breaking a confidentiality agreement it made with a source who wished to remain anonymous. The newspaper's First Amendment defense failed in that case because the doctrine upon which the plaintiff sought recovery was a "generally applicable"

²⁵³*Id.*

²⁵⁴*The Florida Star*, 491 U.S. at 534

²⁵⁵*Bartnicki*, 200 F.3d at 124. Interestingly enough, the *Bartnicki* court agrees that "intermediate scrutiny" is the proper standard of review for the Federal Wiretap Act. However, it bases its conclusion only on the fact the law qualifies as "content neutral" and "generally applicable," thus ignoring a third justification based on the reasoning of *O'Brien*. *See id.* at 123.

²⁵⁶Notice that the Act prohibits many different uses of illegally obtained information. *See* 18 U.S.C. §§ 2511 (1)(c), 2511(1)(d).

law whose operation was not intended to act as a regulation on communicative actions. Promissory estoppel, in that case, had nothing to do with suppressing speech, yet it still managed to have an incidental effect on the newspaper's ability to divulge the identity of its source. Accordingly, the Court held that "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news."²⁵⁷ More importantly, however, the Court affirmed its prior holding that "the publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others."²⁵⁸ Therefore, the presence of a media defendant in the *Bartnicki* case should not affect the Court's analysis. Clearly, the *Cohen* Court refused to insulate the media from the same scrutiny that would apply against any other individual.

The Federal Wiretap Act's disclosure provisions, 18 U.S.C. §§ 2511(1)(c) and (d), qualify as "generally applicable" because their prohibitions against the disclosure of illegally obtained information do not single out speech for special prohibition; rather, they regulate speech based on the manner in which it was acquired. They are based on punishing the conduct that produces the speech. Therefore, the incidental burden on speech is merely a byproduct of the conduct the statutes seek to regulate. Accordingly, these statutes are generally applicable laws falling under the purview of *Cohen* and intermediate scrutiny applies.

2. Content-Neutral Laws

Content-neutral laws regulate evenly across the board regardless of the content or subject of the speech in question. The focus, with respect to the disclosure provisions, is more on the manner in which the information is presented or the manner in which it was acquired, rather than the actual content of the disclosure itself. The statutes make no reference to any particular type of speech, nor are they focused upon any class of speakers. As briefly mentioned earlier, this serves as one of the primary distinctions between the Federal Wiretap Act and the laws struck down in the *Florida Star* line of cases. In each of those cases, the laws in question regulated either a particular type of speech or a particular type of speaker. Such laws have been deemed "content-based" because they impose restrictions based on "particular viewpoints" or particular "subject matter."²⁵⁹

The Court, in *Seattle Times Co. v. Rhinehart*,²⁶⁰ unanimously held that intermediate scrutiny applied to an order prohibiting disclosure of information obtained during discovery. The Court went on to note that the same information could have been disclosed "as long as [it was] gained through [other] means."²⁶¹ The focus of the prohibition was not on the speech, but upon the manner in which it was

²⁵⁷*Cohen*, 501 U.S. at 669.

²⁵⁸*Id.* at 670. (citing *Associated Press v. NLRB*, 301 U.S. 103, 132-33 (1937)).

²⁵⁹*Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 537-38 (1980). Justice Souter, concurring in *Hill v. Colorado*, indicated that strict scrutiny applies if a law "suppress[es] discussion of a subject of a point of view." 530 U.S. 703, 735 (2000) (Souter, J., concur).

²⁶⁰467 U.S. 20, 34 (1984).

²⁶¹*Id.*

obtained. In other words, the civil discovery process was being protected at the incidental expense of free speech. Similarly, the disclosure provisions of the Federal Wiretap Act care little as to the content of the speech regulated. The primary concern is to discourage the interception of private communication, regardless of the type of communication. Therefore, the Act is a content-neutral law and intermediate scrutiny applies.

E. Intermediate Scrutiny as Applied to the Federal Wiretap Act

Obviously, application of the intermediate scrutiny standard does not, however, guarantee a finding that a statute is constitutional.²⁶² In fact, the *Bartnicki* court, which actually decided to apply intermediate scrutiny, spoke to this effect by citing Justice Blackmun's concurrence in *Schad v. Borough of Mount Ephraim*.²⁶³ In that case, Blackmun clearly indicated that the government's burden "to articulate, and support, a reasoned and significant basis" was not a task to be taken lightly.²⁶⁴ While his intentions were probably to remind Congress of its limitations, it should not serve to raise the intermediate scrutiny standard beyond the definition the Court has expressly provided. Nevertheless, the majority in *Bartnicki* concluded that the government interest sought to be protected by the Federal Wiretap Act is insufficient to justify its incidental effect on the First Amendment, thus holding the statute unconstitutional.²⁶⁵ This conclusion represents an incorrect balancing of the interests involved and should be reversed by the United States Supreme Court.

The balancing test to be applied under intermediate scrutiny evaluates the statute to see if "it furthers an important or substantial governmental interest . . . [which] is unrelated to the suppression of free expression . . . and [whose application's] incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."²⁶⁶ The civil provisions of the Federal Wiretap Act satisfy this test.

1. The Substantial Governmental Interest

Typically, a pure "governmental interest" involves somewhat of a self-serving governmental concern, legitimate or otherwise, sought to enable more effective control over a state or the nation. Admittedly, this assertion is an overgeneralization, but it would be fair to conclude that it may embody the average citizen's perception of what a "governmental interest" may be. It is important to note, however, that the "governmental interest" with respect to the Federal Wiretap Act might more appropriately be termed a "citizen's interest" in that the disclosure provisions seek not to protect the government, but to protect the privacy of the citizenry. Generally speaking, then, the interests can be identified as the "constitutionally protected right to privacy." Therefore, the interest's potency should be enhanced due to its genuine public aim and its established constitutional legitimacy.

²⁶²*Bartnicki*, 200 F.3d at 125.

²⁶³452 U.S. 61, 77 (1981).

²⁶⁴*Id.*

²⁶⁵*Bartnicki*, 200 F.3d at 129.

²⁶⁶*United States v. O'Brien*, 391 U.S. 367, 377 (1968).

As mentioned in Section I, Congress' purpose in passing the Federal Wiretap Act, as amended, was to protect privacy interests with respect to wire, oral and electronic communications. Uncontested provisions of the Act include general prohibitions against the interception of such communications absent a warrant or some other form of appropriate justification.²⁶⁷ Of course, these provisions are hailed as the "protectors of privacy" and the "watchdogs of liberty" in a world of modern technology where average citizens engage in high-tech, "James Bond-like" activities. What follows, however, is that general prohibitions on interception alone, while good, will not effectively guard the interests the Act intends to protect. Absent a prohibition on disclosure, an individual's privacy may still be violated – only at a later point in time, and possibly by a different person. Accordingly, by prohibiting disclosure of information obtained in violation of the Act, one of the incentives to intercept in the first place is greatly reduced. In other words, without the prohibition on disclosure, the Act's ability to achieve its ultimate goal is without proper support.

As evidenced by the Framers' Fourth Amendment prohibitions against unreasonable searches and seizures, a citizen's expectation of privacy was, and remains, a paramount concern. Recalling the Supreme Court's progression from *Olmstead* to *Katz*, in Section I, the Court's recognition of the "threat" of technological advancement becomes apparent. It follows, then, that the Federal Wiretap Act's attempt to further protect private communications, both by expanding to meet the circumstances of the times (such as cellular phones and the like) and by reducing the incentive to intercept (via the disclosure provisions), is merely the logical extension of the Framers' intent. Whether one agrees with the extent of this assertion or not, the fact of the matter is that privacy is a "substantial governmental (citizen) interest."

2. Interest is Unrelated to Suppression of Free Expression

By its very definition, a "content-neutral" law bears no interest to the suppression of free speech.²⁶⁸ Once an interest to that effect arises, the law is reclassified and exposed to the strict scrutiny standard mentioned previously. Having already defined the Federal Wiretap Act as a content-neutral law, this portion of the intermediate scrutiny test is *per se* satisfied. However, because additional arguments exist to bolster the position, they will be briefly discussed.

The language of § 2511(c), one of the sections in dispute, provides what is perhaps the best evidence that no direct attempt to regulate speech exists. While it does effectively seal the lips of those in possession of illegally obtained information, it does so based not on the information they hold, but based on the manner in which it was obtained. Again, this speaks directly to the content-neutrality of the provision. More so, however, it indicates that the intent of the law is to protect the privacy of the recorded speaker rather than to restrict the speech of the information holder. Of course, speech is incidentally burdened. To hold otherwise would be to place one's head in the sand. However, as previously discussed, speech is not an absolute right and may be incidentally burdened under proper circumstances.

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

²⁶⁸ *O'Brien*, 391 U.S. at 375.

The Court in *United States v. Nixon*,²⁶⁹ stated that “human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests.”²⁷⁰ What First Amendment advocates fail to realize is that allowing disclosure may result in greater suppression of speech than prohibiting disclosure. As the *Nixon* Court so eloquently explained, if private conversations are not protected from broad distribution it stands to reason that people will speak less freely.²⁷¹ Therefore, to hold the disclosure provisions unconstitutional may well do more harm to the First Amendment than would otherwise occur. Nevertheless, the fact that the provisions arguably enhance speech rather than detract from it serves as strong evidence of their non-suppressive intent.

Conversely, one might argue that upholding the disclosure provisions of the Act will result in a “chilling effect” on speech because the press will be fearful of potential liability connected with “suspect” information. While such a contention seems valid on its face, further consideration reveals that it is without merit. The media has always considered accuracy a priority when reporting information. In so doing, particular media sources establish integrity and reliability in the eyes of the public. Accordingly, information received by news sources is not simply received and then quickly put into print in an *ad hoc* fashion. During the fact checking process it is fair to assume that a reporter would be made aware of or “have reason to know” that given information may have come from an illegal interception. If not, then liability is removed from the equation under the very language of the provisions themselves. Remember, this requirement does not impose a duty to learn. It only imposes liability based on knowledge at the time of acquisition. Therefore, it is not likely that a truly innocent media source will be held liable if sued for disclosure. Accordingly, the “chilling effect” argument is void of merit and should not factor into the Court’s analysis.

3. Incidental Restrictions are Minimal

The third prong of the *O’Brien* test demands that the government intrusion, albeit incidental, be limited in scope so as not to intrude upon First Amendment freedoms more than necessary. Such a requirement bears analytical merit because it foresees the possibility of inappropriate encroachments that cleverly drafted legislation may achieve under the guise of content-neutrality. Perhaps the best way to apply this prong of the test is not to evaluate the scope of the statute’s First Amendment restrictions, but, rather, attempt to identify a lesser intrusive manner (with respect to the First Amendment) under which the statute’s goals might still be achieved. Should a lesser means of encroachment exist, the statute may fail this prong of the test. Note, however, that Supreme Court precedent has not required a regulation to be the absolute least speech-restrictive measure of advancing the state’s interest.²⁷² It need only be shown that the state’s interest is less likely to be achieved absent the regulation.²⁷³

²⁶⁹418 U.S. 683 (1974).

²⁷⁰*Id.* at 705.

²⁷¹*Id.*

²⁷²*See Turner Broad. System v. F.C.C.*, 512 U.S. 622, 662 (1994).

²⁷³*See id.*

As has been cited numerous times, the purpose of the Federal Wiretap Act is to preserve the confidentiality of private oral, wire, or electronic communications. To effectively accomplish this goal, restrictions cannot rest solely on the interceptive act alone. To do so would enable the interceptor to merely pass along the fruits of his labor to a third party who could evade liability under the cover of statutory silence. While civil liability and criminal prosecution may well occur with respect to the interceptor, such results minimally contribute to the ultimate end the statute seeks to attain.

Understandably, when information of public significance comes to light, regardless of how it was obtained, the general reaction is that suppression should not occur. This begs the question as to why the statute could not be written to exclude liability when the intercepted information is of “public significance.” Beyond the obvious problem of defining “publicly significant information” on a case-by-case basis lies the larger problem of transforming the statute from “content-neutral” to “content-based.” As has been demonstrated in this Note, to base the government’s ability to suppress speech on the subject of the information would reclassify the statute in a manner that would require strict First Amendment scrutiny. Under such circumstances it is almost certain that the statute would fail and possibly be removed from achieving its goal. Accordingly, such an alternative method of statutory construction is unacceptable.

Yet another possibility is to carve out a media exception that would hold the press to a different standard of review than the general public. To do so would alleviate First Amendment concerns significantly because the press is the primary vehicle through which Free Speech rights are exercised. This alternative, however, faces two primary obstacles. First, suppression, or lack of its enforcement, based on the speaker’s identity comes dangerously close to qualifying a statute as a content-based regulation. For the same reasons that subject-oriented restrictions require heightened scrutiny, providing a special privilege for a certain entity, while maintaining suppressive control over others, demands the same level of First Amendment scrutiny. Secondly, and more tangibly, the Court, as cited in *Bohner v. McDermott*, has held on numerous occasions that the press has no greater First Amendment protection than any other individual. Accordingly, based on logic as well as precedent, to judicially rewrite the statute so as to enable the media to evade civil liability for disclosure of illegally intercepted information would not be appropriate.

While other options may exist, the aforementioned fairly represent the type of alternative restrictive measures that First Amendment advocates might argue are best. If they are right then the statute may fail the third prong of the *O’Brien* analysis. However, as was demonstrated, each alternative is fatally flawed in that each fails to advance the ultimate goal the drafters of the statute intended – Privacy. The civil provisions of the Federal Wiretap Act strike an appropriate balance between objective based restrictions and adequate punitive measures. Accordingly, they are sufficiently narrow so as not to unnecessarily impinge upon the First Amendment.

VI. CONCLUSION

Often times, it is easy to predict how the Court will rule on a given issue due to the known ideological positions of its members. Generally, the first step in such a prediction involves a simple identification of the issue itself with respect to its liberal

or conservative moorings. Unlike many cases, however, *Bartnicki v. Vopper* presents a novel question arising from the collision of two fundamentally protected rights. Rights, incidentally, whose proponents fall on both sides of the political and ideological spectrum. It is important to recognize that support for one interest over the other does not necessarily represent a categorical denial of the latter right's significance or constitutional legitimacy. People, including judges, regularly advocate on behalf of free speech and privacy simultaneously, all the while believing that their subscription to both is not hypocritical. Accordingly, it is completely understandable, while seemingly illogical, that various Justices may ardently support both rights despite their present opposition in this case.

As was mentioned at the outset, co-existence of these two seminal rights, unless carefully defined, does seem improbable. However, the requisite definition, as has been demonstrated, flows from the proper application of intermediate scrutiny *via* the *O'Brien* analysis. No right is absolute. Even the most important right of all, life, may be taken so long as due process is afforded. So is the case with speech. In no way did Congress intend to suppress information beyond that which was absolutely necessary to meet the privacy objectives the statute was enacted to protect. This statute is clearly content-neutral and should survive First Amendment scrutiny so as to provide the citizenry with the statutory assurance that their most intimate and private communications will be zealously protected. To hold otherwise will only discourage the candid and spontaneous expression free speech advocates so typically fight to protect. Therefore, it is in the best interests of both constitutional rights to uphold the statute and reverse the Third Circuit Court of Appeals' ruling in the case of *Bartnicki v. Vopper*.

VII. EPILOGUE

As mentioned in Footnote 11, authorship of this Note pre-dated the Supreme Court's decision in the *Bartnicki* case. Publication, however, will significantly post-date the Court's decision due to the lengthiness of the publication process. Accordingly, this section provides a brief synopsis of the Court's decision in *Bartnicki*.

On May 21, 2001, in a 6-3 decision authored by Justice Stevens (concurrence by Breyer, joined by O'Connor), the United States Supreme Court decided *Bartnicki v. Vopper*,²⁷⁴ affirming the Third Circuit Court of Appeals' decision in *Bartnicki v. Vopper*.²⁷⁵ In sum, the majority determined that the civil provisions of the Federal Wiretap Act violated the First Amendment. In other words, Congress' good faith attempt to protect the public's privacy rights by prohibiting third-party disclosure of information gained in violation of federal wiretapping laws, according to the majority, ran afoul of the First Amendment rights of the third-party discloser.

Justice Steven's opinion presented no real surprises with respect to its analytical approach. It began with three factual assumptions, the last of which undoubtedly played a critical role in the Court's decision: (1) that respondents played no part in the illegal interception, (2) that their access to the information on the tapes was obtained lawfully, and (3) that the subject matter of the conversations on the tapes

²⁷⁴532 U.S. 514 (2001).

²⁷⁵200 F.3d 109 (3rd Cir. 1999).

was a matter of public concern.²⁷⁶ It then correctly characterized the statutes as content-neutral laws of general applicability, thereby reducing the level of constitutional scrutiny to be applied.²⁷⁷ Next, however, it determined that the statute's "naked prohibition" against disclosure of illegally intercepted information, a characterization which may be somewhat overreaching in light of the statute's "knowing" requirements, constituted a clear regulation of pure speech.²⁷⁸ Having determined that the respondents' conduct qualified as the very type of speech the First Amendment seeks to protect, the Court surprisingly required that governmental interests of the "highest order" be present in order to justify the statute's restriction on speech.²⁷⁹

In short, the Court recognized that the statutes clearly qualified as content-neutral laws; but, nevertheless, found a way to raise the "governmental interests" prong of the intermediate scrutiny test to the highest level, so as to justify its finding of their insufficiency. Essentially, the majority identified the proper standard (intermediate scrutiny), but applied the improper standard (strict scrutiny), a point overtly made by Justice Renquist in his dissent (joined by Justice Scalia and Justice Thomas). Identifying two governmental interests – (1) the removal of an incentive for parties to intercept private conversations, and (2) the minimization of harm to persons whose conversations have been illegally intercepted – the Court deemed them insufficient to justify encroachment upon the First Amendment. Simply put, "in this case, privacy concerns [gave] way when balanced against the interest in publishing matters of public importance."²⁸⁰

As has been mentioned repeatedly, this case presented a clash between two very important constitutional rights – privacy and speech. Sacrificing one at the expense of the other, while difficult, was unavoidable. Logically, then, one might argue that regardless of what the Court decided, the case was a victory for civil rights. While that may be true, this author strongly believes that such a circumstance requires, more than ever, strict adherence by the Court to the proper standard of review. Here, the Court merely paid lip service to the content-neutral character of the statutes, thereafter applying a strict scrutiny analysis to invalidate them.

Had the Court actually applied the test to which it purportedly subscribed, perhaps the civil provisions of the Federal Wiretap Act would be alive to protect an interceptee's interest in his free speech rights. Indeed, while *Bartnicki* may seem to be a victory for the First Amendment, it is also a defeat in that protecting the disclosure of intercepted information will undoubtedly chill the public's willingness to speak freely.

JESS GAMIERE

²⁷⁶532 U.S. at 525.

²⁷⁷*Id.* at 526.

²⁷⁸*Id.* at 531-32 (*see also* Justice Renquist's comments in his dissent, *Id.* at 544.).

²⁷⁹*Id.* at 528.

²⁸⁰*Id.* at 534.