YOU NEVER CALL ME ANYMORE: BARTNICKI V. VOPPER AND THE SUPREME COURT'S ABRIDGEMENT OF THE RIGHT OF PRIVACY IN FAVOR OF THE FIRST AMENDMENT RIGHT OF A FREE PRESS

INTRODUCTION

More than one hundred years ago, Samuel Warren and Louis Brandeis first articulated the legal hypothesis that an individual has a right to be free from public exposure of private information about his or her life.¹ However, the proposed right of privacy has been frequently criticized as incompatible with the First Amendment's protection of free expression.² Scholars note that the right of privacy proposed by Warren and Brandeis creates a conflict between the right of an individual to control information about themselves and the constitutionally protected right of free speech.³ The Supreme Court of the United States has rarely addressed the conflicting nature of these two competing interests.⁴ The Supreme Court’s limited treatment of the conflicting rights, and of the right to privacy in general, has led previous commentators to declare the state of the law “a mess.”⁵

The Supreme Court, in Bartnicki v. Vopper,⁶ found that the First Amendment protected the publication of an illegally procured cellular telephone conversation.⁷ In Bartnicki, a local radio station broadcast a tape of a cellular telephone call between Bartnicki, the local Teachers’ Union representative, and Kane, the Union President (hereinafter “Petitioners”).⁸ The phone call was illegally intercepted by a third party and subsequently provided to a radio station where it was ultimately broadcast.⁹ The Petitioners offered two arguments in favor of penalizing the radio station’s broadcast: 1) the need to remove the incentive for illegal interceptions of conversations; and 2) the desire to minimize the impact to individuals whose discussions had been inter-

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⁸. Bartnicki, 121 S. Ct. at 1756-57.
⁹. Id.
The Supreme Court reasoned that the case presented a conflict between the competing interests of individual privacy and the frank disclosure of information implicating a public concern. The Court, however, rejected both of the Petitioners' theories and noted that although the government's interest in protecting an individual's right to privacy had merit, this interest failed to outweigh the need to permit the publication of public interest matters. Chief Justice William H. Rehnquist, joined by Justices Antonin Scalia and Clarence Thomas, dissented, arguing that the Court's decision subordinated an individual's right to privacy, relegating that right to nothing more than "mere words."

This Note will first explore the facts and holding of Bartnicki. Next, this Note will examine prior Supreme Court cases that examined the proper balance between the publication of private facts, the protection of individual rights, and the First Amendment. This Note will then examine the impact of the holding in Bartnicki and how it expands the right of the media to publish personal information. This Note will posit that the Court's ruling expands the media's ability to publish information to include any information nominally designated as newsworthy or a matter of public significance. Finally, this Note will argue that the Court's decision in Bartnicki implicitly accepts a media driven model for determining what is a matter of public interest, thereby expanding the scope of information appropriate for publication.

FACTS AND HOLDING

In May of 1993, the chief negotiator for the Pennsylvania State Education Association ("Teachers' Union"), Gloria Bartnicki ("Bartnicki") placed a cellular telephone call to the president of the Teachers' Union, Anthony Kane ("Kane"). Kane received the telephone call at home on a conventional telephone. The telephone call occurred during a period of contentious negotiations between the Wyoming Valley West School Board ("School Board") and the Teachers' Union which

10. Id. at 1762.
11. Id. at 1764-65.
12. Id.
13. Id. at 1769, 1775-76 (Rehnquist, C.J., dissenting).
14. See infra notes 19-150 and accompanying text.
15. See infra notes 151-361 and accompanying text.
16. See infra notes 385-509 and accompanying text.
17. See infra notes 510-81 and accompanying text.
18. See infra notes 582-609 and accompanying text.
had garnered significant media coverage. Bartnicki and Kane reviewed various aspects of the negotiations including when to strike, the problems generated by public discussion regarding the negotiations, and the imperative for a dramatic reply to the School Board's position.

Bartnicki and Kane articulated their views about the members of the School Board classifying some as "nitwits" and "rabble rousers," while expressing sorrow for others. During the conversation, Kane said "[i]f they're not gonna move for three percent, we're gonna have to go to their . . . homes . . . [t]o blow off their front porches, we'll have to do some work on some of those guys. (PAUSES). Really, . . . because this is, you know, . . . bad news." Kane continued by noting that a major source of his discontent was the School Board's decision to negotiate through the newspaper. Kane suggested that he would have preferred the School Board not to have discussed the information in public. Finally, Kane stated, "You don't discuss this in public . . . Particularly with the press." During the conversation, Kane identified the contents of the discussion as "very confidential."

An unidentified individual intercepted Bartnicki and Kane's telephone call and captured it on audio tape. Subsequently, Jack Yocum ("Yocum"), the head of a group at odds with the Teachers' Union, discovered the tape in his mailbox. After reviewing the tape, Yocum identified the voices of Kane and Bartnicki. Yocum provided the tape to Fred Williams, also known as Frederick W. Vopper ("Vopper"), an employee of WILK Radio. Vopper, an individual also critical of the Teachers' Union, played the tape on his radio program. The tape aired multiple times, was subsequently broadcast on local television stations, and appeared as a written transcript in several newspapers.

22. Id. at 1756-57.
24. Bartnicki, 121 S. Ct. at 1757 (citation omitted).
27. Id.
29. Bartnicki, 200 F.3d at 113.
30. Bartnicki, 121 S. Ct. at 1757.
31. Id.
32. Bartnicki, 200 F.3d at 113. The tape was also provided to another local radio host, Rob Neyhard. Id. Yocum noted that he felt that he had a moral imperative to disclose the tape. Respondent's Brief at 2, Bartnicki v. Vopper, 121 S. Ct. 1753 (2001) (No. 99-1687 & 99-1728).
33. Bartnicki, 121 S. Ct. at 1757. The tape was also played by a different station and printed in several newspapers. Id.
Neither Bartnicki nor Kane were aware that their telephone call had been intercepted until Vopper's broadcast.

Alleging a violation of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Electronic Communications Privacy Act of 1986 ("Wiretapping Acts"), Bartnicki and Kane ("Petitioners") sued Yocum and Vopper ("Respondents"). Petitioners and Respondents filed separate motions for summary judgment with the United States District Court for the Middle District of Pennsylvania. Respondents alleged that they did not participate in the interception of the conversation. Moreover, because the interception could have occurred inadvertently, the Respondents alleged that they had not acted illegally. Further, Respondents argued that without regard to the potential illegality, the First Amendment protected their disclosure of the tape. District Court Judge Edwin M. Kosik denied the motions for summary judgment.

The district court reasoned that a statutory violation occurred if an individual intentionally revealed the content of an electronic communication that is known, or should be known, to be illegally obtained. The district court articulated that interpreting the statute in this manner was consistent with the congressional intent to protect an individual's right to privacy. The prerequisites to a violation, according to the district court, were proof the interception was intentional and proof that an individual was involved in the illegal interception. The district court found that the Respondents' reliance on the First Amendment failed because the Wiretapping Acts were content-neutral and did not tend to chill speech or require any prior restraint of information. The district court rejected the motions for summary judgment by both the Respondents and the Petitioners because a genuine issue of fact existed regarding whether the discussion was intentionally intercepted. Further, the district court noted that

34. Bartnicki, 200 F.3d at 113.
37. Bartnicki, 200 F.3d at 113. The Petitioners also brought suit against two media outlets. Id.
38. Bartnicki, 121 S. Ct. at 1753.
39. Id. at 1757.
40. Id.
41. Id.
42. Bartnicki, 200 F.3d at 113.
43. Bartnicki, 121 S. Ct. at 1757.
44. Bartnicki, 200 F.3d at 115-16.
45. Bartnicki, 121 S. Ct. at 1757-58.
46. Id. at 1758.
47. Id.
a question remained regarding whether the Respondents knew, or should have known, that the conversation was illegally procured.\textsuperscript{48} The district court granted a motion for interlocutory appeal.\textsuperscript{49} The district court certified two issues as controlling.\textsuperscript{50} First, whether imposing liability on the Respondents for their broadcast of the tape violated the First Amendment because the Respondents had not participated in the illegal interception.\textsuperscript{51} Second, whether the First Amendment barred imposing liability on Respondent Yocum for providing the tape to Respondent Vopper.\textsuperscript{52} The United States Court of Appeals for the Third Circuit accepted the appeal.\textsuperscript{53}

The United States, through the Solicitor General, in accordance with 28 U.S.C. § 2403,\textsuperscript{54} intervened in the action.\textsuperscript{55} The Solicitor General intervened as a Petitioner to defend the Wiretapping Acts constitutionality, arguing that the purpose of the Wiretapping Acts was to uphold the confidentiality of various forms of communication.\textsuperscript{56} According to the Solicitor General, the Wiretapping Acts protected communications in two ways: 1) they denied the interceptor benefit of the "fruits of his labor;" and 2) they dried up the market for illegally obtained communications.\textsuperscript{57} Further, the Solicitor General set forth that an important governmental interest existed under the Wiretapping Acts in protecting an individual's right to privacy.\textsuperscript{58}

The Third Circuit noted that the appeal neither encompassed the restriction on the interception of transmissions, nor addressed any criminal aspects of the Wiretapping Acts.\textsuperscript{59} The Third Circuit explained that the appeal focused exclusively on civil liability for disclosure of illegally obtained communications.\textsuperscript{60} Circuit Judge Dolores K. Sloviter, writing for the court, noted that the Third Circuit in light of

\textsuperscript{48} Bartnicki, 200 F.3d at 116. The Supreme Court noted that 18 U.S.C. § 2511(1)(a) (2000) provides that any person who "intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication; . . . shall be punished . . . ." Bartnicki, 121 S. Ct. at 1758 n.4.
\textsuperscript{49} Bartnicki, 200 F.3d at 116. Prior to the grant of the interlocutory appeal, the district court also denied Vopper's motion for reconsideration. Id. at 113, 114.
\textsuperscript{50} Bartnicki, 200 F.3d. at 113.
\textsuperscript{51} Id. at 113-14.
\textsuperscript{52} Id. at 114.
\textsuperscript{53} Id. at 109, 114.
\textsuperscript{55} Bartnicki, 200 F.3d at 114. Section 2403 of Title 29 of the United States Code allows the United States to intervene in any action in which the constitutionality of a congressional act is called into question. 28 U.S.C. § 2403 (1994).
\textsuperscript{56} Bartnicki, 200 F.3d. at 114, 123.
\textsuperscript{57} Id.
\textsuperscript{58} Id. at 125. The court noted that Vopper did not appear to have challenged the stated governmental interest expressed by the United States. Id.
\textsuperscript{59} Bartnicki, 200 F.3d at 116.
\textsuperscript{60} Id.
Supreme Court jurisprudence would examine the issue in a narrow and fact specific context.61

The Third Circuit articulated that the issue presented was whether the Wiretapping Acts may be used to punish individuals who had knowledge of, but did not participate in, the illegal acquisition of information and subsequent disclosure of private information.62 In addressing this issue, the court found that the Wiretapping Acts were content-neutral; thus, intermediate scrutiny was appropriate.63 Accordingly, the court reasoned that to satisfy the traditional intermediate scrutiny test the court must determine whether the statute in question was narrowly tailored, promoted a significant governmental concern, and allowed other avenues for communication to remain.64

The Third Circuit first accepted the Solicitor General's proposition that the maintenance of communication privacy was an important state interest.65 Next, the Third Circuit considered whether the Solicitor General had demonstrated that the Wiretapping Acts furthered the articulated governmental interest.66 The Third Circuit addressed the Solicitor General's two specific arguments for the propriety of the statute: 1) preventing the interceptor from enjoying the "fruits of his labor;" and 2) ending the demand for the intercepted communications.67 First, the court dismissed the Solicitor General's "fruits of his labor" defense reasoning that the record was bereft of any indication that the Respondents were participants in the interception.68 Thus, the court stated, the Solicitor General's theory that the punishment of illegally disclosed communications would penalize the individuals involved in the illegal acquisition was inapplicable to the facts of the current case.69

Second, the court focused on the Solicitor General's argument that the statute would eliminate demand for illegally intercepted communications.70 The court reasoned that the correlation between pun-
ishing third parties from publishing illegally acquired information
and prevention of the initial acquisition was, at most, indirect.\textsuperscript{71} The
court noted that the Solicitor General had offered no evidence that the
imposition of penalties upon the Respondents had any effect on the
interceptor in the current case.\textsuperscript{72} Moreover, the Court provided that
no evidence had been adduced demonstrating that the Wiretapping
Acts had prevented any other interceptions.\textsuperscript{73} Thus, the court found
that the Solicitor General's theory was unsupported by any evidence,
and required extending logic beyond what the court would accept.\textsuperscript{74}

In addition, the Third Circuit noted that the Wiretapping Acts
currently provided a means to achieve the stated government objec-
tive of protecting communication privacy; specifically, the ability to
sanction individuals responsible for the interception of the transmis-
sion, as well as those who participated indirectly.\textsuperscript{75} Accordingly, the
court noted that the Solicitor General's goal of protecting the confiden-
tiality of communications could be achieved without including defend-
ants, such as the Respondents.\textsuperscript{76}

The Third Circuit also considered the possible statutory over-
breadth of the Wiretapping Acts.\textsuperscript{77} The court asserted that the Wire-
tapping Acts would discourage publication of lawful information.\textsuperscript{78}
The court hypothesized that because information came to reporters
from a variety of sources, some of which were unknown, the imposi-
tion of the Wiretapping Acts would lead to the nondisclosure of infor-
mation due to a fear of potential liability.\textsuperscript{79} According to the court, the
conversation at issue was, without question, one of public interest and
newsworthiness.\textsuperscript{80} Furthermore, the court opined that the Supreme
Court had previously found that an attempt to penalize the publica-
tion of truthful facts was rarely constitutional.\textsuperscript{81}

\textsuperscript{71} Id.
\textsuperscript{72} Id.
\textsuperscript{73} Id.
\textsuperscript{74} Id. (citation omitted).
\textsuperscript{75} See Id. (analogizing the case at bar with "prevent[ing] littering by punishing
litters, not by prohibiting leafleting" in Schneider v. New Jersey, 308 U.S. 147, 162
(1939)).
\textsuperscript{76} Id.
\textsuperscript{77} Id. at 126-27.
\textsuperscript{78} Id.
\textsuperscript{79} Id. at 127.
\textsuperscript{80} Id. The court opined that the content of the conversation, in addition to the
persons speaking, was indicia of the newsworthy character of the conversation. Id. The
court noted that the fact that the president of the Teachers' Union would articulate a
suggestion of violence was, alone, newsworthy. Id.
\textsuperscript{81} Bartnicki, 200 F.3d at 127 (citing Smith v. Daily Mail Publl'g Co., 443 U.S. 97,
102 (1979)). The court also addressed the reasoning in the dissenting opinion, noting
that the differing opinions stemmed primarily from a differing weight given to the legal
principles articulated by the majority. Id.
Consequently, the Third Circuit held that the civil liability portion of the Wiretapping Acts did not meet the intermediate scrutiny test.\textsuperscript{82} The court determined that the governmental interest of protecting the privacy of communications did not justify the burden placed on freedom of speech.\textsuperscript{83} Accordingly, the court found that the Respondents could not be penalized for their use or disclosure of illegally acquired material when there was no accusation of either encouragement of, or participation in, the improper acquisition.\textsuperscript{84}

Judge Louis H. Pollak dissented from the majority's application of the intermediate scrutiny test.\textsuperscript{85} The dissent identified three aspects of the majority opinion that were unavailing.\textsuperscript{86} First, Judge Pollak suggested that the majority's rationale examined only a portion of the statutory design of the Wiretapping Acts and did not investigate the totality of the statutory intent.\textsuperscript{87} According to Judge Pollak, the statutory purpose of the Wiretapping Acts included both the protection of communication privacy, and the determination of the conditions and qualifying factors authorizing the interception of communications.\textsuperscript{88} Judge Pollak noted the enjoinment of disclosure by third parties was essential because the initial individual responsible for the interception would not likely reveal the interception for fear of self-incrimination.\textsuperscript{89} In Judge Pollak's view, the prevention of third party disclosure of the illegal interception was vital to satisfy congressional intent.\textsuperscript{90}

Second, the dissent questioned the majority's position that the Solicitor General failed to produce evidence sufficiently linking the imposition of a statutory penalty and the determent of subsequent wrongdoers.\textsuperscript{91} Judge Pollak found that ample legislative consensus existed suggesting that the goal of protecting communication privacy was enhanced by the imposition of civil penalties upon third parties

\textsuperscript{82} Bartnicki, 200 F.3d at 129.
\textsuperscript{83} Id. The court concluded by noting that even if the provisions in the Wiretapping Acts achieved the Solicitor General's goals, the impact would still be unnecessarily broad. Id. (citing Ward v. Rock Against Racism, 491 U.S. 781, 800 (1989)).
\textsuperscript{84} Bartnicki, 200 F.3d at 129. Because the court determined that the government had not met its initial burdens under the intermediate scrutiny test, it did not reach the question of whether alternative methods of communication remained open. Id.
\textsuperscript{85} Bartnicki, 200 F.3d at 131 (Pollak, J., dissenting).
\textsuperscript{86} Id. at 133-34 (Pollak, J., dissenting).
\textsuperscript{87} Id. at 133 (Pollak, J., dissenting).
\textsuperscript{89} Id. at 133 (Pollak, J., dissenting).
\textsuperscript{90} Id. (Pollak, J., dissenting).
\textsuperscript{91} Id. (Pollak, J., dissenting). The dissent identified the close connection between the prohibition against non-permissive interception and the duty of non-disclosure by third parties as the source of its bewilderment. Id. (Pollak, J., dissenting).
who disclosed intercepted communications. The dissent noted that the Wiretapping Acts were buttressed by similar statutes in forty states.

Third, the dissent disagreed with the majority’s conclusion that the Wiretapping Acts inhibited too much speech. Judge Pollak noted that the alleged prohibited activity in other cases was minor and dealt with lesser problems more aptly solved by governmental directives, rather than impositions on First Amendment rights. Judge Pollak further determined that the prevention of unsanctioned disclosure of private discussions, on the other hand, were the exact event the Wiretapping Acts were designed to address.

Judge Pollak, in dissent, concluded by noting that the values of free speech and privacy are coequal. The balance of First Amendment rights and privacy rights are encapsulated, Judge Pollak noted, by both the freedom from prohibition against voluntary expression of ideas, and by the freedom to not speak publicly. Thus, Judge Pollak explained, the freedom not to speak serves the same absolute goal as the affirmative aspect of freedom of speech.

Bartnicki and Kane, along with the Solicitor General of the United States, filed for writ of certiorari. The Supreme Court of the United States granted certiorari and affirmed the Third Circuit’s decision. Justice John Paul Stevens, writing for the majority, noted that the issue before the Court was what protection, if any, did the First Amendment afford to a divulgence of the contents of an illegally acquired communication. The Court, upon review of the case, made

92. Bartnicki, 200 F.3d at 134 (Pollak, J., dissenting). The dissent also noted that the other states within the Third Circuit’s jurisdiction, Delaware and New Jersey were among the forty states that had an analogous statute. Id. (Pollak, J., dissenting).
93. Bartnicki, 200 F.3d at 134 (Pollak, J., dissenting).
94. Id. (Pollak, J., dissenting). Bartnicki, 200 F.3d at 134-35 (Pollak, J., dissenting).
96. Id. (Pollak, J., dissenting). Bartnicki, 200 F.3d at 134-35 (Pollak, J., dissenting). The dissent also disagreed with the majority’s assessment that the imposition of the proposed penalties would limit and deter journalists. Id. at 135 (Pollak, J., dissenting). The dissent supposes that a member of the media would, without regard to potential liability, investigate the source and details of a conversation before publication as part of their professional responsibility. Id. (Pollak, J., dissenting).
97. Id. Bartnicki, 200 F.3d at 136 (Pollak, J., dissenting).
98. Id. (Pollak, J., dissenting) (citation omitted).
99. Id. (Pollak, J., dissenting).
100. Id. at 121 S. Ct at 1753.
101. Id. at 1766.
102. Id. The Court noted that Judge Pollack, in dissent, identified Boehner v. McDermott, 191 F.3d 463 (D.C. Cir. 1999), vacated, 532 U.S. 1050 (2001), as having addressed similar issues, but with a different conclusion, accordingly, the grant of
three assumptions regarding the factual background of the case: 1) the Petitioners' communication was intercepted intentionally, and was accordingly unlawful; 2) the Respondents had reason to know that the communication was illegally intercepted; and 3) the ultimate disclosure of the conversation violated both the state and federal components of the Wiretapping Acts. Consequently, Justice Stevens framed the question as whether the First Amendment prevented the application of the Wiretapping Acts under these circumstances.

The Court first opined that three features distinguished Vopper's interception from the majority of the cases emerging from the Wiretapping Acts: 1) the Respondents had no participation in the initial illegal acquisition; 2) the Respondents' access to the information contained in the intercepted material was lawful; and 3) the information in the tapes was of a public nature. Next, the Court accepted the Petitioners' argument that the Wiretapping Acts, and their Pennsylvania counterpart, were content neutral. Finally, the Court noted that punishment by the state of a media outlet for the publication of truthful material was likely unconstitutional. Based on the foregoing, Justice Stevens stated that the issue was whether the publication of material by a lawful method might nonetheless be punished because of the initial illegality of the acquisition.

The Court subsequently addressed the Solicitor General's two proffered reasons for the prohibitions: 1) the removal of an incentive for potential interceptors; and 2) the necessity of limiting the harm to individuals whose conversations were intercepted. Justice Stevens opined that the Solicitor General's first justification was unpersua-
He noted that no evidence provided by the Solicitor General led to the conclusion that prohibition of speech by an individual who lawfully possessed information would deter illegal conduct by an unknown third party. Justice Stevens stated that although there were occasions when limiting an individual's free speech rights may be appropriate to prevent criminal conduct by a third party, the facts in the current case did not rise to that level. Thus, Justice Stevens rejected the Solicitor General's first justification for the prohibitions of the Wiretapping Acts.

According to Justice Stevens, the Solicitor General's privacy argument was much stronger. The Court noted that private speech could conceivably be chilled by a fear that private conversations would become public. Justice Stevens explained that anxiety of an individual's speech being monitored could inhibit the individual's inclination to express ideas. Justice Stevens expressed concern that the disclosure of private conversations could often be more intrusive than the original interception itself. The Court however, distinguished the current case, stating that the statute enacted a penalty upon the Respondents for publication of information of a public nature.

The Court noted that when privacy concerns were weighed against the media's interest in the publication of items of public interest, privacy must yield. Justice Stevens concluded that a consequence of involvement in public affairs is an attendant degradation of individual privacy. Likewise, Justice Stevens noted a longstanding commitment to the robust and uninhibited discussion of public issues. This commitment to a discussion of public issues, the Court

110. Id. at 1764. The Court noted that the validity of the prohibition against the original interceptor's use of information acquired by their illegal activity. Id. at 1764 n.19.
111. Bartnicki, 121 S. Ct. at 1763, 1764.
112. Id. at 1762. The Court reasoned that "minimal value" speech, such as child pornography, is an instance where suppression of a law abiding individual's rights may be allowed to prevent criminal conduct by a third party. Id. at 1762 n.13.
113. Bartnicki, 121 S. Ct. at 1764.
114. Id. at 1762, 1764.
115. Id. at 1764. The Court also noted the ruling in Harper & Row, Publishers, Inc. v. Nation Enter., 471 U.S. 539, 559 (1985), suggesting that the freedom not to speak in public is concomitant with the freedom to speak publicly. Id. at 1764 n.20.
117. Bartnicki, 121 S. Ct. at 1764. The Court noted that they did not address the appropriateness of the Wiretapping Acts to a purely private concern, domestic gossip, or trade secrets. Id.
118. Bartnicki, 121 S. Ct. at 1764-65.
119. Id. at 1765.
120. Id.
121. Id.
stated, granted First Amendment protection even in the presence of factual error or of defamatory material. Accordingly, the Court opined that the illegal interception of speech likewise did not remove the First Amendment protection. Thus, Justice Stevens declared that the discussion concerning matters of public interest merited the protection of the First Amendment. Therefore, the Court affirmed the judgment of the court of appeals.

Justice Stephen G. Breyer, joined by Justice Sandra Day O'Connor, filed a concurring opinion that expressed agreement with the narrow holding necessitated by the unique circumstances of the case. Justice Breyer stated that the Court's holding created only narrow media immunity. Justice Breyer identified three issues in this case: 1) the lack of illegal behavior by the Respondents; 2) the slight legitimate interest of Petitioners in sustaining the private nature of their conversation; and 3) the limited public scope of the Petitioners' positions. In particular, Justice Breyer noted that Petitioners, in their professional roles, had voluntarily entered a public dispute. Accordingly, Justice Breyer stated that Petitioners accepted the loss of privacy that accompanied public life. Consequently, according to Justice Breyer, the unique circumstances of low privacy expectations and high public interests served to create a narrow exception that did not envelop the general statutory goal of protecting privacy.

Chief Justice William H. Rehnquist, joined by Justices Antonin Scalia and Clarence Thomas, dissented. Chief Justice Rehnquist first noted the historical interests in maintaining privacy of personal communications. Chief Justice Rehnquist also noted society's need

122. Id.
123. Id. The Court determined that the salary negotiations for the high school were "unquestionably" a matter of public interest and Bartnicki and Kane were "clearly" debating the issue at the time of their conversation. Id.
125. Id.
126. Id. at 1766 (Breyer, J., concurring).
127. Id. (Breyer, J., concurring).
128. Id. at 1767-68 (Breyer, J., concurring). The concurring opinion noted that although the publication may have been illegal, a privilege exists for the publication of unlawful acts that threaten the public. Id. at 1767 (Breyer, J., concurring).
129. Bartnicki, 121 S. Ct. at 1768 (Breyer, J., concurring).
130. Id. (Breyer, J., concurring). The concurrence, however, noted that there was no constitutional mandate for anyone to completely give up the right to private conversations. Id. (Breyer, J., concurring). The concurrence, in this case, concluded that the matter at issue was "far removed" from the circumstances when "truly" private matters were made public. Id. (Breyer, J., concurring).
131. Bartnicki, 121 S. Ct. at 1768 (Breyer, J., concurring).
132. Id. at 1769 (Rehnquist, C.J., dissenting).
133. Id. at 1769-70 (Rehnquist, C.J., dissenting).
for freedom from the fear of surreptitious surveillance and unwanted disclosure of private conversations.\textsuperscript{134} Chief Justice Rehnquist observed that the Court, while articulating the content-neutrality of the Wiretapping Acts, nevertheless employed a strict scrutiny test usually reserved to judge statutes designed to regulate content.\textsuperscript{135}

Chief Justice Rehnquist argued that the Court attempted to circumvent the previous methodology for examining content-neutral statutes by relying on a string of cases standing for the proposition that the media's publication of truthful information had First Amendment protection.\textsuperscript{136} The dissent stated that the case law cited by the majority involved information obtained in a lawful manner, available to the public before publication, and involved the possibility of self-censorship of the media.\textsuperscript{137} This case, Chief Justice Rehnquist reasoned, presented a dissimilar scenario.\textsuperscript{138} Nevertheless, Chief Justice Rehnquist noted, the Court viewed these cases as persuasive and identified the lack of a criminal penalty for the illegal receipt as dispositive, ignoring the issue of the receiver's knowledge of the illegal interception.\textsuperscript{139} The dissent suggested that the Wiretapping Acts were content-neutral, regulated only illegally received information, did not limit publication of information in the public domain, contained a scienter requirement, and imposed no unique restrictions on the media.\textsuperscript{140} Thus, Chief Justice Rehnquist determined the Wiretapping Acts should have been upheld.\textsuperscript{141}

The dissent additionally addressed the Court's rejection of the deterrence of future interceptor's argument due to a lack of supporting empirical evidence.\textsuperscript{142} Chief Justice Rehnquist characterized the argument as a "dry up the market" theory.\textsuperscript{143} The dissent argued that the theory did not require a high degree of evidence to prove its utility because it was neither implausible, nor novel.\textsuperscript{144} The dissent noted that the Court itself had endorsed the theory in relation to the exclu-

\textsuperscript{134} Id. (Rehnquist, C.J., dissenting).
\textsuperscript{135} Id. at 1770 (Rehnquist, C.J., dissenting).
\textsuperscript{136} Id. at 1770-71 (Rehnquist, C.J., dissenting). The dissent noted that the Court relied on the \textit{Daily Mail} line of precedent. Id. (Rehnquist, C.J., dissenting).
\textsuperscript{137} Id. at 1771-72 (Rehnquist, C.J., dissenting).
\textsuperscript{138} Id. at 1772 (Rehnquist, C.J., dissenting). Specifically, the dissent noted that the information in the current case involved a private conversation, and that the statute was designed precisely to prevent disclosure of information not in the public domain. Id. at 1771-72 (Rehnquist, C.J., dissenting). Further, the dissent noted that self-censorship was a reason to uphold, and not strike down, the Wiretapping Acts. Id. at 1772 (Rehnquist, C.J., dissenting).
\textsuperscript{139} \textit{Bartnicki}, 121 S. Ct. at 1772 (Rehnquist, C.J., dissenting).
\textsuperscript{140} Id. (Rehnquist, C.J., dissenting).
\textsuperscript{141} Id. (Rehnquist, C.J., dissenting).
\textsuperscript{142} Id. at 1773 (Rehnquist, C.J., dissenting).
\textsuperscript{143} Id. (Rehnquist, C.J., dissenting).
\textsuperscript{144} Id. at 1773-74 (Rehnquist, C.J., dissenting).
sionary rule against Fourth Amendment violations; further, when applied to child pornography laws the Court accepted the theory without the demand for empirical evidence. Thus, the dissent reasoned in this case, the majority interjected its own ideals above the United States Congress, and accompanying state legislatures, who viewed the theory as plausible.

Finally, Chief Justice Rehnquist noted that the majority's holding would chill the speech of millions of individuals who use cellular telephones. Chief Justice Rehnquist suggested that the Petitioners did not intend to engage in a public debate when they conducted their private conversation. Accordingly, Chief Justice Rehnquist reasoned that viewing an illegal interception and disclosure of a private conversation as constitutionally protected speech was a perversion of the First Amendment. The dissent concluded that the Court's decision was not supported by precedent and invalidated Congress' attempt to balance privacy and freedom of speech.

BACKGROUND

The Tension Between The Freedom Of The Press And The Right To Privacy

A. Public½cation Of Information Gathered By Lawful Means

In Cox Broadcasting Corp. v. Cohn, the United States Supreme Court opined that the First and Fourteenth Amendments to the Constitution barred the imposition of civil liability against a media outlet that broadcast the name of a victim obtained from official court records. In Cox Broadcasting, the father of a deceased rape victim ("Cohn") brought suit against a reporter and media company ("media outlet") who broadcast the victim's name in violation of a Georgia statute in the Superior Court of Fulton County Georgia. In 1971, six individuals raped a seventeen-year-old woman who subsequently died from the crime. In 1972, in conjunction with coverage of the trial of the six individuals, a reporter for the media outlet discovered the

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145. Id. at 1774 (Rehnquist, C.J., dissenting).
146. Id. (Rehnquist, C.J., dissenting).
147. Id. at 1775 (Rehnquist, C.J., dissenting).
148. Id. at 1776 (Rehnquist, C.J., dissenting).
149. Id. (Rehnquist, C.J., dissenting). The dissent distinguished hypothetical individuals engaged in discussion in a public arena such as a bargaining session. Id. at 1775-76 (Rehnquist, C.J., dissenting).
150. Bartnicki, 121 S. Ct. at 1776 (Rehnquist, C.J., dissenting).
The victim's name was obtained through an examination of the charges that were available for public inspection in the courthouse. Subsequently, the reporter broadcast a report detailing the court proceedings and included the name of the victim in his report.

The trial court granted summary judgment to Cohn. The trial court reasoned that the Georgia statute prohibiting the disclosure of the name of a rape victim permitted a civil cause of action for the victim. Because there was no dispute regarding whether the media outlet had disclosed the victim's name, the court determined liability existed against the media outlet as a matter of law.

The trial court issued a certificate for immediate review to the Supreme Court of Georgia to determine if the imposition of liability on the media outlet was correct. The Supreme Court of Georgia reversed the trial court, holding that the state statute did not occasion a cause of action and, consequently, did not rule on the constitutionality of the statute. The court, however, opined that a common law tort of a right to privacy existed in Georgia. Cohn's assertion that his right of privacy was violated by the publication of his daughter's name, the court held, was a properly asserted cause of action under the privacy tort. The court noted, nevertheless, Cohn's cause of action did not create liability on the media outlet as a matter of law. Rather, the determination of whether the disclosure invaded Cohn's "zone of privacy," the court opined, was an issue to be determined by a finder of fact. Finally, the court concluded that the constitutional protection in the First and Fourteenth Amendments did not necessitate a judgment for the media outlet. The court noted that the protection of the First Amendment does not require abolishing the right

155. Id. at 472.
156. Id. The reporter noted that he had gathered the information through personal notes taken during the trial, as well as through examination of the indictments, obtained by a request to the clerk of the court during a recess. Id. at 472 n.3.
157. Cox Broadcasting, 420 U.S. at 473-74. The report was also broadcast the next day. Id. at 474.
158. Cox Broadcasting, 200 S.E.2d at 129. The media outlet and Cohn brought actions for summary judgment because there was no dispute about the facts. Id.
159. Cox Broadcasting, 200 S.E.2d at 129.
160. Id.
161. Id. at 127, 129.
162. Id. at 127, 129-30.
163. Id. at 130.
164. Id. at 130-31. The court noted that an assertion by a relative for an invasion of privacy claim may be considered a relational right of privacy. Id. at 130.
165. Cox Broadcasting, 200 S.E.2d at 131.
166. Id. The court opined that the fact finder should require proof of a willful or negligent disregard of the impact that the publication would have on an individual. Id.
to privacy and that the objectives of each can be obtained with minimal intrusion on the other.\footnote{168}

Upon a motion for rehearing by the media outlet, the court declared that the state statute did not conflict with the First Amendment.\footnote{169} The court stated that the Georgia legislature had the privilege to determine that a rape victim should not be identified, and the court determined that no public interest existed to engender the protection of the First Amendment.\footnote{170} The media outlet filed an appeal, which the United States Supreme Court accepted in order to consider the constitutional validity of the Georgia statute.\footnote{171}

The Supreme Court reversed the decision of the Georgia Supreme Court determining that because the reporter based the news report on information gathered from information provided by the court, the protection of the First and Fourteenth Amendments barred Georgia from imposing liability on the media outlet.\footnote{172} Justice Byron R. White, delivering the opinion for the Court, reasoned that the question of whether a state may punish a media outlet for the publication of a rape victim's name revealed in a court proceeding, presented an important First Amendment question bearing on the freedom of the press.\footnote{173} The Court noted that Georgia's defense of the statute and concomitant privacy action was supported by the argument that a zone of individual privacy encompasses each individual and forbids intrusion by the media.\footnote{174} The media outlet urged the Court to find that the media could not be liable for publication of information that is truthful and accurate, even if it could damage an individual's reputation or sensibilities.\footnote{175}

The Court acknowledged that the right of privacy had been recognized by at least 30 states, and further acknowledged that Georgia courts had accepted the premise since 1905.\footnote{176} The Court, however,

\begin{footnotes}
\item[168] Id. (quoting Briscoe v. Reader's Digest Ass'n, 483 P.2d 34, 42 (Cal. 1971)).
\item[169] Cox Broadcasting, 200 S.E.2d at 133-34 (Gunter, J., Motion for Reh'g). The media outlet, in its motion, contended that the disclosure was appropriate because the information was a subject of public concern. Id. at 133. (Gunter, J., Motion for Reh'g).
\item[170] Cox Broadcasting, 200 S.E.2d at 134 (Gunter, J., Motion for Reh'g).
\item[171] Cox Broadcasting, 420 U.S. at 476. The media outlet also requested a determination of whether the Georgia Supreme Court's decision was a decree or final judgment. Id.
\item[172] Cox Broadcasting, 420 U.S. at 496-97.
\item[173] Id. at 471, 484-86. The Court engaged in a lengthy discussion of the appropriateness of the Court taking up the case based on the Court's right of appellate jurisdiction. Id. at 476-87.
\item[174] Cox Broadcasting, 420 U.S. at 487. The Court also acknowledged the historical precedent established by an 1890 Harvard Law Review article, The Right to Privacy. Id. (citing Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193, 196 (1890)).
\item[175] Cox Broadcasting, 420 U.S. at 489.
\item[176] Id. at 488.
\end{footnotes}
distinguished the publication at issue in this case as not involving an appropriation of an individual’s name, or an invasion into a private area.\textsuperscript{177} Rather, the Court noted, the case involved a publication that would be offensive to a reasonable person, despite its truthfulness.\textsuperscript{178}

The Court also declined to reach the broader issue suggested by the media outlet, and instead focused on the more narrow question of the propriety of a state sanctioned penalty for accurate publication of a rape victim’s name.\textsuperscript{179} In particular, the Court reviewed whether sanctions may be imposed for publication of information gathered from court records created in conjunction with a prosecution and available for inspection by the public.\textsuperscript{180} The Court found that a state may not impose such penalties.\textsuperscript{181}

The Court stated that the media plays an important role in presenting the public with information regarding the actions of government.\textsuperscript{182} Accordingly, the reporting of the media helps to ensure the fairness of trials and allows the public to scrutinize the management of the courts.\textsuperscript{183} The Court opined that a lack of media reporting would limit the ability to offer reasoned opinions on the government.\textsuperscript{184} Moreover, the Court determined that the events reported by the media outlet such as the commission, prosecution and judicial proceedings of a crime are matters of legitimate public concern and require the scrutiny of the press.\textsuperscript{185} The Court examined the exceptions to the tort of invasion of privacy when the information had already been made public.\textsuperscript{186} Legal commentators, the Court suggested, have found that no liability can arise when further publicity is created by publication of information that is already public, nor can liability arise for publicity of facts regarding an individual that are a part of the public record.\textsuperscript{187} Consequently, the Court noted that an individual’s privacy interests wane when the information has already appeared in a public record.\textsuperscript{188}

\textsuperscript{177}. Id. at 489.
\textsuperscript{178}. Id.
\textsuperscript{179}. Id. at 491. The Court acknowledged that in defamation actions, the truthfulness of publication, is a valid defense. Id. at 489-90.
\textsuperscript{180}. Cox Broadcasting, 420 U.S. at 491.
\textsuperscript{181}. Id. at 491.
\textsuperscript{182}. Id. at 491-92.
\textsuperscript{183}. Id. at 492.
\textsuperscript{184}. Id.
\textsuperscript{185}. Id. The Court also acknowledged the privilege that truthful reporting of trials has historically enjoyed. Id. at 492-93.
\textsuperscript{186}. Cox Broadcasting, 420 U.S. at 493-94.
\textsuperscript{187}. Id. at 493-94 (quoting RESTATEMENT (SECOND) OF TORTS § 652D, cmt. c, at 114 (Tentative Draft No. 13, 1967)).
\textsuperscript{188}. Id. at 494-95.
Thus, the Court concluded, because the State of Georgia placed
the information in question in a public record, it must have concluded
that the information served a public interest.189 As such, publication
of the information by the media served a public good, provided informa-
tion to individuals concerned with the preservation of government,
and was of critical importance to societal maintenance.190 Accord-
ingly, the Court declined to allow the media to be penalized for dis-
seminating accurate information contained in public records
maintained by the court.191

Four years later, the United States Supreme Court in Smith v.
Daily Mail Publishing Co.,192 similarly reasoned that a state may not
penalize a newspaper for the publication of an alleged juvenile delin-
quent's identity when the information was both truthful and lawfully
obtained.193 In Daily Mail, the Charleston Daily Mail newspaper,
along with the Charleston Gazette ("newspaper"), were indicted by a
grand jury for publishing the name of an individual involved in an
action in juvenile court.194 Subsequently, the newspaper filed an ori-
inal-jurisdiction petition requesting a writ of prohibition against Cir-
cuit Court Judges of Kanawha County, West Virginia and the
prosecuting attorney ("West Virginia") in the West Virginia Supreme
Court of Appeals.195 The indictment of the newspaper by the grand
jury followed the publication by the newspaper of the name of a youth
alleged to have shot and killed a classmate at Hayes Junior High
School in St. Albans, West Virginia.196 The newspaper learned of the
incident by listening to the police band on the radio.197 Upon arriving
at the scene, the newspaper reporters discovered the name of the al-
leged perpetrator by asking witnesses, police officers, and a prosecut-
ing attorney at the scene.198 The Charleston Gazette, in the following
morning's newspaper, published the alleged juvenile assailant's
name.199 A grand jury subsequently indicted the newspapers for vio-

189. Id. at 495.
190. Id.
191. Id. at 496. The Court further noted that because of the potential for self-cen-
sorship, they were hesitant to create a rule that allowed the punishment of the media
for publication of information available, but found offensive to the reasonable person.
Id. at 496.
194. Daily Mail, 443 U.S. at 99, 100.
195. Id. at 100.
196. Id. at 99-100. The suspect was identified by many different eyewitnesses and
had been arrested by the police after the incident. Id. at 99.
198. Id.
199. Id. The Charleston Daily Mail initially decided not to print the youth's name
based on an editorial decision. Id. However, because the Charlotte Gazette and several
lotion of a West Virginia statute prohibiting the knowing publication of a juvenile's name who was involved in a court action. The newspaper argued, that the statute under which they were charged, ran afoot of both the West Virginia Constitution, as well as the First and Fourteenth Amendments to the United States Constitution. The State of West Virginia argued that the statutory prohibitions were necessary to protect the future opportunities of juveniles accused of a crime, as well as to lessen the possible future anti-social behavior by such individuals.

The West Virginia Supreme Court of Appeals found in favor of the newspaper, reasoning that because the West Virginia statute criminalizes the publication of a child's name, it was in conflict with the First Amendment and improperly placed a prior restraint on the press. The West Virginia court opined that the United States Supreme Court had articulated a heavy presumption against the constitutionality of prior restraint of the press in recent cases. Accordingly, the court determined West Virginia's defense that the protection of a child's name from publication would allow that individual to obviate the possible future prejudice associated with such publicity later in life, was unavailing. The court noted that because previous United States Supreme Court precedent had determined that a robust press was essential to the advancement of society, and that the West Virginia statute attempted to abridge this freedom by means of a prior restraint, the statute was impermissible. West Virginia subsequently filed a petition for writ of certiorari with the United States Supreme Court.

other media outlets had published the youth's name, the Daily Mail included the individual's name in their afternoon edition of the paper. Id. at 99-100.

200. Daily Mail, 443 U.S. at 100.
201. Id. at 100.
202. Id. at 104.
204. Daily Mail, 248 S.E.2d at 270-71 (quoting Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 558 (1976)). The court also noted that it would look to federal law to analyze the propriety of the statute. Id. at 270.
205. Daily Mail, 248 S.E.2d at 271. The court reviewed several United States Supreme Court decisions holding similarly, in particular, the court noted the analogous case of Landmark Communications v. Virginia., 435 U.S. 829 (1978), as a compelling example of the Court's dim view of attempts at prior restraint. Id. at 271-72.
206. Daily Mail, 248 S.E.2d at 272.
207. Daily Mail, 443 U.S. at 97.
208. Id. at 98.
The Supreme Court affirmed the West Virginia Supreme Court of Appeals, maintaining that the state's interest in preventing publication of the youth's name did not justify the imposition of a criminal penalty upon the newspaper for publication of truthful, and lawfully obtained information. Chief Justice Warren Burger, writing for the majority, reasoned that despite the views of the newspaper and West Virginia, the issue before the court did not depend on whether the prevention of publication constituted a prior restraint. The Court noted that the protection of the First Amendment encompasses more than simply prior restraint, and that anytime a state attempts to penalize publication it must demonstrate that its action are vital to accomplish state interests.

The Court opined that enjoining the publication of truthful information had rarely been upheld as commensurate with constitutional standards. The Court explained that recent decisions of the Court established the general principle that publication of lawfully obtained facts regarding items of public importance was constitutional barring a demonstration of an important governmental interest that would be aided by a prohibition. Further, the Court noted that although the newspaper reporters obtained their information through typical reporting methods, and not directly from the government, the principle was still applicable.

The Court opined that the only justification offered by West Virginia in defense of the prohibition was the need for protection of the anonymity of juvenile criminals. The Court, however, found West Virginia's contention unpersuasive, and did not justify the imposition of a criminal penalty upon the newspaper. Finally, the Court noted that the statutory prohibitions of West Virginia only abridged the ability of newspapers from publishing the information, and not other types of media. Therefore, the Court, presupposing that the statute served a state interest, noted its impact would be muted by the lack of

209. Id. at 105-06.
210. Id. at 98, 100-01.
211. Id. at 101-02. Thus, the Court did not decide if the statute was a prior restraint on the press. Id. at 102.
212. Daily Mail, 443 U.S. at 102.
213. Id. at 103. The Court, in support of this general notion, looked to the opinions in Cox Broadcasting, 420 U.S. 469, and Oklahoma Publ'g Co. v. District Court, 430 U.S. 308 (1977). Id. at 102-03.
215. Id. at 104.
216. Id. The Court also concluded that constitutional protections predominate over the state's interest in the protection of adolescents. Id.
inclusion of all types of media.\textsuperscript{218} The Court noted that neither the unlawful access of the media to classified information, nor privacy and pretrial publicity, were at issue in the case.\textsuperscript{219} Thus, the Court concluded that the West Virginia Supreme Court of Appeals' ruling should be affirmed because of the unique circumstances in the case.\textsuperscript{220}

Justice William H. Rehnquist concurred in the opinion reasoning that although he agreed that the statute did not achieve its stated purpose, he disagreed with the Court's reasoning that the purpose itself was not satisfactory.\textsuperscript{221} Justice Rehnquist noted that although the Court showed great deference to the principles of freedom of speech, they had not created absolute rules; preferring to weigh the circumstances of each case individually.\textsuperscript{222} The concurring opinion reasoned that the Court should resist the inclination to accept all justifications alleging an obstruction of free speech, or the freedom of the press, in its desire to protect speech.\textsuperscript{223} Thus, the concurring opinion viewed West Virginia's interests in protecting the anonymity of juvenile criminals one of the "highest order" and justified any interference with the freedom of the press.\textsuperscript{224} However, due to the flaw in the ability of the statute to achieve its stated purpose, the concurrence joined the Court's opinion.\textsuperscript{225}

Ten years later, in \textit{The Florida Star v. B.J.F.},\textsuperscript{226} the United States Supreme Court held that the publication of lawfully obtained, truthful information by a media outlet may be prohibited only in narrow and circumscribed situations, if at all.\textsuperscript{227} In \textit{Florida Star}, a victim of a sexual assault, identified in court records as B.J.F., brought suit against the Florida Star ("Florida Star"), a newspaper, in the Circuit Court for Duval County alleging a violation of a state statute prohibiting the revelation of the name of a sexual assault victim's name.\textsuperscript{228} B.J.F, in October of 1983, reported to the county sheriff that she was the victim of a robbery and a sexual assault by an unknown

\textsuperscript{218} Id. The Court also asserted that no evidence indicated that creating a criminal penalty was essential to the maintenance of confidentiality in juvenile actions. \textit{Id.} at 105.

\textsuperscript{219} \textit{Daily Mail}, 443 U.S. at 105.

\textsuperscript{220} \textit{Daily Mail}, 443 U.S. at 105-06.

\textsuperscript{221} \textit{Id.} at 106, 110 (Rehnquist, J., concurring).

\textsuperscript{222} \textit{Id.} at 106 (Rehnquist, J., concurring).

\textsuperscript{223} \textit{Id.} at 107 (Rehnquist, J., concurring).

\textsuperscript{224} \textit{Id.} (Rehnquist, J., concurring).

\textsuperscript{225} \textit{Id.} at 110.

\textsuperscript{226} 491 U.S. 524 (1989).


\textsuperscript{228} \textit{Florida Star}, 491 U.S. at 526, 528. B.J.F. also sued the police department. \textit{Id.} at 528.
perp tram.

The Duval County Sheriff's Department ("Department") composed a report based on the information received and identified B.J.F. by her complete name. The report was subsequently placed into the pressroom; an area not restricted with respect to the individuals who may access the room, or the information that may be retrieved from the reports contained therein.

The Florida Star newspaper contained a recurring section that detailed local crimes under investigation by the police. On October 29, 1983, the newspaper ran a story based on a verbatim copy of the police report obtained by an employee of the newspaper. The newspaper identified B.J.F. by her full name, included details about her assault and the accompanying police response. B.J.F. subsequently sued both the newspaper and the Department alleging she had suffered emotional distress because of the newspaper story.

The district court denied motions from Florida Star for a directed verdict reasoning that the statute in question was constitutional, as it appropriately balanced privacy and First Amendment rights, and only applied to a limited set of "sensitive" criminal actions. Upon the completion of Florida Star's defense, the district court ruled that Florida Star was negligent per se because it violated the Florida statute and, therefore, directed a verdict for B.J.F. A jury, contemplating only damages and causation, found for B.J.F. awarding her $25,000 in punitive damages and $75,000 in compensatory damages.

An appeal of the circuit court's verdict was filed by Florida Star in the District Court of Appeal of Florida for the First District. The District Court of Appeal affirmed the jury verdict. The court, in a three-paragraph opinion, reasoned that a sexual assault victim's name was private information and could not be disseminated as a

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229. Florida Star, 491 U.S. at 527. B.J.F. initially used her complete name in the case caption, however, both the lower court and the Supreme Court referred to her only by her initials to protect her privacy. Id. at 527 n.2.
230. Florida Star, 491 U.S. at 527.
231. Id.
232. Id. at 526-27.
233. Id. at 527. The individual sent to the police station pressroom was a reporter in training. Id.
234. Florida Star, 491 U.S. at 527. The internal policy of the newspaper prohibited the publication of the full name of a sexual offense victim. Id. at 528.
235. Florida Star, 491 U.S. at 528.
236. Id.
237. Id. at 528-29.
238. Id. at 529. The police department had settled earlier in the case for $2500. Id. at 528.
240. Florida Star, 499 So. 2d at 884.
Thus, the directed verdict by the district court was appropriate. The Florida Supreme Court refused to review the case. Florida Star appealed to the United States Supreme Court, which agreed to consider the conflict between the First Amendment rights of a free press and the protection of personal privacy in relation to the publication of truthful information.

The Supreme Court reversed the decision of the District Court of Appeal holding that publication of truthful information, if lawfully obtained, can only be punished by a law narrowly tailored and designed to serve an interest of the highest degree. The Florida statute, the Court concluded, did not satisfy such a requirement. Justice Thurgood Marshall, writing for the majority, reasoned that although a trilogy of previous decisions by the Court examining the interaction between privacy interest and reporting of truthful information were not dispositive, penalizing Florida Star nevertheless was violative of the First Amendment. The Court opined that despite the similarities of a prior case, Cox Broadcasting, in which the Court refrained from punishing a media outlet that broadcast a rape and murder victim's name obtained from official records, the current case was distinguishable. The publication in Cox Broadcasting, the Court noted was based on information gleaned from court records open to the public. In contrast, the Court noted that the information in the current case was obtained from a police report generated before criminal proceedings had been initiated.

The Court also refused to conclude that punishment of truthful publication is never allowed by the First Amendment, and instead, limited their decision to apply only in the context before the Court. The Court, in examining the context in the case, used the framework

241. Id.
242. Florida Star, 491 U.S. at 529.
243. Id.
244. Id. at 553. The Supreme Court, before noting its probable jurisdiction, certified a question to Florida Supreme Court to determine whether the Florida court had jurisdiction when it decided not to hear the case. Id. at 529 n.4. The Florida Supreme Court affirmed that it had jurisdiction. Id.
245. Florida Star, 491 U.S. at 541.
246. Id.
247. Id. at 526, 530-32 (citing Daily Mail, 443 U.S. 97; Oklahoma Publ'g Co.; 430 U.S. 308; Cox Broadcasting, 420 U.S. 469).
248. Id at 530, 532.
249. Id. at 532. Further, the Court opined that the media's scrutiny of trials is an additional guarantee of fairness and is deserving of protection; an element that is not present in the current case. Id. at 532 (quoting Cox Broadcasting, 420 U.S. at 492).
250. Florida Star, 491 U.S. at 532.
251. Id. at 541. The Court noted that their previous rulings had carefully avoided determining the general question of whether states may punish the publication of accurate information. Id. at 530.
established by *Daily Mail* to guide its analysis. The Court, in *Daily Mail*, considered two factors in determining whether truthful publication may be punished: 1) was the information obtained lawfully; and 2) was there a state interest of great magnitude that required prohibition.

The publication by Florida Star, the Court reasoned, based on the *Daily Mail* criteria, clearly demanded reversal. First, the Court noted that the information obtained by the newspaper was both accurate and lawful. Further, the Court reasoned the information in the report contained matters of public significance because the report included information regarding the occurrence and investigation of a violent crime.

Next, in relation to the second prong of the *Daily Mail* test, the Court noted that three factors undermined the argument that the protection of the victim’s names qualified as an interest of the highest order. First, the majority reasoned that because the information obtained by Florida Star came from the government, an appropriate assumption was that the government could have prevented the dissemination of such information by a less drastic method. Thus, the Court noted, imposition of a penalty against a media outlet for publication of information released by the government cannot be considered a narrowly tailored means to achieve the government’s objectives.

Second, the Court reasoned the imposition of a negligence *per se* theory under the Florida statute swept too broadly. The *per se* rule creates an automatic liability for publication of information without regard to the disposition of the victim in the community, including

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253. *Id.* at 536-37.
254. *Id.* at 536. The Court did note that the *Daily Mail* analysis does not determine whether punishment of the publication of unlawfully obtained information is appropriate. *Id.* at 535 n.8.
255. *Florida Star*, 491 U.S. at 536. The Court reasoned that despite the fact that officials in Florida were not required to disclose the report containing the identity of victims this did not make it illegal for an individual to examine the record once it was made public by the government. *Id.*
257. *Id.* at 537. B.J.F. argued that the state interest in punishing the publication of victims’ names was based on an interest in the privacy of victims, their personal safety and the need to encourage victims to report such incidents to police without fear of subsequent revelation of their identity. *Id.*
258. *Florida Star*, 491 U.S. at 538. The Court noted that the full name of B.J.F would not have been revealed, in this case, had the police department abided by Florida law which prohibited the dissemination of a rape victim’s identity. *Id.*
259. *Florida Star*, 491 U.S. at 538. Because Florida Star obtained the information from the government, the court noted, if a penalty was imposed, it would likely result in self-censorship by the media. *Id.*
whether she had intentionally garnered public attention regarding the crime.\(^2\) The Court also noted that no scienter requirement was present in the Florida statute; thus, the Florida statute protected the publication of truthful material less stringently than it did defamatory falsehoods.\(^2\) The Court opined that previous categorical restrictions on the press were proscribed when First Amendment concerns were at issue.\(^2\) Accordingly, the Court noted that similar individualized adjudication to protect the victim’s identity was indispensable.\(^2\)

Third, the Court reasoned that the facial underinclusiveness of the statute created doubts about whether the statute served the state’s interest of protecting the identity of sexual crime victims.\(^2\) The Court noted that the statute only prohibited distribution of the victim’s name by mass communication means.\(^2\) The Court explained that despite the equally detrimental effects of the exposure, the statute would not cover a single individual who disseminated the same information.\(^2\) Thus, the Court determined because the statute only provided a partial ban, it did not provide an adequate solution to the state’s proffered interest.\(^2\)

Justice Byron R. White, joined by Chief Justice William H. Rehnquist and Justice Sandra Day O’Connor dissented, questioning whether there was any information about an individual that may not be published by the press, and declaring that the effect of the Court’s ruling was to destroy the publication of private facts tort.\(^2\) The dissent reasoned that the practical effect of the Court’s ruling was an abolition of any type of private facts that would remain off limits for publication.\(^2\) The dissent opined that the Court’s ruling implied that instances such as the inadvertent disclosure of the contents of a police wiretap could be legally disclosed despite the prohibition of a

\(^{261}\) Id. The Court also suggested that the victim’s identity could be a subject of public interest because of questions regarding the veracity of the victim’s story. Id.

\(^{262}\) Florida Star, 491 U.S. at 539.

\(^{263}\) Id. at 539 (citation omitted).

\(^{264}\) Id. at 540. Third, the Court also reasoned that the facial underinclusiveness of the statute created doubts about the significant interest that B.J.F. articulates as supported by the legislation were actually served. Id. at 540. The Court noted that the statute only prohibits distribution of the victim’s name by mass communication means, and thus does not provide a solution to the alleged problem, as it only provides a partial ban. Id. at 540.

\(^{265}\) Florida Star, 491 U.S. at 540.

\(^{266}\) Id. at 540.

\(^{267}\) Id.

\(^{268}\) Id. at 540-41.

\(^{269}\) Id. at 542, 550 (White, J., dissenting).

\(^{270}\) Id. at 550-51 (White, J., dissenting). The dissent also addressed their disagreement with the Court’s interpretation of the authoritative value of the prior cases cited by the Court. Id. at 543 (White, J., dissenting).
state statute. Justice White suggested that although the right to privacy was not unmitigated, the Court did not attempt to balance the public’s right to information and an individual’s right to privacy. The dissent reasoned that to preserve an acceptable quality of life, intrusion into certain areas of an individual’s life must have the protection of law. In this case, Justice White argued personal information identifying a victim of a crime was an area deserving of protection.

B. THE RIGHT NOT TO SPEAK PUBLICLY AS AN ASPECT OF FIRST AMENDMENT PROTECTION

In Pacific Gas and Electric Co. v. Public Utilities Commission of California, the Supreme Court of the United States stated that the First Amendment’s protections extended to the right not to speak, as well as the right to speak. In Pacific Gas, a group representing residential customers of Pacific Gas (“TURN”) intervened before the California Public Utilities Commission (“Commission”) to request that Pacific Gas be enjoined from using space in billing envelopes to disseminate politically based editorials. The Pacific Gas and Electric Company (“Pacific Gas”) had included a newsletter in the monthly bill for 62 years. The newsletter historically included editorials of a political nature as well as public interest stories and general information about utility service. In petitioning the Commission to forbid the dissemination of the newsletter, TURN argued that the customers of Pacific Gas should not be forced to incur the cost of the political speech of Pacific Gas.

The Commission found in favor of TURN, opining that the space in the monthly bill that Pacific Gas used to disseminate the newsletter was the property of the customers. The Commission reasoned that although mailing customers’ bills was a part of Pacific Gas’ duty, due

271. Id. at 551 n.4 (White, J., dissenting).
272. Id. at 551 (White, J., dissenting).
273. Id. at 552 (White, J., dissenting) (quoting Virgil v. Time, Inc., 527 F.2d 1122, 1128 (9th Cir. 1975)).
274. Id. at 553 (White, J., dissenting).
277. Pacific Gas, 475 U.S. at 5. The name of the intervening group, TURN, is an acronym for Toward Utility Rate Normalization. Id.
278. Pacific Gas, 475 U.S. at 5. The newsletter was named Progress. Id.
279. Pacific Gas, 475 U.S. at 5.
280. Id.
281. Id. The Commission determined that the space that belonged to the ratepayers was that which remained after the bill and other legal notices were included, and would accommodate additional materials, without additional postage. Id. at 5-6.
to the method of assigning postage, extra space existed in the envelopes. Because the space was created from the residual fees paid by consumers, allowing Pacific Gas to unilaterally control the space would deprive customers of the value in the space and unjustly improve the position of Pacific Gas. Accordingly, the Commission viewed the space as properly belonging to customers of Pacific Gas. In an attempt to apportion the space in question between Pacific Gas and the ratepayers, the Commission allowed TURN to utilize the space in the envelopes on a regular basis for whatever purpose it saw fit, provided that TURN identify the source of the material.

Pacific Gas appealed the decision of the Commission to the California Supreme Court. Pacific Gas argued that it had a First Amendment right to not promulgate a message that it did not support. The California Supreme Court denied review of Pacific Gas' appeal. The United States Supreme Court noted its likely jurisdiction to consider whether the Commission could require Pacific Gas, a private company, to include in its billing envelopes disagreeable speech from a third party.

The Supreme Court reversed, and vacated the Commission's decision holding that the Commission's ruling impermissibly encumbered Pacific Gas' First Amendment rights by forcing Pacific Gas' association with the beliefs of another speaker when the additional speaker was selected because of their viewpoints. As such, the Court concluded, the Commission's ruling was not narrowly tailored, nor was it a valid regulation of time, place or manner. Justice Lewis F. Powell, writing for the Court, reasoned that the right of free speech was intended to advance important societal interests without regard for the speaker's self-expression interest. The Court noted that a protection of the public's interest in obtaining information is furthered by shielding those who wish to become a member of the marketplace of

\[282. \text{Pacific Gas, 475 U.S. at 5 n.3.}
283. \text{Id.}
284. \text{Id.}
285. \text{Id. at 6-7. The Commission reasoned that because TURN represented a large group of consumers, the public would benefit from TURN's use of the space for communication and solicitation of funds. Id. at 6.}
286. \text{Pacific Gas, 475 U.S. at 1, 7.}
287. \text{Id. at 7.}
288. \text{Id.}
289. \text{Id. at 4, 7.}
290. \text{Id. at 7, 20-21.}
291. \text{Id. at 21.}
292. \text{Id. at 4, 8 (citation omitted).}\]
ideas. In *Pacific Gas*, the Court suggested that the newsletter produced by the company deserved to be fully protected by the First Amendment. The Court provided that the Commission's decision was based on two possible theories: 1) allowing TURN access to a private forum did not impinge on Pacific Gas' right to speak; or 2) Pacific Gas had no property interest in the forum, and therefore, had no right to restrict its access. The Court subsequently examined these two hypotheses.

The Court reasoned that it had previously determined that requiring a private company to furnish a forum for differing views could impinge upon the First Amendment rights of the company. The Court provided that its prior decisions were based on the view that a forced right of access depressed vigorous public debate. Speech, the Court noted, involves the choice of what to say and what not to say. An essential element of the First Amendment, the Court declared, is a prohibition of forced public expressions. Concomitantly, the First Amendment carries with it an attendant right not to speak that achieves the same goal as the affirmative prong of the First Amendment.

The decision by the Commission, the Court noted, was not consistent with the Court's established precedent. The Court opined that the Commission's order would adversely affect the flow of information because Pacific Gas might choose to limit publication of any information for fear of having to help promulgate views in opposition to its own position. The Court concluded that although Pacific Gas is not exempt from debate, it is exempt from restrictions that restrain its own rights not to enhance the voice of adverse positions. Thus, because the Commission's requirements only impacted Pacific Gas, and not TURN, they went beyond the content-neutral restrictions previ-
ously sustained by the Court and impermissibly favored an entity because of their views.305

The Court also disapproved of the Commission's requirements that would force Pacific Gas to associate with objectionable speech.306 Pacific Gas' incentive to respond if TURN made an argument counter to their interest would be great, however, the Court noted that this type of forced response is inapposite to the type of discussion that the First Amendment was intended to create.307 Finally, the Court noted that TURN's argument that the restrictions serve important governmental functions fails because the restrictions are content-based, and not content-neutral.308 Thus, the Court reasoned that the Commission's rulings did not further compelling interests of California, did not offer a valid regulation of time, place or manner, and was not narrowly tailored.309

C. THE LIMITS OF THE PRESS' RIGHT TO REPORT INFORMATION

In Time Inc. v. Firestone,310 the United States Supreme Court found that information related to a wealthy individual's divorce did not constitute a public controversy, the participants were not public figures, and as such, rejected the contention that the media's publication should be protected.311 In Time, Mary Alice Firestone ("Fire-
stone") sued Time, Inc. ("media outlet") for libel in the Florida Circuit Court. A Florida court granted the divorce, articulating, in the final judgment, several details of the allegations made in the trial. The media outlet, based on reports from a wire service, and details from a newspaper in New York, learned that a judgment had been issued in the Firestone divorce. The media outlet wrote a news story detailing the divorce and printed it the next week. Firestone subsequently demanded a retraction of the article claiming that a section of the story was false, malicious and defamatory. The media outlet refused, and Firestone instituted a libel action.

The media outlet, based on reports from a wire service, and details from a newspaper in New York, learned that a judgment had been issued in the Firestone divorce. The media outlet wrote a news story detailing the divorce and printed it the next week. Firestone subsequently demanded a retraction of the article claiming that a section of the story was false, malicious and defamatory. The media outlet refused, and Firestone instituted a libel action.

The Florida Circuit Court for Palm Beach County entered summary judgment for the media outlet. Firestone appealed the summary judgment to the District Court of Appeal of Florida, Fourth District. The District Court of Appeal accepted the appeal and reversed, reasoning that several genuine issues of fact existed, including the issue of malice, and remanded the decision to the trial court for a determination by the trier of fact. Upon remand, a jury verdict was entered in favor of Firestone and a final judgment ordered the media outlet to pay Firestone $100,000. The media outlet appealed and the district court reversed the judgment of the lower court, reasoning that the divorce was a matter of great public interest and fell under the protection of the New York Times series of cases. The Supreme Court of Florida subsequently reversed the district court, reasoning that the media outlets' publication did not fall within the New York Times rubric and remanded several questions to the district court.

The district court, upon remand, entered judgment for the media out-

313. *Id.* at 450. Firestone was a member of one of the United States' wealthier families. *Id.*
315. *Id.* at 451. The media outlet also received information regarding the decision from their Miami office, and from a "stringer" based in the area. *Id.*
317. *Id.* at 452.
318. *Id.*
321. *Id.*
322. *Id.*
324. *Time*, 305 So. 2d at 174-75.
let articulating that there was no libel cause of action because there was no damage to Firestone's reputation. Further, the report was fair and accurate and Firestone had not provided sufficient proof to overcome the privilege of reporting court proceedings.

Firestone appealed the decision of the district court to the Florida Supreme Court, requesting a review of the series of lower court opinions regarding the liable action brought against the media outlet. The Florida Supreme Court quashed the lower court's decision and remanded the case with instructions to reinstate the final judgment and verdict for Firestone. The Florida Supreme Court reasoned that the information published by the media outlet was inaccurate and that the trial court had properly instructed the jury on the pertinent issues including fairness, accuracy, malice, and reckless disregard. Accordingly, the Florida Supreme Court determined that the judgment of the trial court was correct and that the media outlet had been negligent in its publication of the incorrect information regarding Firestone. The media outlet petitioned for writ of certiorari with the United States Supreme Court which granted certiorari to consider whether the decision of the Florida Supreme Court violated the media outlet's constitutional rights under the First and Fourteenth Amendments.

The Supreme Court vacated and remanded the decision of the Florida Supreme Court; however, in their decision the Court rejected the media outlet's contention that Firestone was a public figure, and thus, fit within the Court's established rulings governing libel. Further, the Court rejected the assertion that the information published was obtained through a judicial proceeding and therefore should be protected by an actual malice standard without regard to the accuracy of the article. Justice William H. Rehnquist, writing for the Court, reasoned that Firestone had neither assumed any special notoriety, nor sought to place herself at the center of any public controversy and accordingly was not a public figure. The Court rejected the hypothesis of the media outlet that because Firestone had

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325. *Time*, 279 So. 2d at 394.
326. *Id.*
328. *Id.* at 178.
329. *Id.* at 172, 177.
330. *Id.* at 177-78.
332. *Id.* at 452-53, 464.
333. *Id.* at 453.
334. *Id.* at 449, 453-55. Justice Thurgood Marshall filed a dissenting opinion noting that Mary Alice Firestone's subscription to a newspaper clipping service, and her membership in the sporting set of Palm Beach society, sufficed to indicate that she was, in fact, a public figure. *Id.* at 484-85 (Marshall, J., dissenting).
been depicted as a "cause celebre" by the Florida courts she should necessarily be viewed as a public figure.\textsuperscript{336} The Court noted, and ultimately rejected, the media outlet's implicit desire to equate every controversy of interest to society to a "public controversy."\textsuperscript{336} Moreover, the Court noted that Firestone had not affirmatively sought to make the personal details of her divorce public, but rather was forced to enter the judicial process to obtain a divorce.\textsuperscript{337} The Court reasoned that despite a series of press conferences held by Firestone they did not transform her into a public figure because the legal dispute at issue in her divorce proceedings was not affected.\textsuperscript{338} Thus, the Court reasoned that the divorce of a wealthy individual, despite the interest of some members of the public was not a public controversy as articulated by previous Supreme Court rulings.\textsuperscript{339}

D. THE EXPECTATION OF PRIVACY ON THE TELEPHONE

In \textit{Katz v. United States},\textsuperscript{340} the United States Supreme Court held than an individual using a telephone has an expectation that their words will not be disseminated to the public.\textsuperscript{341} In \textit{Katz}, the United States charged Charles Katz, in the United States District Court for the Southern District of California, with violating a federal statute that prohibited the use of wire communications for wagering.\textsuperscript{342} Early in 1965, Katz was observed using a telephone in a public telephone booth on a nearly daily basis.\textsuperscript{343} Subsequently, agents of the Federal Bureau of Investigation installed microphones on the top of the phone booths that Katz used.\textsuperscript{344} The agents, by activating the microphones when Katz used the telephone, collected evidence indicating that Katz was engaged in wagering.\textsuperscript{345} Katz was subsequently arrested.\textsuperscript{346}

\begin{itemize}
\item \textsuperscript{335} \textit{Time}, 424 U.S. at 454.
\item \textsuperscript{336} \textit{Id}.
\item \textsuperscript{337} \textit{Id}.
\item \textsuperscript{338} \textit{Id.} at 454 n.3.
\item \textsuperscript{339} \textit{Id.} at 454. See \textit{Gertz v. Robert Welch, Inc.}, 418 U.S. 323, 345 (1974) (defining the concept of public figure as persons who have assumed positions of distinction in the community by occupying important positions and by involvement in public controversies).
\item \textsuperscript{340} 389 U.S. 347 (1967).
\item \textsuperscript{341} \textit{Katz v. United States}, 389 U.S. 347, 347, 352 (1967).
\item \textsuperscript{342} \textit{Katz}, 389 U.S. at 348.
\item \textsuperscript{343} \textit{Katz v. United States}, 369 F.2d 130, 131 (9th Cir. 1966), \textit{rev'd}, 389 U.S. 347 (1967).
\item \textsuperscript{344} \textit{Katz}, 369 F.2d at 131.
\item \textsuperscript{345} \textit{Id.} at 131-32.
\item \textsuperscript{346} \textit{Id.} at 132. Katz was charged with an eight-count indictment. \textit{Id.} at 30-31.
\end{itemize}
The district court found that the evidence indicated Katz was engaged in wagering on a more than casual basis. Moreover, the district court found that Katz engaged in wagering during the period that his telephone conversations were being recorded. Accordingly, Katz was found guilty by the district court.

Katz appealed the decision of the district court to the United States Court of Appeals for the Ninth Circuit, arguing that the evidence procured by the government in recording his telephone conversations violated the search and seizure provisions of the Fourth Amendment to the United States Constitution. Katz contended that upon shutting the door to the telephone booth, it operated as his residence, and thus should be free from unwarranted intrusions as articulated by the Fourth Amendment. The Ninth Circuit affirmed Katz's conviction concluding that no violation of the Fourth Amendment occurred because the government did not physically invade the area occupied by Katz. Katz filed a petition for writ of certiorari with the United States Supreme Court which granted certiorari to examine whether a violation of the Fourth Amendment occurred.

The Supreme Court reversed the decision of the Ninth Circuit, reasoning that an individual's right to be free from searches and seizures that are unreasonable exists without regard to the location. Justice Potter Stewart, writing for the Court, reasoned that constitutional protection might attach to things a person endeavors to keep private, even if they are accessible to the public. The Court stated that people, and not places, are protected by the Fourth Amendment. Additionally, the Court noted that Katz had an expectation that his conversations would remain private, despite making his telephone calls from a telephone booth. The Court noted that Katz, upon entering the phone booth, sought privacy from the uninvited ear and rightfully expected that his conversation, uttered into the telephone, would not be broadcast to the public.

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348. Id. at 132-33.
349. Id. at 131. The district court had previously denied Katz's motion to suppress. Id. at 131. Katz waived his right to a jury trial. Id.
350. Id. at 130, 133.
351. Id. at 133.
353. Id. at 349, 350-51.
354. Id. at 359.
355. Id. at 351-52.
356. Id. at 351.
357. Id. at 352.
358. Id. The Court also noted that the expectation of privacy did not diminish simply because he was in a place that was visible. Id.
The Court rejected the Government's argument that the invasion of Katz's privacy was permissible because they did not physically infiltrate the telephone booth. The Court determined that the Government's interception of Katz's conversation, as he spoke on the telephone, violated the Fourth Amendment. The Court reasoned that Katz was justified in relying on the privacy attendant in the use of the telephone; consequently, the government's actions impermissibly violated that reliance and constituted a search and seizure.

ANALYSIS

In Bartnicki v. Vopper, the United States Supreme Court concluded that the First Amendment protected the disclosure of a cellular telephone conversation acquired through illegal channels. In Bartnicki, a telephone conversation between the chief negotiator for a Teachers' Union, Gloria Bartnicki ("Bartnicki"), and the union president, Anthony Kane ("Kane") included a statement by Kane that "we're gonna have to go to their, . . . homes . . . [t]o blow off their front porches." An unknown individual illegally intercepted and recorded the conversation between Bartnicki and Kane ("Petitioners"). Subsequently, Jack Yocum ("Yocum") discovered the recording in his mailbox. Yocum made the recording available to Fred Williams, also known as Fred Vopper ("Vopper") who played the tape on Vopper's radio program. The Petitioners brought suit alleging that Yocum and Vopper (collectively "Respondents") violated a federal statute prohibiting the knowing, intentional disclosure of information illegally obtained, because they knew, or should have known, that the initial acquisition was illegal.

The Supreme Court recognized that the public and unauthorized disclosure of a private telephone conversation presented a clash between the First Amendment rights of the media and an individual's right of privacy. The Court reasoned, however, that the telephone conversation was undeniably a matter of public concern. Additionally, the Court noted that the participants plainly engaged in a debate.

360. Id. at 353.
361. Id.
364. Id. at 1756-57.
365. Id. at 1756.
366. Id. at 1757.
367. Id.
368. Id.
369. Id. at 1756.
370. Id. at 1756, 1765.
about that public concern. As such, the Court determined that the Petitioners' privacy rights must be subrogated to the First Amendment and the right of the media to publish private information of a public concern. Accordingly, the Court opined that the First Amendment safeguarded the disclosure by the media of the Petitioners' conversation.

Chief Justice William H. Rehnquist, joined by Justices Antonin Scalia and Clarence Thomas, dissented in the opinion. The dissent argued that the Court's opinion reduced an individual's right to privacy to "mere words." The Court's ruling, the dissent determined, nullified the right of privacy by creating a right to publish information as long as it touched upon a matter of public concern, without regard to the initial legality of the acquisition. The dissent reasoned that this newfound right created by the majority suffered from several problems: 1) it failed to define what constituted a matter of public concern; 2) no precedential support existed for the decision; and 3) no evidence indicated that the Petitioners' conversation constituted a matter of public concern or was intended to be a public debate. Thus, the dissent concluded that the Constitution should not shield involuntary dissemination of a personal discussion.

In Bartnicki, the United States Supreme Court expanded the scope of private information that may be published without liability. The Court's holding both deviates from, and creates an extension of, previous rulings in four ways. First, the ruling in Bartnicki is dissimilar to prior Supreme Court decisions that allowed abridgement of an individual's privacy when the information satisfied three criteria: 1) it was obtained by legal methods; 2) it was obtained from a source available to the general public; and 3) it involved a newsworthy subject. Second, the decision, in Bartnicki, is inconsistent with prior holdings articulating the limitations of publishing private facts,
because it curtails the traditionally accepted privacy rights that a telephone conversation affords and expands the scope of private information that may be published. Third, the Court in Bartnicki created a new rule that allows publication of any subject nominally defined as a matter of public importance, without regard to the source of the information. Fourth, the Court’s failure to decide what constitutes a matter of public interest in Bartnicki abdicates that power to the news media and concomitantly expands the scope of private information that is potentially newsworthy.

I. THE PUBLICATION OF PRIVATE INFORMATION

In 1890, Louis Brandeis and Samuel Warren first reasoned that an individual’s right of privacy should be protected by the law. Warren and Brandeis declared that the media, through its photographic devices and by its mechanical technology, had begun to invade the privacy of citizens. The Supreme Court, however, before its ruling in Bartnicki, had not clearly articulated a general policy regarding the widespread publication of private facts. Instead, a patchwork of Supreme Court decisions had left the status of the media’s ability to publish information of a personal nature unclear and, in the view of one commentator, “a mess.”

The Court has, under certain circumstances, justified the subrogation of an individual’s privacy rights on First Amendment grounds. The Supreme Court, in previous decisions, reasoned that if personal information was a matter of public record, and prevention of publication would chill the media’s free speech rights, the First Amendment trumped an individual’s right of privacy. In each case, the Court concluded that the government’s interest in preventing publication failed to satisfy an interest of the highest order because the

382. See infra notes 510-81 and accompanying text.
383. See infra notes 582-609 and accompanying text.
384. See infra notes 582-609 and accompanying text.
389. See infra notes 393-509 and accompanying text.
390. See infra notes 393-509 and accompanying text. The Court noted its holdings regarding the untruthful publication of private facts was not at issue because there was no question regarding whether the publication was truthful, only the publication was illegal. Bartnicki, 121 S. Ct. at 1761-62.
dissemination of the private information was either caused by the government, or made available to the public before the media's publication. Thus, scholars note that pre-Bartnicki cases can only be viewed as creating a narrow understanding of when an individual's right to privacy may be subjugated to the First Amendment.

A. Bartnicki Deviates From Prior Supreme Court Cases Addressing the Appropriateness of Publishing Personal Information Through Lawful Methods

The holding in Bartnicki deviates from prior Supreme Court cases addressing the appropriateness of publishing personal information in three aspects: first, in prior cases, the media had obtained the personal information through lawful methods; second, in prior cases, the personal information had been available to the public before publication by the media; and third, in prior cases, the Court described the government's interest in protecting the information to be published as minimal. However, in Bartnicki, none of these factors were present. First, in Bartnicki, the information published had presumably been obtained by illegal methods. Second, the Petitioners' telephone conversation published by the Respondents was not available to the media, by any means, before its publication. Third, in Bartnicki, the Court described the governmental interest in protecting the publication of the Petitioners' personal information as "important." Therefore, the Court's decision, in Bartnicki, is dissimilar from previous Supreme Court cases that have addressed the propriety of publishing personal information.

1. The Information in Bartnicki Was Presumably Obtained Illegally

The personal information published by the media, in prior Supreme Court cases, was legally obtained. In each of the prior cases, the information had either been obtained 1) from government sources; 2) using traditional reporting techniques; or 3) was available to the

392. Jurata, 36 San Diego L. Rev. at 498-502 (noting the limited nature of Supreme Court decisions regarding the disclosure of private facts).
393. See infra notes 393-509 and accompanying text.
394. See infra notes 393-509 and accompanying text.
395. See infra notes 423-28 and accompanying text.
396. See infra notes 459-65 and accompanying text.
397. See infra notes 496-502 and accompanying text.
398. See infra notes 393-509 and accompanying text.
399. See infra notes 403-22 and accompanying text.
public prior to its publication by the media. In *Bartnicki*, however, the Court accepted the supposition that the information published by the Respondents was obtained illegally. Thus, the personal information published in *Bartnicki* is unlike the personal information published in previous Supreme Court cases.

a) Personal Information Obtained from Government Sources

In *Cox Broadcasting Corp. v. Cohn*, the Supreme Court addressed the propriety of a news media’s publication of truthful, but private facts, about an individual. In *Cox Broadcasting*, the Court refused to punish a media outlet for the publication of the name of a deceased victim of a sexual assault. The Court noted that a reporter obtained the victim’s name after examining the indictment available in the courtroom. The information published was a part of the official documents of the court and was available for inspection by any member of the public. The Court explained that the individual who obtained the information had done so through personal observation and by asking for the information from the clerk of the court. Finally, the Court determined that neither party alleged that the information had been procured in an improper fashion.

b) Personal Information Obtained Through Traditional Reporting Techniques

In *Smith v. Daily Mail Publishing*, the Supreme Court denied a state the right to sanction a newspaper for publishing information regarding a juvenile’s involvement in a violent crime. In *Daily Mail*, a reporter learned the name of the accused by asking witnesses, an attorney on the case, and members of the police that were at the scene of the crime. The Court noted that the reporter collected the information through standard reporting techniques. Thus, the
Court reasoned the information had been lawfully obtained.\textsuperscript{414} Accordingly, the Court specifically observed that its holding must be narrowly construed because there was not an unlawful action by the press.\textsuperscript{415}

c) Personal Information Available to the Public Prior to Publication

The Supreme Court in \textit{The Florida Star v. B.J.F.},\textsuperscript{416} found that a newspaper could not be penalized for publishing information provided by the government.\textsuperscript{417} In \textit{Florida Star}, a weekly newspaper based in Jacksonville, Florida printed the details of a robbery and sexual assault, including the alleged victim's name.\textsuperscript{418} The facts included in the newspaper report were taken verbatim from a report prepared by the Duval County Sheriff's Department.\textsuperscript{419} The police report, copied by the newspaper reporter, was in an area open to the public.\textsuperscript{420} The Court reasoned that although the information was not normally available, it was not illegal for the media outlet to use the information if the government itself had provided the information.\textsuperscript{421} Accordingly, the Court determined that the reporter had lawfully obtained the published information.\textsuperscript{422}

In \textit{Bartnicki}, the information broadcast by the Respondents was initially obtained through presumably illegal means.\textsuperscript{423} An unknown third party, in \textit{Bartnicki}, secretly recorded the conversation of the Petitioners.\textsuperscript{424} The individual who recorded the conversation used an electronic device to aid in the interception.\textsuperscript{425} Thus, the Court determined, the interception in \textit{Bartnicki} presumably violated the federal statute preventing the intentional interception of communications.\textsuperscript{426} The unknown third party provided the Respondents with the audio tape containing the presumably illegally intercepted conversation of the Petitioners.\textsuperscript{427} Thus, in \textit{Bartnicki}, the Court accepted the submission that the Respondents knew, or had reason to believe, that the conversation provided had been illegally procured.\textsuperscript{428}

\begin{itemize}
\item \textsuperscript{414} \textit{Id.} at 104.
\item \textsuperscript{415} \textit{Id.} at 105.
\item \textsuperscript{416} 491 U.S. 524 (1989).
\item \textsuperscript{417} Jurata, 36 \textit{SAN DIEGO L. REV.} at 500.
\item \textsuperscript{418} \textit{Florida Star v. B.J.F.}, 491 U.S. 524, 527 (1989).
\item \textsuperscript{419} \textit{Florida Star}, 491 U.S. at 527.
\item \textsuperscript{420} \textit{Id.} at 527, 538.
\item \textsuperscript{421} \textit{Id.} at 538, 541.
\item \textsuperscript{422} \textit{Id.} at 536.
\item \textsuperscript{423} \textit{Bartnicki}, 121 S. Ct. at 1756.
\item \textsuperscript{424} \textit{Id.} at 1757.
\item \textsuperscript{425} \textit{Id.}
\item \textsuperscript{426} \textit{Id.} at 1757, 1760.
\item \textsuperscript{427} \textit{Id.} at 1757.
\item \textsuperscript{428} \textit{Id.} at 1760.
\end{itemize}
Dissimilar to prior cases, the publication in *Bartnicki* was obtained through an unlawful act.\textsuperscript{429} Although the radio station that ultimately broadcast the Petitioners' conversation did not participate in the illegal procurement of the recording, the radio station did have reason to know that the tape recording had been illegally intercepted.\textsuperscript{430} Consequently, although the Respondents' committed no crime, the station's actions could not be considered law abiding.\textsuperscript{431} The information published by the Respondents in *Bartnicki*, unlike the information published in prior cases, was not generated by the government.\textsuperscript{432} The information published in *Bartnicki* was also unlike the information published in prior cases because the information was not gleaned from a source available to the general public, but rather one that was available only through illegal methods.\textsuperscript{433} Thus, the illegal procurement of the information published in *Bartnicki* was manifestly different from the legal methods of obtaining private information in earlier cases.\textsuperscript{434}

2. **The Information Was Not Available to the Public Prior to Publication**

The second reason that *Bartnicki* is dissimilar to the Court's prior decisions is that the information was not available to the public prior to publication.\textsuperscript{435} In prior cases, the information was made public by the government itself or was available by request to the public before

\textsuperscript{429} Compare *Bartnicki*, 121 S. Ct. at 1756 (noting that the telephone call was illegally intercepted), with *Florida Star*, 491 U.S. at 536 (noting name of victim lawfully was obtained from police report), and *Cox Broadcasting*, 420 U.S. at 496 (noting that information was obtained through personal observation and request of court clerk), and *Daily Mail*, 443 U.S. at 103 (noting that information was obtained through traditional reporting techniques).

\textsuperscript{430} *Bartnicki*, 121 S. Ct. at 1760.

\textsuperscript{431} Compare *Bartnicki*, 121 S. Ct. at 1772 (Rehnquist, C.J., dissenting) (reasoning that despite the lack of the criminal nature of rebroadcast of illegally obtained information, Respondents could not be considered law abiding), with *Cox Broadcasting*, 420 U.S. at 496 (noting information was obtained in a proper fashion through court records), and *Florida Star*, 491 U.S. at 536 (noting name of victim was lawfully obtained).

\textsuperscript{432} Compare *Bartnicki*, 121 S. Ct. at 1757 (noting information was obtained through secret use of electronic device), with *Cox Broadcasting*, 420 U.S. at 496 (noting information was obtained in through official court documents), and *Daily Mail*, 443 U.S. at 103 (noting information was obtained from police and prosecuting attorney at the scene), and *Florida Star*, 491 U.S. at 536 (noting name of victim was obtained from police report).

\textsuperscript{433} Compare *Bartnicki*, 121 S. Ct. at 1757 (noting that the intentional interception occurred via an electronic device), with *Cox Broadcasting*, 420 U.S. at 496 (noting information was obtained through observation and request of court clerk), and *Daily Mail*, 443 U.S. at 103 (noting information was obtained by asking witnesses), and *Florida Star*, 491 U.S. at 536 (noting name of victim was lawfully obtained by copying police report).

\textsuperscript{434} See supra notes 403-33 and accompanying text.

\textsuperscript{435} See infra notes 439-58 and accompanying text.
In *Bartnicki*, however, the information was created between two private individuals who did not intend their conversation to be public or to be made available to the public. Accordingly, the information published in *Bartnicki* is unlike the information previously accepted by the Supreme Court as viable for publication.

The victim's name published in *Cox Broadcasting* was obtained through examination of a grand jury indictment that contained the name of the individual. Additionally, the information in *Cox Broadcasting* was obtained through two sources: first, personal observations of a reporter while attending the trial and second, through review of the court documents. The information in *Cox Broadcasting* was also both accessible and available to any member of the public upon request. The court documents were made available to the reporter by a request to the clerk of the court during a recess in the trial. The reporter asserted, and the Court agreed, that the court records were available to any member of the public. Consequently, the information obtained in *Cox Broadcasting* was provided to the media, in official court documents, accessible to the public.

Likewise, information published in *Daily Mail* was available to the public by traditional reporting techniques. In *Daily Mail*, a newspaper published an article revealing the name of a youth who was arrested for murder. The newspaper obtained the information about the alleged criminal's name by interviewing witnesses at the scene. Further, the reporter who acquired the information received corroborating evidence of the assailant's name by asking the police and the attorney who was prosecuting the case. The Court reasoned that the request for information by the reporter was within the traditional activities of a newspaper. Thus, the personal information published in *Daily Mail* was obtained through accepted reporting techniques and confirmed through government sources.

436. *See infra* notes 439-58 and accompanying text.
437. *See infra* notes 459-65 and accompanying text.
438. *See infra* notes 439-65 and accompanying text.
440. *Id.* at 472 n.3.
441. *Id.*
442. *Id.*
443. *Id.* at 472-73, 472 n.3.
444. *See infra* notes 439-58 and accompanying text.
446. *Id.* at 99.
447. *Id.*
448. *Id.*
449. *Id.* at 103.
450. *See supra* 445-49 notes and accompanying text.
The information reported in Florida Star was also obtained by gathering information from sources accessible to the general public.\textsuperscript{451} In Florida Star, a weekly newspaper published the name of an assault victim.\textsuperscript{462} The victim's name was acquired by a reporter for the newspaper through review of a police report containing the victim's name.\textsuperscript{463} The reporter copied the information for the story, without variation, directly from the information provided by the police department.\textsuperscript{464} The reporter located the police report in the pressroom of the police department.\textsuperscript{455} There were no restrictions placed on the room where the information was found, nor on the information found in that room.\textsuperscript{466} The information obtained by the reporter had been exclusively prepared by the government and located in a governmental publication: the police report.\textsuperscript{457} Thus, the information in Florida Star was both available to the public and provided by the government.\textsuperscript{458}

In Bartnicki, the information broadcast by the radio station was initially acquired through the use of an electronic device.\textsuperscript{459} An unknown person intentionally recorded the Petitioners' conversation.\textsuperscript{460} The conversation was recorded surreptitiously and without the knowledge of the parties to the conversation.\textsuperscript{461} The Petitioners characterized the information contained in the conversation as "very confidential."\textsuperscript{462} Accordingly, the initial acquisition of the information broadcast by the radio station violated Title III of the Omnibus Crime Control and Safe Streets Act of 1968, and was thus, illegal.\textsuperscript{463} A copy of the illegally recorded tape was subsequently placed in the mailbox of an individual who was opposed to the Petitioners' views.\textsuperscript{464} A copy of the illegally acquired tape was provided to the radio station, and ultimately broadcast on a public affairs program.\textsuperscript{465}

Dissimilar to the prior cases, the information broadcast in Bartnicki was not available to the public, nor was the government involved
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in the initial compilation of information.\(^{466}\) In Bartnicki, the conversation recorded and subsequently broadcast, was a telephone call between two individuals.\(^{467}\) The government did not publish the information, nor did it appear in an official report, instead the information was obtained through an initial illegal activity.\(^{468}\) The information acquired by the Respondents in Bartnicki was not available to the public by request, nor was it in a location available for examination by the general public.\(^{469}\) Moreover, the information acquired in Bartnicki, was not the product of a newspaper reporting techniques, but rather the product of an illegal activity.\(^{470}\) Thus, the information in Bartnicki is dissimilar to prior decisions because the information broadcast was not available to the public.\(^{471}\)

3. In Prior Cases, the Supreme Court Described The Government's Interest in Protecting The Disclosure of Information As Minimal

The Supreme Court, in prior cases, described the government's interest in protecting the disclosure of information as minimal.\(^{472}\) The Court, in previous rulings found the governmental interest in preventing publication of private facts too precipitous to warrant a prohibition against dissemination.\(^{473}\) However, in Bartnicki, the Court described the government's interest in protecting the disclosure of the Petitioners' private information as "important."\(^{474}\) The Bartnicki Court's acceptance of the governmental interest as important is unlike previous Supreme Court cases addressing the publication of private information.\(^{475}\)

\(^{466}\) Compare Bartnicki, 121 S. Ct. at 1756 (addressing a private telephone call), with Cox Broadcasting, 420 U.S. at 496 (noting information was located in grand jury indictment), and Daily Mail, 443 U.S. at 99 (noting information was available to any individual present at the scene), and Florida Star, 491 U.S. at 527 (noting information was contained in police report and available to the public).

\(^{467}\) Bartnicki, 121 S. Ct. at 1756.

\(^{468}\) Compare Bartnicki, 121 S. Ct. at 1756 (addressing an illegal interception by unknown individual), with Cox Broadcasting, 420 U.S. at 496 (noting information was obtained from government report), and Florida Star, 491 U.S. at 527 (noting information was obtained from police report).

\(^{469}\) Compare Bartnicki, 121 S. Ct. at 1760 (noting illegal nature of interception), with Cox Broadcasting, 420 U.S. at 496 (noting that information was located in indictment and available by request), and Daily Mail, 443 U.S. at 99 (noting information was available to any individual present at the scene), and Florida Star, 491 U.S. at 527 (noting that information was contained in police report and available to the public).

\(^{470}\) Compare Bartnicki, 121 S. Ct. at 1756 (noting the initial illegal acquisition), with Daily Mail, 443 U.S. at 103 (noting the information was obtained through traditional reporting techniques).

\(^{471}\) See supra notes 439-72 and accompanying text.

\(^{472}\) See infra notes 476-95 and accompanying text.

\(^{473}\) See infra notes 476-95 and accompanying text.

\(^{474}\) See infra notes 496-502 and accompanying text.

\(^{475}\) See infra notes 476-509 and accompanying text.
In *Cox Broadcasting*, the Supreme Court reasoned that because the government provided the name of a victim, it must have concluded that the disclosure served a public interest.\(^476\) In *Cox Broadcasting*, the state defended a statute preventing the dissemination of the victim's name by asserting that an interest existed in protecting a zone of privacy that could not be intruded upon by the press.\(^477\) The Court, however, reasoned that because the information had previously appeared in a public record, the interest in future protection dimmed.\(^478\) Additionally, the Court opined that because the state had, itself, placed the information in the record, the state must have decided that the public would be served by the publication.\(^479\) The Court explained that information in the public record was vital to persons interested in government.\(^480\) Therefore, the Court reasoned that an inherent benefit to the public was occasioned by the publication of public records.\(^481\) The Court explained that the ability for the media to publish information, in the public record, was vital to the maintenance of democratic government.\(^482\) Thus, the Court determined that because the government had made the information public, the media could not be punished for a subsequent publication of that information.\(^483\)

In *Daily Mail*, the State defended its right to limit the publication of juvenile offenders' names reasoning that publication would protect the anonymity of, and prevent future prejudice against, the alleged criminal.\(^484\) The Court reasoned that the state's interest in protecting a juvenile offender's future could not withstand the constitutional right of the media to publish information.\(^485\) The Court explained that the right of confrontation inherent in the Sixth Amendment, as well as the rights associated with the First Amendment, must be considered concomitantly with the state's interest in preventing publication of a criminal's identity.\(^486\) The Court opined that a state's need to protect the identity of an accused cannot justify the imposition of sanctions on the media for publication.\(^487\) The Court noted that although many other states protected information released in juvenile proceedings, almost all achieved their goal without resorting to criminal sanc-

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\(^476\) *Cox Broadcasting*, 420 U.S. at 495-96.
\(^477\) Id. at 487.
\(^478\) Id. at 494-95.
\(^479\) Id. at 495.
\(^480\) Id.
\(^481\) Id.
\(^482\) Id.
\(^483\) Id. at 496.
\(^484\) *Daily Mail*, 443 U.S. at 104.
\(^485\) Id.
\(^486\) Id.
\(^487\) Id. at 104, 105-06.
tions for publication.\textsuperscript{488} The Court reasoned that no evidence was adduced indicating the governmental interest in protecting the secrecy in juvenile proceedings would be served by the proposed sanctions.\textsuperscript{489} Therefore, the Court concluded that the declared governmental interest did not justify criminal punishment of the publication of personal information of an alleged juvenile criminal.\textsuperscript{490}

In \textit{Florida Star}, the Court determined that the government's interest in preventing publication of the names of victims of violent crime did not trump the First Amendment rights of the media when the information had already been made available to the public.\textsuperscript{491} In \textit{Florida Star}, the government argued that prevention of publication furthered three important interests: first, it protected the privacy of victims of sexual crimes; second, it protected the physical safety of those victims; and third, it would encourage future victims to report such crimes without fear of subsequent exposure.\textsuperscript{492} However, the Court maintained that the state's arguments were too precipitous to persuade it that an important state interest was served by the prevention of publication of previously available information.\textsuperscript{493} The Court asserted that since the state had provided the information, it was reasonable to assume that the government had more appropriate means to limit or prevent the dissemination of information than punishing the publication of such information.\textsuperscript{494} Therefore, the Court explained that because the state itself dissolved the privacy of the victim through its disclosure, the governmental interest in subsequently protecting the victims' privacy was not served by the imposition of sanctions on the media for its publication.\textsuperscript{495}

The Court in \textit{Bartnicki}, however, specifically noted that an important governmental interest existed in protecting the dissemination of private communications.\textsuperscript{496} In \textit{Bartnicki}, the government asserted that preventing the publication of information obtained through illegal means was necessary to protect the privacy of communications and to promote unfettered communication of thoughts and information between individuals.\textsuperscript{497} The Court, in \textit{Bartnicki}, noted the government interest in protecting the privacy of communication was “impor-

\textsuperscript{488} Id. at 105.
\textsuperscript{489} Id.
\textsuperscript{490} Id. at 106.
\textsuperscript{491} \textit{Florida Star}, 491 U.S. at 537-38.
\textsuperscript{492} Id. at 537.
\textsuperscript{493} Id.
\textsuperscript{494} Id. at 538.
\textsuperscript{495} Id.
\textsuperscript{496} \textit{Bartnicki}, 121 S. Ct. at 1764 (citations omitted).
\textsuperscript{497} Id. at 1764 (citation omitted).
tart." The Court reasoned that because the revelation of a private conversation was often a greater intrusion than the initial acquisition of information, a legitimate justification existed for the prevention of publication. Further, the Court noted that fear of the disclosure of private information could chill speech. The Court stated "fear or suspicion that one's speech is being monitored by a stranger, even without the reality of such activity, can have a seriously inhibiting effect upon the willingness to voice critical and constructive ideas." Additionally, the Court opined that the valid reason for preventing disclosure of illegally obtained messages existed, even if the subsequent punishment would not prevent future illegal occurrences.

Thus, the third dissimilar aspect of Bartnicki from prior cases is the presence of an important governmental interest. In Bartnicki, the Court viewed the government's interest as important and worthy of consideration. Dissimilarly, in Cox Broadcasting, Daily Mail, and Florida Star, the articulated interests of the government, were found unavailing or vitiated by the circumstances of the case. In Bartnicki, unlike previous cases decided by the Supreme Court, the information sought to be protected was not a matter of public record. Moreover, in Bartnicki, the government had not acted in a way that destroyed the Petitioners' expectation of privacy before publication by the Respondents. Finally, unlike previous cases, the

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498. Id. (citation omitted).
499. Id.
500. Id. (citation omitted).
501. Id. (quoting President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 202 (1967)).
502. Bartnicki, 121 S. Ct. at 1764.
503. Compare Bartnicki, 121 S. Ct. at 1764 (noting an important governmental interest in privacy), with Cox Broadcasting, 420 U.S. at 495 (noting that the information provided served to promote a public interest), and Daily Mail, 443 U.S. at 104, 106 (noting that governmental interest in preventing future anti-social behavior, or protecting reputation, was not persuasive), and Florida Star, 491 U.S. at 537, 541 (reasoning that the protection of victims and prevention of crime was not a sufficient governmental interest).
504. Bartnicki, 121 S. Ct. at 1764.
505. Compare Bartnicki, 121 S. Ct. at 1764 (reasoning that the interest asserted was important and worthy of consideration), with Cox Broadcasting, 420 U.S. at 487, 494-95 (noting that the publication of the facts, by the government, in the current case reduced the expectation of privacy asserted by the government as justifying the publication prohibition), and Daily Mail, 443 U.S. at 104 (noting that constitutional rights trumped governmental interest in future reputation of juvenile offenders), and Florida Star, 491 U.S. at 541 (holding that no governmental interest was served by preventing publication).
506. Compare Bartnicki, 121 S. Ct. at 1764 (reasoning that the interest asserted was important and worthy of consideration), with Cox Broadcasting, 420 U.S. at 495 (noting that the information published was located on official governmental records).
507. Compare Bartnicki, 121 S. Ct. at 1764 (reasoning that the interest asserted was important and worthy of consideration), with Cox Broadcasting, 420 U.S. at 487,
method of protecting the governmental interest in Bartnicki has been accepted by many state legislatures as appropriate.508 Accordingly, the viable governmental interest, articulated by the Solicitor General and accepted by the Court, in Bartnicki, separates it from the prior cases.509

II. THE ALLEGED ILLEGAL METHOD OF OBTAINING THE CONVERSATION IN BARTNICKI FORCED THE COURT TO ESTABLISH A NEW RULE

The alleged illegal method of obtaining the conversation in Bartnicki forced the Court to establish a new rule regarding when a media outlet may lawfully publish private information of a public concern.510 The decision in Bartnicki rebuffed the holdings of prior decisions by the Court in two substantial ways.511 First, the Court in Bartnicki denigrated the right not to speak to a status below the right of the media to publish information of public interest.512 Second, the ruling in Bartnicki eliminates the traditional boundaries of the type of private information that may be published by the media.513

A. THE RULING IN BARTNICKI SUBJUGATES THE FIRST AMENDMENT RIGHT NOT TO SPEAK

The Supreme Court’s decision, in Bartnicki, allowing publication of private facts, because the facts relate to a matter of public interest, rejects the First Amendment’s protections guaranteeing the right not to speak.514 The Bartnicki decision ignores the protection historically afforded under the First Amendment allowing individuals not to speak, and instead chooses to view the media’s freedom of speech as paramount.515 Thus, the decision in Bartnicki directly conflicts with prior Supreme Court rulings upholding the right to remain speechless.

494-95 (noting that the publication of the facts, by the government, in the current case reduced the expectation of privacy asserted by the government as justifying the publication prohibition), and Florida Star, 491 U.S. at 541 (reasoning that the government’s inadvertent disclosure of the victim’s name on an official report lessened the justification for punishing the media for subsequent publication of the information).

508. Compare Bartnicki, 121 S. Ct. at 1769 (Rehnquist, C.J., dissenting) (noting that forty states, as well as the District of Columbia promulgated laws to prohibit the interception and disclosure of communications), with Daily Mail, 443 U.S. at 105 (noting that every state had a statute to protect the information in juvenile proceedings, but only a few attempted to impose criminal sanctions to further the interest).

509. See supra notes 476-508 and accompanying text.

510. See infra notes 514-81 and accompanying text.

511. See infra notes 514-81 and accompanying text.

512. See infra notes 514-34 and accompanying text.

513. See infra notes 535-81 and accompanying text.

514. See infra notes 517-34 and accompanying text.

515. See infra notes 517-23 and accompanying text.
as one of dominant importance among First Amendment protections.516

In Pacific Gas and Electric Co. v. Public Utilities Commission,517 the Supreme Court addressed the First Amendment protection of an individual's right not to speak.518 In Pacific Gas, the Court found that a California regulatory commission's order requiring a company to associate with information it found objectionable was improper.519 The company argued that it had a right not to be associated with a message to which it was opposed.520 Speech, the Court opined, involved not only the choice to speak, but also the choice not to speak.521 Accordingly, the Court reasoned that an essential element of the First Amendment was protection of both the voluntary expression of ideas, as well as the decision whether to speak publicly.522 In Pacific Gas, because the company was forced to associate with views contrary to its interest, the Court found that the company's First Amendment right not to speak was impermissibly abridged.523

In Bartnicki, the Petitioners argued that the Respondents should be punished for the broadcast of an illegally intercepted conversation.524 The Court noted that if it allowed publication of such information, future speech could be chilled and thus adversely affected.525 The Court acknowledged, in a footnote, that freedom of speech contained both the right to speak voluntarily, and coequally the right not to speak at all.526 Nevertheless, the Court determined the right of individual privacy must defer to the right of the media to publish information.527

Dissimilar to Pacific Gas, in Bartnicki, the Court removes the right not to speak from its place as an essential First Amendment consideration to one that is subservient to the First Amendment rights of the media.528 The Petitioners in Bartnicki, similar to the company in

516. See infra notes 517-34 and accompanying text.
517. 475 U.S. 1 (1986).
520. Id. at 7.
521. Id. at 11 (quoting Harper & Row Publ'g Inc. v. Nation Enters., 471 U.S. 539, 559 (1985)).
522. Id.
523. Id. at 15-16.
524. Bartnicki, 121 S. Ct. at 1762.
525. Id. at 1764.
526. Id. at 1764 n.20 (quoting Harper & Row Publ'g Inc. v. Nation Enters., 471 U.S. 539, 559 (1985)).
527. Id. at 1765.
528. Compare Bartnicki, 121 S. Ct. at 1765 (noting that privacy concerns are subsumed by the need to publish matters of public importance), with Pacific Gas, 475 U.S. at 11 (noting that the essential element of the First Amendment is to prohibit restraints on both speaking and the decision not to speak).
Pacific Gas, chose not to speak. In Bartnicki, however, the Court eschews the right not to speak established in Pacific Gas, and instead views the publishing of private information of a public nature as paramount without regard to the intent of the speakers. The Bartnicki Court, dissimilar to Pacific Gas, allowed the publication of speech that the Petitioners specifically attempted to keep out of the public purview. The Court, in Bartnicki, determined that the protection afforded the decision not to speak articulated in Pacific Gas was inferior to the media's right to publish information of public interest. Thus, the Supreme Court in Bartnicki did not hold absolute the right not to speak. Consequently, the decision in Bartnicki establishing a rule allowing the involuntary dissemination a confidential conversation is inconsistent with the Supreme Court's previous holdings establishing an individual's right to be free from forced speech.

B. The Ruling in Bartnicki Eliminated the Traditional Limitations on the Right to Publish Private Information by the Media

In Bartnicki, the Court expanded the traditional boundaries limiting the type of information that could be published by the media. In particular, the Court in Bartnicki expanded the ability to publish information in two contexts. First, the Court eliminated the traditional expectation of privacy that an individual enjoyed when speak-
ing on a telephone. Second, the Court in Bartnicki, by allowing
publication of a private conversation, abolished the prohibition
against publishing highly personal information by the media.

1. Before Bartnicki An Individual Using a Telephone Was Entitled
to an Expectation of Privacy

In Bartnicki, the Court's decision is inconsistent with the Su-
preme Court's prior estimation of the privacy afforded to an individ-
ual's use of the telephone. The private information published by
the radio station in Bartnicki was obtained through the illegal acquisi-
tion of a cellular telephone call between Gloria Bartnicki and Anthony
Kane. The Court in Bartnicki expanded upon its prior decisions
regarding the circumstances in which information may be published
without liability to the media. The Bartnicki decision thus conflicts
with the traditional view of the Supreme Court regarding the unique
nature of a telephone conversation.

The Supreme Court, in Katz v. United States, established the
essential role the telephone occupies in private conversations. The
Court, in Katz, addressing the constitutionality of a search and
seizure, articulated the inherently private nature of a telephone
call. The Court noted that an individual who uses a telephone does
not expect privacy from visual intrusion, but rather from audile intru-
sion. The Court reasoned that an individual who places a tele-
phone call from the privacy of a phone booth is justified in believing
that the words spoken into the telephone will not be subsequently an-
nounced to the public. The Court reasoned that a more circumspect
reading of the Constitution would disregard the essential place that
the telephone occupies in society.

The Court, in Bartnicki, examined whether Respondents could be
punished for the publication of an illegally intercepted conver-
sation. The intercepted conversation took place between one individ-
ual who was on a cellular telephone and one individual who was on a

537. See infra notes 539-56 and accompanying text.
538. See infra notes 557-81 and accompanying text.
539. See infra notes 543-56 and accompanying text.
540. Bartnicki, 121 S. Ct. at 1753, 1756-57.
541. See infra notes 543-81 and accompanying text.
542. See infra notes 543-56 and accompanying text.
546. Id. at 352.
547. Id.
548. Id.
549. Bartnicki, 121 S. Ct. at 1756, 1762.

However, the decision in \textit{Bartnicki}, dissimilar to the holding in \textit{Katz}, did not take into account any unique privacy expectations because the Petitioners' conversation occurred while on the telephone.\footnote{Compare \textit{Bartnicki}, 121 S. Ct. at 1756, 1765 (noting that the intercepted conversation took place on a cellular telephone and noting that privacy must give way when balanced against the right to publish information of a public interest), \textit{with Katz}, 389 U.S. at 352 (reasoning that an individual is entitled to conclude that words spoken into the telephone will not be transmitted all over the world).} The \textit{Bartnicki} Court's ruling allowed the media to publish the contents of an illegally acquired telephone conversation, but did not discuss whether the method of communication between the parties affected the decision.\footnote{Compare \textit{Bartnicki}, 121 S. Ct. at 1756 (reasoning the disclosure of a telephone conversation is consistent with the protections afforded by the First Amendment), \textit{with Katz}, 389 U.S. at 352 (noting that the use of a telephone affords entitlement of privacy).} Further, although the Supreme Court established that a conversation by telephone carried certain inherent privacy expectations thirty-four years before \textit{Bartnicki}, the Court does not distinguish, or address, its previous opinion.\footnote{Compare \textit{Bartnicki}, 121 S. Ct. at 1759 (referring to \textit{Katz} only by noting that Congress enacted Title III of the Omnibus Crime Control And Safe Streets Act of 1968), \textit{with Katz}, 389 U.S. at 352 (noting that the expectation of privacy is consistent with the important role that the telephone plays in communications).} The expansion of the media's right to broadcast an illegally intercepted private telephone conversation is clearly incompatible with the rule articulated in \textit{Katz} viewing the expectation of privacy of a telephone conversation as consistent with the Constitution.\footnote{See infra notes 561-81 and accompanying text.} Therefore, the \textit{Bartnicki} decision is inconsistent with the established precedent of the Court.

\section*{2. Before \textit{Bartnicki} Information of a Highly Personal Nature Could Not Be Published}

The decision in \textit{Bartnicki} expanded the type of information that could be published without liability by the media.\footnote{See \textit{infra} notes 561-81 and accompanying text.} Prior Supreme
Court rulings determined that not all private facts about an individual could be published without regard to the public status of the individual, or the ultimate interest of the public. The decision in *Bartnicki* eliminates the barrier as to the type of information that may be published without liability. Therefore, *Bartnicki* is inconsistent with the Court's previous decisions rejecting the right to publish information that is merely shocking or controversial.

In *Time v. Firestone*, the Supreme Court addressed the propriety of publishing information about a divorce between wealthy individuals. The divorce decree included a number of details regarding the litigants including information about their extramarital affairs. The information contained in the decree was subsequently printed in a national magazine. In *Time*, the Supreme Court reasoned that despite the high profile of the parties, they were not public figures; moreover, the details surrounding their divorce were not proper subjects of public inquiry. Additionally, the Court reasoned, the details of the divorce proceedings did not constitute a matter of public interest, despite the potential curiosity of the public. The Court noted further support for its reasoning because the individual participants in the divorce had not voluntarily publicized the information regarding their marriage.

In *Bartnicki*, the information published was a private conversation discussing the nature of the bargaining process and the attitude of the Petitioners toward the members of the School Board. The participants in the telephone call discussed upcoming labor negotia-

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558. *See infra* notes 561-67 and accompanying text.
559. *See infra* notes 561-81 and accompanying text.
560. *See infra* notes 561-81 and accompanying text.
564. *Id.* at 451-52.
565. *Id.* at 454-55.
566. *Id.* at 454.
567. *Id.* at 454. The Court further opined that despite several press conferences held by Respondent, she did not give up her status as a private individual. *Id.* at 454 n.3. Likewise, in *Michaels v. Internet Entertainment Group, Inc.*, a federal district court in California reasoned that despite the public status of the litigants, the publication of a videotape depicting their sexual activities was not a matter of public concern. 5 F. Supp. 2d 823, 828, 840-41 (C.D. Cal. 1998). In reaching the decision, the court noted that although a media privilege exists to disclose information of a public concern, the privilege was finite. *Id.* at 839-40. The court reasoned that if the publication of private facts is only undertaken to expose sensational and lurid details of an individual's life, it is not of public interest and is not protected by the public interest privilege. *Id.* at 840 (quoting *Diaz v. Oakland Tribune, Inc.*, 188 Cal. Rptr. 762, 767 (1983)).
tion strategies and the date for a possible strike. The conversation between Bartnicki and Kane also included a recitation of Bartnicki's home and cellular telephone numbers. The conversation included a discussion of potentially "blowing off" the School Board member's porches. Finally, Kane noted to Bartnicki that their telephone conversation, and the contents therein, were "very confidential." The Bartnicki Court concluded that the matter was of public importance because the conversation included a discussion of the ongoing labor negotiations.

Similar to the information published in *Time*, the publication of the Petitioners' conversation revealed controversial and sensational details regarding their personal life, their opinions about members of the School Board and their potential plans for violence. Nevertheless, the majority in *Bartnicki* viewed the Petitioner's conversation as containing information plainly of public importance. Consequently, dissimilar to *Time*, the Court in *Bartnicki* allowed the media to publish private information about the Petitioners' emotional thoughts and unrestrained opinions.

Thus, the Court in *Bartnicki* eschews the traditional limitations on the type of information that may be published by a media outlet. Concomitantly, the Court expanded the freedom of the press to report any item nominally designated as a matter of public concern. Moreover, the rule established in *Bartnicki* forces public figures to

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569. *Bartnicki*, 121 S. Ct. at 1756-57.
571. *Bartnicki*, 121 S. Ct. at 1757.
573. *Bartnicki*, 121 S. Ct. at 1765.
574. Compare *Bartnicki*, 121 S. Ct. at 1256-57 (noting that the radio station played a tape of the individual's conversation and threatening to damage school board members' property), *with Time*, 424 U.S. at 451-52 (noting that the magazine article contained information regarding the details of the individual's extra-marital affairs that would have "[made] Dr. Freud's hair curl").
575. *Bartnicki*, 121 S. Ct. at 1765. In *Bartnicki*, the concurring opinion noted that the Petitioners had little legitimate expectation to privacy because of the potential threat of public safety that the conversation created. Id. at 1767 (Breyer, J., concurring).
577. See supra notes 561-76 and accompanying text.
578. See supra notes 561-76 and accompanying text (discussing traditional boundaries of publication); *Bartnicki*, 121 S. Ct. at 1769 (Rehnquist, C.J., dissenting) (providing that the publication of some forms of information should be protected). See also *Florida*
fear that their right to a private conversation, despite the illegality of its acquisition, may be subject to unauthorized disclosure. The decision in Bartnicki is incompatible with previous Court rulings that did not allow publication of merely sensational information, despite the interest of the public. The Bartnicki Court, despite previous Supreme Court decisions to the contrary, determined that the right to publish all information, if pertaining to a public interest, is inviolable.

III. THE DECISION IN BARTNICKI ABDICATES THE AUTHORITY TO DETERMINE WHAT CONSTITUTES A MATTER OF PUBLIC INTEREST TO THE MEDIA

A final consequence of the Court's decision in Bartnicki is the installation of the media as arbiters of what constitutes a matter of public interest. The Court's failure in Bartnicki to articulate a judicial basis for determining what constitutes a matter of public interest allows the determination to be made by the media; thus increasing the media's power to determine what information is of public interest and fit for publication. The effect of the Supreme Court's decision in Bartnicki, focusing on the public concern regarding the private facts to be published as opposed to the lawfulness of acquisition, creates a new and significantly broader rule regarding the publication of private facts. The rule established in Bartnicki expands both the scope of what types of private facts may be published by the news media as well as the criteria with which the media must comply. Therefore, the Court in Bartnicki established the media's burden as requiring only a demonstration that the matter is of public importance. Accordingly, the burden, once satisfied, provides the media with a license to publish information, with impunity, no matter how private.
The Supreme Court, in *Cox Broadcasting*, addressed the propriety of punishing a media outlet for publishing a victim's name that was acquired by reading a grand jury indictment. The Court declared that the media outlet could not be punished because the information had already appeared in a form available to the public. The Court further reasoned that the decision to publish information contained in public court documents properly belonged to the judgment of the media outlet.

Likewise, in *Florida Star*, the Court addressed whether a newspaper could be punished for the publication of a victim's name that had been obtained from a police report. The Court, in *Florida Star*, reasoned that the media outlet could not be punished because the government had provided the information. The Court opined that once the government placed the facts in the public domain the decision to publish the information is left to the editorial judgment of media outlets.

The Court, in *Bartnicki*, examined whether a media outlet could broadcast a conversation that had been illegally intercepted. The Court reasoned that the broadcast was permissible because the information involved a public matter and thus was subject to the First Amendment protection. However, the Court failed to establish a rule describing how to determine whether particular information constitutes a matter of public interest. In *Bartnicki*, the Supreme Court's decision to avoid designating factors for determining what private information could be a matter of public interest expands the media's power to make such determinations.

The Supreme Court's previous decisions in *Cox Broadcasting*, and *Florida Star* allowing deferment to the media's judgment were limited to consideration of facts already in the public eye. In contrast, *Bartnicki* expands this deference to the initial determination of what

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589. *Id.* at 496.
590. *Id.*
592. *Id.* at 538.
593. *Id.* (quoting *Cox Broadcasting*, 420 U.S. at 496).
594. *Bartnicki*, 121 S. Ct. at 1756.
595. *Id.*
596. *Id.* at 1769 (Rehnquist, C.J., dissenting).
597. *See infra* notes 598-609 and accompanying text.
598. *Compare Bartnicki*, 121 S. Ct. at 1756-57 (noting that the radio station broadcast a illegally intercepted conversation), *with Cox Broadcasting*, 420 U.S. at 496 (noting that the information was available to the public from examination of court record), and *Daily Mail*, 443 U.S. at 99 (noting that the information was available to any individual present at the crime scene), and *Florida Star*, 491 U.S. at 527 (noting that the information was available to the public through the police report).
may be considered a matter of public interest. In Bartnicki, dissimilar to Cox Communication and Florida Star, the Court grants the media the ability to determine what is suitable for publication before, rather than after the initial appearance of the private information. Accordingly, the Bartnicki decision implicitly accepts a "leave-it-to-the-press model" to determine whether private information constitutes a matter of public concern and is newsworthy. The "leave-it-to-the-press model" allows the press, rather than the judiciary, to determine public interest and publish information accordingly. The Court, in implicitly accepting the "leave-it-to-the-press model," abstains from decisions regarding what constitutes matters of public importance and concludes, by default, that information printed by the media is a legitimate public concern. Thus, the decision in Bartnicki, elevating the right of the media to determine what constitutes a matter of public interest, necessarily entrenches the media as the authority on the topic.

The new authority bestowed on the media as the ultimate arbiter of what is newsworthy may produce an additional intrusion into privacy by the publication of private facts. The "leave-it-to-the-press model" presupposes that the media's self control will prevent the publication of private information with no public value. However, as the publication in Time of personal divorce details illustrated, the media does not necessarily follow the hypothesized model of re-

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599. Compare Bartnicki, 121 S. Ct. at 1769 (Rehnquist, C.J., dissenting) (noting the failure of the Court to attempt to define public concern), with Cox Broadcasting, 420 U.S. at 496 (allowing media discretion regarding the publication of information of court records), and Florida Star, 491 U.S. at 538 (quoting Cox Broadcasting, 420 U.S. at 496) (allowing the media to determine if publication of information available in the public record is proper).

600. Compare Bartnicki, 121 S. Ct. at 1765-66 (reasoning that the right to privacy fails when weighed against the media's right to publish matters of public interest despite the private nature, and illegal acquisition, of the information), with Cox Broadcasting, 420 U.S. at 496) (allowing media discretion regarding the publication information of court records subsequent to the information becoming available to the public), and Florida Star, 491 U.S. at 538 (quoting Cox Broadcasting, 420 U.S. at 496) (allowing the media to determine if publication of information available in the public record is proper).

601. See Jurata, 36 SAN DIEGO L. REV. at 502-08 (quoting Zimmerman, 68 CORNELL L. REV. at 353) (discussing the possible methods of determining newsworthiness including the Restatement (Second) of Torts model, the refusal to acknowledge model, the "leave-it-to-the-press model", the California three pronged model and the "logical nexus" model).


604. See supra notes 588-603 and accompanying text.

605. Jurata, 36 SAN DIEGO L. REV. at 505-06.

606. Jurata, 36 SAN DIEGO L. REV. at 505-06.
The “leave-it-to-the-press model” of determining whether information is of legitimate public interest creates an incentive for the media to publish any topic, no matter how lurid, in hopes of generating publicity. Thus, the “leave-it-to-the-press model” creates the potential for expansion of the First Amendment rights of the press, while ignoring the potential implications to the individual's right of privacy.

CONCLUSION

The Supreme Court, in Bartnicki v. Vopper, determined that a media outlet was protected in the publication of a cellular telephone conversation illegally intercepted by an unknown third party. In Bartnicki, Gloria Bartnicki and Anthony Kane engaged in a telephone conversation detailing their strategy in ongoing School Board negotiations. During the course of their telephone conversation, which included a threat to “blow off” the front porches of School Board members, an unknown third party illegally intercepted their conversation. A local radio station subsequently broadcast the intercepted tape. The Court, in reaching its decision to protect the broadcast by the radio station, explained that the case presented a conflict between an individual's right of privacy and the First Amendment protection of freedom of the press. The Court determined that the privacy interest of an individual was outweighed by the need to publish information regarding an item of public interest. The Court reasoned that the telephone conversation between Bartnicki and Kane was a matter of public importance. Therefore, the Court found that the broadcast of their conversation demanded First Amendment protection.

The Supreme Court, in Bartnicki, expands the scope of private information that may be published by the media to any information determined to be a matter of public interest, without regard to how it

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607. See Time, 424 U.S. at 457 (noting that the details of most court proceedings would not add to legitimate public debate).
608. Jurata, 36 San Diego L. Rev. at 505-06. But see Zimmerman, 68 Cornell L. Rev. at 354 (arguing that arguments based on the potential for the press to pander are class-based judgments without merit).
609. See supra notes 588-608 and accompanying text.
612. Bartnicki, 121 S. Ct. at 1753, 1756-57.
613. Id. at 1756-57.
614. Id. at 1757.
615. Id. at 1764-65.
616. Id. at 1765.
617. Id.
618. Id.
was initially obtained. The Court, without articulating their rationale, declared that a telephone conversation explicitly designated as "very confidential," was nevertheless a matter of public interest. The Court's decision expands the traditional contours of what constitutes matters of public interest suitable for publication. The Court, in Bartnicki, departs from previous case law and allows the publication of personal information that was obtained not through legal methods, but rather through illegal methods. Consequently, the Court's decision limits an individual's First Amendment right not to speak in favor of the media's right to publish private information designated as a public interest. Moreover, the Court's decision rejects the traditional expectation of privacy that a telephone conversation enjoyed, as well as the historical prohibition against publication of private facts that were merely scandalous.

The Court's departure from its previous holdings enhances the media's free speech rights, but concomitantly chills the free speech rights of many individuals. The Court's conclusory finding that Bartnicki's conversation was "clearly" a matter of public interest failed to provide guidance to lower courts when determining whether an event is a matter of public interest. Accordingly, the Court implicitly accepts a "leave-it-to-the-press model" for determining matters of public interest that apparently reaches to the contents of confidential telephone conversations. Because Bartnicki blurs the line of what is a matter of public interest, individuals may become less inclined to speak freely, fearing that their conversation, if intercepted, could be considered a matter of public interest and broadcast without repercussion. Thus, the Court's decision while expanding the First Amendment rights of the media, narrows the free speech rights and privacy expectations of individuals.

The decision in Bartnicki appears to signal the functional end to the idea that individuals are protected from publication of personal information by the media. The lowered standard of what constitutes a matter of public interest, combined with the ability of the media to decide what fits within the definition, produces the effect of placing all conversations within the theoretical boundaries of matters of public interest and thereby suitable for publication. The determination by the Court that a conversation between participants in a local School Board negotiation was proper for publication, despite the articulated need to maintain an individual's privacy, may signal the end of any reasonable expectation of privacy for members of the public who are active in public life at a national, regional or even local level. Thus,
the ultimate effect of the ruling in Bartnicki is to eliminate the right of privacy for all individuals except for those most isolated Americans.

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