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Is Anyone Listening to Me?: Bartnicki v. Vopper

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Is Anyone Listening to Me?: *Bartnicki v. Vopper*

> *The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.*[1]
>
> — Samuel Warren & Louis Brandeis

I. INTRODUCTION

If Warren and Brandeis's statement was true in 1890, it is even more true today. The quantum technological leaps made in the last century have emaciated our privacy. While individual privacy interests usually have been protected by the Supreme Court and various federal and state statutes, they nonetheless remain vulnerable.

In *Bartnicki v. Vopper*,[2] the United States Supreme Court held the First Amendment protected a rebroadcast on commercial radio of an illegally intercepted cellular phone conversation.[3] The Court found the content of the conversation was a matter of public concern, and thus held the media's freedom of speech interest outweighed the speaker's privacy interest.[4] *Bartnicki*, therefore, serves as an example of the frailty of privacy.

Our communications have a long history of protection from intrusion. We are protected by the Fourth Amendment from unreasonable searches and seizures by the government.[5] This protection extends to telephone conversations[6] and other forms of communication. Protection of communications also comes in the form of many federal and state statutes. In fact, the statutes declared unconstitutional in *Bartnicki* were implemented specifically to protect individuals' communications.[7]

The privacy interest in *Bartnicki* came head to head with another cherished American institution, freedom of the press. This interest

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1. Samuel Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 196 (1890).
2. 532 U.S. 514, 121 S. Ct. 1753 (2001).
3. Bartnicki v. Vopper, 532 U.S. 514, 516, 121 S. Ct. 1753, 1756 (2001).
4. *Id.* at 525, 121 S. Ct. at 1760.
5. U.S. Const. amend. IV.
6. Katz v. U.S., 389 U.S. 347, 88 S. Ct. 507 (1967).
7. S. Rep. No. 90-1097 at 2153 (1968).

also receives the highest form of protection from the Constitution.[8] In addition, the media enjoy statutory[9] and jurisprudential[10] authority to disseminate information. It is therefore inevitable that the privacy interests of individuals and the freedom enjoyed by the media will clash. This clash occurred in *Bartnicki* where the Court found the media's interest to be of greater weight and held the statutes prohibiting disclosure violated the First Amendment. The Court stated the statutes implicated the core purposes of the First Amendment because they imposed sanctions on the publication of truthful information of public concern.[11]

The Court's decision in *Bartnicki* is flawed. The decision ignores the sound judgment of Congress and forty states, including Louisiana. The Court also applied the wrong standard of judicial review. These statutes are content neutral and therefore are subject only to intermediate scrutiny. However, the Court applied strict scrutiny usually reserved for those regulations affecting content. Finally, and perhaps most importantly, the Court's decision ignores social reality. Allowing this type of disclosure will create a chilling of free speech which the First Amendment was designed to avoid.

This note details the *Bartnicki* decision and its ramifications on speech. Part II explains the facts and procedural history of *Bartnicki*. Part III is an overview of Justice Stevens's majority opinion. Part IV explores why the Court's decision is flawed. Finally, Part V focuses on implications of *Bartnicki* for Louisiana.

II. FACTS AND PROCEDURAL HISTORY

A. Facts

During 1992 and most of 1993, the Pennsylvania State Education Association, a union representing the teachers at Wyoming Valley West High School, engaged in collective-bargaining negotiations with the school board.[12] Gloria Bartnicki was the chief negotiator for the Wyoming Valley teacher's union.[13] During the negotiations, Bartnicki used the cellular phone in her car to call Anthony Kane, a teacher at Wyoming Valley and president of the teacher's union.[14] In this conversation, Bartnicki and Kane discussed the status of the

8. U.S. Const. amend. I.
9. 5 U.S.C.A. § 552 (1996).
10. New York Times v. U.S., 403 U.S. 713, 91 S. Ct. 2140 (1971).
11. *Bartnicki,* 532 U.S. at 534, 121 S. Ct. at 1765.
12. *Id.* at 518, 121 S. Ct. at 1756.
13. Petitioner's Brief at 4, Bartnicki v. Vopper, 532 U.S. 514, 121 S. Ct. 1753 (2001) (Nos. 99-1687, 99-1728).
14. *Id.*

negotiations and the timing of a proposed strike.[15] Also, some questionable negotiating strategies were mentioned which could have been misconstrued as advocating violence.[16]

Unknown to either Bartnicki or Kane, the conversation was intercepted and recorded on a cassette tape by an unknown person, apparently using a scanner that picked up the signal from Bartnicki's cellular phone.[17] The tape was then placed in the mailbox of Jack Yocum, the president of the Wyoming Valley West Taxpayers' Association, an organization opposed to the union's bargaining proposals.[18] After listening to the tape and recognizing the voices of Bartnicki and Kane, Yocum gave a copy of the tape to Frederick Vopper, the host of a talk show on a local radio station.[19] Both Yocum and Vopper realized the conversation between Bartnicki and Kane involved a cellular phone, and that a scanner probably had been used to intercept the call.[20]

Early in the fall of 1993, the union and the school board accepted a non-binding arbitration proposal that was generally favorable to the union.[21] After the agreement was reached, Vopper played the tape during his talk show. Until that broadcast, Bartnicki and Kane did not know their conversation had been intercepted and taped.[22] They sued Vopper for civil damages. Bartnicki and Kane claimed the disclosure violated both Title III of the Omnibus Crime Control and Safe Street Act of 1968, as amended by the Electronic Communications Privacy Act of 1986[23] and the Pennsylvania Wiretapping and Electronic Surveillance Control Act.[24] Both statutes prohibit the intentional interception of any wire, oral, or electronic communication.[25] More importantly, the statutes also prohibit the intentional disclosure of such communications if one knows or has reason to know the information was obtained through the interception of a wire, oral or electronic communication.[26] Vopper contended the statutes were not violated because he had nothing to do with the interception and the conversation may have been intercepted

15. *Bartnicki*, 532 U.S. at 518, 121 S. Ct. at 1756.
16. Specifically, Kane said "If they're not gonna move for three percent, we're gonna have to go to their homes.....To blow off their front porches, we'll have to do some work on some of those guys."
17. Petitioner's Brief, *supra* note 13, at 5.
18. *Id.*
19. *Id.*
20. Petitioner's Brief, *supra* note 13, at 6.
21. *Bartnicki*, 532 U.S. at 519, 121 S. Ct. at 1757.
22. Petitioner's Brief, *supra* note 13, at 5.
23. 18 U.S.C. § 2510 (2001).
24. 18 Pa. Cons. Stat. § 5703 (2000).
25. 18 U.S.C. § 2511(1)(a) (2001).
26. 18 U.S.C. § 2511(c) (2001).

inadvertently.[27] Moreover, Vopper argued, even if disclosure of the conversation did violate the statutes, the disclosure was protected by the First Amendment.[28]

B. Procedural History

The District Court rejected the defendant's statutory argument because, under the plain language, an individual violates the federal act by disclosing the contents of an electronic communication when he knows or has reason to know the information was obtained by illegal means.[29] On summary judgment, the District Court also concluded the text of the interception raised a genuine issue of material fact as to whether the conversation was intentionally intercepted.[30] Finally, the District Court rejected defendant's First Amendment defense because the statutes were content neutral laws of general applicability that contained no indicia of prior restraint.[31]

On appeal, the Third Circuit reversed.[32] All three members of the panel agreed the statutes were content neutral and therefore subject only to intermediate scrutiny.[33] The majority nonetheless concluded the statutes failed intermediate scrutiny.[34] Therefore, the court held the provisions could not be constitutionally applied to penalize the use or disclosure of illegally intercepted information where there was no allegation the defendants participated in or encouraged the interception.[35]

III. SUPREME COURT OPINION

The United States Supreme Court granted certiorari[36] and affirmed. In the majority decision by Justice Stevens, the Court found that the interception was intentional and therefore illegal.[37] The Court also noted that the defendant had reason to know it was unlawfully obtained, thus making the disclosure illegal.[38] The only issue before the Court, therefore, was whether the statutes as applied to this case

27. *Bartnicki*, 532 U.S. at 520, 121 S. Ct. at 1757.
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. Bartnicki v. Vopper, 200 F.3d 109, 129 (3d Cir. 1999).
33. *Bartnicki*, 532 U.S. at 521, 121 S. Ct. at 1758.
34. *Bartnicki*, 200 F.3d at 129.
35. *Id.*
36. 530 U.S. 1260, 120 S. Ct. 2716 (2000).
37. *Bartnicki*, 532 U.S. 514, 121 S. Ct. 1753.
38. *Id.*

violated the First Amendment.[39] Specifically, did the media's interest in disclosing this conversation outweigh the privacy rights of Bartnicki and Kane? In determining this issue the Court accepted several facts as true.[40] The defendants were not involved in the illegal interception of the conversation, and their access to the information on the tapes was obtained lawfully, even though the information itself was intercepted unlawfully by someone else.[41] More importantly, the Court noted that the subject matter of the conversation was a matter of public concern.[42] The public concern, according to the Court, stemmed from the fact that the statements about the negotiations would have been newsworthy had they been made in a public arena.[43] This suggests that the Court saw the conversation as one of public concern because it involved labor negotiations and not that it could be loosely interpreted as advocating violence.

The Court agreed with the Third Circuit that the statutes were content neutral.[44] It recognized that the purpose of the statutes was to protect the privacy of communications, and that they focused on the source of the communication rather than its subject matter.[45] However, the Court also recognized prohibition of disclosures as a regulation of pure speech.[46] It analogized the delivery of the taped conversations here to the delivery of a pamphlet, making it the kind of speech the First Amendment protects.[47] The Court, therefore, contradicts itself by saying the statutes are both content neutral and regulations of pure speech. Nevertheless, the Court demanded a privacy need of the highest order to justify the interest protected by the statutes. This suggests the Court actually analyzed the statutes as regulations of pure speech.

The Court recognized two interests served by the statutes.[48] The first interest was to remove an incentive for parties to intercept private conversations.[49] The Court rejected this interest because the normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it. The plaintiffs presented no empirical evidence to support the assumption that the prohibition against disclosures reduces the number of illegal

39. *Id.*
40. *Id.*
41. *Id.*
42. *Bartnicki*, 532 U.S. 514, 121 S. Ct. 1753.
43. *Id.*
44. *Id.*
45. *Bartnicki*, 532 U.S. at 526, 121 S. Ct. at 1761.
46. *Id.*
47. *Id.*
48. *Bartnicki*, 532 U.S. at 529, 121 S. Ct. at 1762.
49. *Id.*

interceptions.[50] The second interest was minimizing the harm to persons whose conversations have been illegally intercepted.[51] The Court was sympathetic to this interest, and stated that disclosure of these conversations might have a chilling effect on private speech.[52] However, while the Court found this interest to be significantly stronger, it nonetheless found it insufficient. The Court held that privacy concerns give way when balanced against the interest in publishing matters of public concern.[53] Moreover, a loss of privacy is a natural consequence of involvement in public affairs.[54] Open debate about public issues is an important goal, and the Court saw this goal as more important than protecting private conversations. Finding the negotiations between the union and the school board an unquestionable matter of public concern, the Court held the prohibition against disclosure violated the First Amendment.[55]

IV. THE COURT'S DECISION IS INCORRECT

A. The Statutes Under Scrutiny

The statutes in question in *Bartnicki* are 18 U.S.C. §2511 and 18 Pa. C.S.A. §5703. Both statutes contain similar language. The federal statute creates a prohibition for anyone who "intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication."[56] It also provides a prohibition for anyone who "intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know the information was obtained through interception of a wire, oral, or electronic communication in violation of this subsection."[57]

The Pennsylvania statute contains similar language and states a person is guilty of a felony of the third degree if he "intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept any wire, electronic or oral communication."[58] Pennsylvania's statute also contains an anti-disclosure provision making it a felony for anyone who "intentionally

50. *Id.*
51. *Id.*
52. *Id.* at 533, 121 S. Ct. at 1764.
53. *Id.* at 534, 121 S. Ct. at 1765.
54. *Id.*
55. *Id.*
56. 18 U.S.C. § 2511(1)(a) (2001).
57. 18 U.S.C. § 2511(1)(c) (2001).
58. 18 Pa. Cons. Stat. § 5703(1) (2000).

discloses or endeavors to disclose to any other person the contents of any wire, electronic or oral communication, or evidence derived therefrom, knowing or having reason to know the information was obtained through the interception of a wire, electronic or oral communication."[59]

B. Legislative Judgment

The *Bartnicki* decision exempts news media from the anti-disclosure provisions of these statutes when the information is of public concern.[60] This decision ignores the sound judgments of various legislative bodies. When Title III of the Omnibus Crime Control and Safe Streets Act of 1968 was enacted, Congress recognized the tremendous scientific and technological developments that have taken place in the last century making possible today the widespread use and abuse of electronic surveillance techniques.[61] Congress also recognized that as a result of these developments in surveillance, privacy of communication was seriously jeopardized.[62] Title III was enacted with the purpose, in part, of protecting the privacy of wire and oral communications.[63] Interestingly, Congress took notice of the increasing problem of employer-labor espionage and the difficulty of conducting business meetings in private.[64] This suggests Congress envisioned situations very similar to the facts of *Bartnicki*. While the author does not suggest the Wyoming Valley West School Board was responsible for the interception and recording of the Bartnicki conversation, the end result was the same. The union's strategies were intercepted and disclosed to the employer. In addition, Bartnicki and Kane were trying to conduct business privately, and that privacy was violated. Therefore, Congress, in drafting Title III, sought to prevent exactly what happened in *Bartnicki*.

In drafting Title III, Congress paid special attention to the United States Supreme Court decisions in *New York v. Berger*[65] and *Katz v. United States*.[66] In *Berger*, the Court declared a New York eavesdropping statute unconstitutional. The statute in *Berger* authorized an ex parte order for eavesdropping.[67] The Court held the

59. 18 Pa. Cons. Stat. § 5703(2) (2000).
60. *Bartnicki*, 532 U.S. 514, 121 S. Ct. 1753.
61. S. Rep. No. 90-1097, *supra* note 7, at 2154.
62. *Id.*
63. *Id.* at 2153.
64. *Id.* at 2154.
65. 388 U.S. 41, 87 S. Ct. 1873 (1967).
66. 389 U.S. 347, 98 S. Ct. 507 (1967).
67. *Berger*, 388 U.S. at 54, 87 S. Ct. at 1881.

statute was too broad resulting in a trespassory intrusion into a constitutionally protected area.[68] The Court also held that conversation, and the right to keep it private, is constitutionally protected.[69] In addition, the *Berger* Court provided a constitutional framework within which a wiretapping statute should fit in order to survive constitutional scrutiny. Congress took note of these standards, which focused on protecting the privacy of conversation, in drafting Title III.[70]

In *Katz v. United States*, the Court held the Government's activities in electronically listening to and recording petitioner's words violated the privacy which he justifiably relied upon while using a telephone booth.[71] There, the FBI had attached electronic eavesdropping devices to the outside of a public telephone booth which Katz used to make phone calls.[72] The Court stated that what a person seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.[73] Like *Berger*, *Katz* seeks to provide greater protection for our private conversations. Admittedly, *Berger* and *Katz* dealt with protection from government intrusion. Nonetheless, the level of privacy afforded to conversations should be the same whether the intrusion comes from the government or private individuals. This was Congress's goal in drafting Title III.[74]

In 1986, Congress passed the Electronic Communications Privacy Act as an amendment of Title III and to protect against the unauthorized interception of electronic communications.[75] The act was designed to update and clarify federal privacy protections and standards in light of dramatic changes in new computer and telecommunications technologies.[76] Congress was concerned with the lack of federal statutory standards to protect the privacy and security of communications transmitted by new telecommunications technology.[77] The concern was that this lack of protection would have the effect of discouraging use of such innovations.[78] One of the advancements recognized by Congress to be in need of protection was

68. *Id.* at 58, 88 S. Ct. at 1883.
69. *Id.* at 51, 88 S. Ct. at 1879.
70. S. Rep. No. 90-1097, *supra* note 7, at 2161.
71. *Katz*, 389 U.S. at 353, 88 S. Ct. at 512.
72. *Id.* at 348, 88 S. Ct. at 509.
73. *Id.* at 351, 88 S. Ct. at 511.
74. S. Rep. No. 90-1097, *supra* note 7, at 2162.
75. S. Rep. No. 99-541, at 3555 (1986).
76. *Id.*
77. *Id.* at 3559.
78. *Id.*

the cellular phone.[79] They understood that cellular phone conversations could be intercepted by special scanners or modified radio scanners.[80]

The legislative history indicates that Congress made a rational judgment to protect the type of conversation involved in *Bartnicki* not only from interception but disclosure as well.[81] In addition to federal legislation, forty states have enacted similar legislation to protect these types of communication.[82] The Court ignored these judgments and replaced them with its own: "The Court's decision to hold these statutes unconstitutional rests upon nothing more than the bald substitution of its own prognostications in place of the reasoned judgment of 41 legislative bodies and the United States Congress."[83] The Court inadvertently overruled itself by doing so. Title III was drafted with the Court's decisions in *Berger* and *Katz* in mind. These cases called for increased protection of private communications. Congress obliged by creating prohibitions on interception and disclosure of phone conversations. Now, however, the Court in *Bartnicki* has changed the rules. In discussing the privacy of communication interest, the Court did not say that interest is no longer in need of protection but that the media's interest in invading it is greater.

The facts of *Bartnicki* make for a difficult decision. The Court recognized there are "important interests on both sides of the constitutional calculus."[84] It agreed that public disclosure of private conversations might well have a chilling effect on private speech.[85] It also recognized that there exists "valid independent justifications

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79. *Id.* at 3556.
80. *Id.* at 3563.
81. S. Rep. No. 99-541, at 3555 (1986).
82. See Ala. Code §13A-11-30; Alaska Stat. Ann. §42.20.300(d); Ark. Code Ann. §5-60-120; Cal.Penal Code Ann. §631; Colo. Rev. Stat. §18-9-303; Del. Code Ann., Tit. 11 §1336(b)(1); D.C. Code Ann. §23-542; Fla. Stat. §934.03(1); Ga. Code Ann. §16-11-66.1; Haw. Rev. Stat. §803-42; Idaho Code §18-6702; Ill. Comp. Stat., ch. 720, §5/14-2(b); Iowa Code §808B.2; Kan. Stat. Ann. §21-4002; Ky. Rev. Stat. Ann. §526.060; La. Rev. Stat. Ann. §15:1303; Me. Rev. Stat. Ann., Tit. 15 §710(3); Md. Cts. & Jud. Proc. Code Ann. §10-402; Mass. Gen. Laws §272:99(C)(3); Mich. Comp. Law Ann. §750.539e; Minn. Stat. §626A.02; Mo. Rev. Stat. §542.402; Neb. Rev. Stat. §86-702; Nev. Rev. Stat. §200.630; N.H. Rev. Stat. Ann. §570-A:2; N.J. Stat. Ann. §2A:156A-3; N.M. Stat. Ann. §30-12-1; N.C. Gen. Stat. §15A-287; N.D. Cent. Code §12.1-15-02; Ohio Rev. Code Ann. §2933.52(A)(3); Okla. Stat., Tit. 13, §176.3; Ore. Rev. Stat. §165.540; 18 Pa. Const. Stat. §5703; R.I. Gen. Laws §11-35-21; Tenn. Code Ann. §39-13-601; Tex. Penal Code Ann. §16.02; Utah Code Ann. §77-23a-4; Va. Code Ann. §19.2-62; W.Va. Code §62-1D-3; Wis. Stat. §968.31(1); Wyo. Stat. Ann. §7-3-602.
83. *Bartnicki*, 532 U.S. at 552, 121 S.Ct. at 1774 (Rehnquist, C.J. dissenting).
84. *Id.*. at 532, 121 S. Ct. at 1764.
85. *Id.*

for prohibiting these disclosures."[86] The Court is well within the bounds of judicial review in replacing Congress's judgment with its own. After all, "it is emphatically the province and duty of the Court to say what the law is."[87] However, this is a close case and deference should be given to the well thought out and reasoned judgment of Congress and forty state legislatures. As the dissent in *Bartnicki* noted,

> Congress is far better equipped than the judiciary to evaluate the vast amounts of data bearing upon complex issues and that sound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable.[88]

This is even more true when Congress used the previous judgment of the Court as guidance. Here, Congress took its cue from the Court to create more privacy, and the Court is now taking that privacy away.

C. Standard of Review

Each court that examined *Bartnicki* determined the statutes at issue were content neutral. Determining if a statute is content neutral is not an easy task. In determining content neutrality, a court will inquire whether "the government has adopted a regulation of speech because of disagreement with the message it conveys."[89] If a restriction on speech makes no reference to the ideas or views expressed, it will be seen as content neutral.[90] The government's purpose will be the controlling consideration.[91] As evidenced by the legislative history, the purpose of the *Bartnicki* statutes is to protect the privacy of communications. There was no legislative intent to place restrictions on a particular viewpoint. Congress could not disagree with what was said here because they had no way of knowing what it would be. How the speech is made is the issue rather than what is said or who is saying it. It stands to reason then that these statutes are content neutral. Once the Court determines a statute is content neutral, the appropriate level of judicial review is applied.

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86. *Id.*
87. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
88. Bartnicki, 532 U.S. at 550, 121 S. Ct. at 1773 (Rehnquist, C.J. dissenting).
89. Ward v. Rock Against Racism, 491 U.S. 781, 791, 109 S. Ct. 2746, 2754 (1989).
90. Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 643, 114 S. Ct. 2445, 2459 (1994).
91. *Ward*, 491 U.S. at 791, 109 S. Ct. at 2754.

This appropriate level of review for a content neutral regulation is intermediate scrutiny.[92] While this standard of review is not always labeled intermediate scrutiny, the requirements are generally the same. In *United States v. O'Brien*, the United States Supreme Court held a regulation of speech and non-speech conduct is justified if it "furthers an important or significant government interest unrelated to the suppression of free expression with an incidental restriction on alleged First Amendment freedoms no greater than essential to the furtherance of the government interest."[93] The statute in *O'Brien* prohibited the destruction or mutilation of draft cards.

In *Turner Broadcasting Systems, Inc. v. FCC*,[94] the Court adopted the *O'Brien* requirements for sustaining a content neutral regulation. The statute in *Turner* required cable television systems to devote a portion of their channels to the transmission of local broadcast televison stations.[95] There, the Court even stated that regulations unrelated to content are subject to an intermediate level of scrutiny.[96] The Court further stated that "these regulations are not subject to strict scrutiny because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue."[97]

In *Ward v. Rock Against Racism*,[98] the Court again stated the requirements for a valid content neutral regulation but in a slightly different formulation. The regulations in *Ward* were designed to control the volume of concerts in New York City's Central Park.[99] There, the Court stated that content neutral regulations must be "narrowly tailored to serve a significant government interest and that they [must] leave open ample alternative channels of communication of the information."[100] This formulation is simply the intermediate scrutiny of *Turner* in different clothing.

While the Court may not always use the same terminology, the requirements for a content neutral regulation to survive intermediate scrutiny are the same. There must be an important or significant government interest advanced by the regulation. The regulation must be narrowly tailored to serve that interest. According to the *Ward* Court, "the requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial government interest that would be

92. *Turner Broadcasting*, 512 U.S. at 662, 114 S. Ct. at 2469.
93. Unites States v. O'Brien, 391 U.S. 367, 377, 88 S. Ct. 1673, 1679 (1968).
94. *Turner Broadcasting*, 512 U.S. at 662, 114 S. Ct. at 2469.
95. *Id.* at 626, 114 S. Ct. at 2451.
96. *Id.* at 642, 114 S. Ct. at 2459.
97. *Id.*
98. *Ward*, 491 U.S. at 791, 109 S. Ct. at 2754.
99. *Id.* at 784, 109 S. Ct. at 2750.
100. *Id.*

achieved less effectively absent the regulation."[101] Finally, the regulation must not restrict the First Amendment freedoms any more than necessary.

The *Bartnicki* statutes meet the requirements of a valid content neutral regulation. The government interest at issue here is privacy of communication. Intuition leads one to believe this is an important interest, and the *Bartnicki* Court agrees.[102]

The *Bartnicki* statutes are narrowly tailored to serve that government interest. The only way to prevent disclosure is to prohibit it and provide a penalty for violating that prohibition. Without the regulation here, the government interest would be achieved less effectively. Removal of the disclosure prohibition makes it difficult to keep communication private. Even though the interception prohibition may remain, there is little deterrence for someone to surreptitiously record a conversation and then "launder" it to someone with clean hands for disclosure. Without the disclosure provision, situations like the one in *Bartnicki* may become more familiar. The government cannot effectively protect our communication without prohibiting disclosure.

Finally, the regulations in *Bartnicki* go no further than necessary to protect communication. The protection afforded by these statutes in no way has the effect of suppressing free expression. In fact, the opposite outcome is more likely. Knowing a conversation will not be disclosed to the public will make the speakers more likely to express themselves freely. In addition, these laws do not attempt to suppress ideas or specific types of speech. They discriminate only on the basis of the form of communication and not content. The alleged First Amendment freedoms restricted here are the desires of those who seek to publicly disclose these conversations. Despite meeting the requirements for a valid content neutral regulation, the Court nonetheless held the statutes violated the First Amendment.

The Court applied strict scrutiny to the statutes despite an admission the statutes were content neutral. Justice Stevens stated the plaintiffs in *Bartnicki* must have shown a need of the highest order to constitutionally prohibit disclosure of the intercepted phone call.[103] Justice Stevens cited *Smith v. Daily Mail Publishing Co.*[104] as authority for that standard. Specifically, the Court in *Smith* held if a newspaper lawfully obtains truthful information about a matter of public significance, state officials may not constitutionally punish

101. *Id.* at 799, 109 S. Ct. at 2758 (quoting Unites States v. Albertini, 472 U.S. 675, 689 (1985)).
102. *Bartnicki*, 532 U.S. at 535, 121 S. Ct. at 1765.
103. *Id.* at 528, 121 S. Ct. at 1761.
104. 443 U.S. 97, 99 S. Ct. 2667 (1979).

publication of the information absent a need of the highest order.[105] The *Bartnicki* Court followed this principle, and found the applicable statutes violated the First Amendment. In *Florida Star v. B.J.F.*,[106] another case followed by the *Bartnicki* majority, the prohibition was against disclosure of the name of a rape victim. Finally, the *Bartnicki* Court relied on *Landmark Communications, Inc. v. Virginia*,[107] which dealt with confidential proceedings before a state judicial review commission. In each of these cases, the Supreme Court held the regulations prohibiting disclosure of truthful information violated the First Amendment. The regulations at issue in *Bartnicki* are quite different, however. The *Bartnicki* statutes do not regulate based on content. In contrast, the statutes under scrutiny in the cases relied on by the majority do regulate based on content. A content based speech restriction can survive only if it satisfies strict scrutiny.[108] Therefore, the *Bartnicki* majority applied the wrong level of judicial review.

The dissent in *Bartnicki*, written by Chief Justice Rehnquist, gave a succinct analysis of the standard of judicial review that should have been applied to these statutes. Justice Rehnquist stated,

> These laws are content neutral; they only regulate information that was illegally obtained; they do not restrict publication of what is already in the public domain; they impose no special burdens upon the media; they have a scienter requirement to provide fair warning; and they promote the privacy and free speech of those using cellular phones.[109]

The dissent also pointed out that these statutes were narrowly tailored and that it would be a mistake to apply strict scrutiny.[110] Instead of the strict scrutiny applied in *Smith*, *Florida Star*, and *Landmark*, the Court should have applied intermediate scrutiny. As explained above, the statutes would survive that level of judicial review.

D. Social Reality

The *Bartnicki* majority made two critical errors: ignoring the judgement of Congress and forty state legislatures, and applying the improper standard of judicial review. In addition to those mistaken

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105. Smith v. Daily Mail Publishing Co., 443 U.S. 97, 103, 99 S. Ct. 2667, 2671 (1979). In *Smith*, the statute in question sought to prevent disclosure of the name of a juvenile defendant.

106. Florida Star v. B.J.F., 491 U.S. 524, 109 S. Ct. 1029 (1975).

107. 435 U.S. 829, 98 S. Ct. 1535 (1978).

108. Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 126, 109 S. Ct. 2829, 2836 (1989).

109. *Bartnicki*, 532 U.S. at 548, 121 S. Ct. at 1772.

110. *Id.*

judgements, the Court made yet another error. The *Bartnicki* decision is incorrect because it ignored social reality. Privacy of communication provides a great deal of social utility. Specifically, it is often crucial to liberty and progress.

One of the most common forms of protection of communication is privilege. Whether the conversation is between an attorney and his client, a doctor and his patient, or between spouses, without privilege American individual liberty would be greatly eroded. Those protected conversations may often involve matters of public concern, but they are nonetheless protected from disclosure.

The Federal Rules of Evidence provide that privilege is governed by the common law as interpreted by the courts of the United States in light of reason and experience.[111] However, the law of privileges is not just a rule governing admissibility of evidence. Its primary purpose is to protect confidentiality of certain communications under circumstances where such confidentiality serves broad societal goals.[112] This principle has led to the development of the privileges with which we are all familiar. The purpose of the attorney-client privilege is to encourage full and frank communication between attorneys and their clients. This promotes broader public interests in observance of law and administration of justice.[113] Likewise, the purpose of the doctor-patient privilege is to protect the patient by encouraging full and confidential disclosure to his physician of all information, however embarrassing, which might aid the physician in diagnosis and treatment.[114] A similar principle is also seen in spousal immunity. This privilege has been recognized on grounds that it is necessary to foster family peace as well as benefit the public.[115]

The purpose behind these widely recognized privileges is to foster communication for the good of the individual and the public. The conversation between Bartnicki and Kane deserves the same protection. Without it, the willingness of individuals to speak candidly and openly will be drastically diminished. The purpose of recognized privileges applies squarely to this situation. While the author does not advocate the creation of a union president-union negotiator privilege, the circumstances surrounding Bartnicki and Kane's conversation fit within the purpose of recognized privileges, thus justifying the existence of the statutes struck down by the Court. If individuals know their cellular phone conversations are subject to interception and disclosure, they are less likely to speak freely. It is accepted that cellular phone transmissions are generally not secure

111. Fed. R. Evid. 501.
112. Perrington v. Bergen Brunswig Corp., 77 F.R.D. 455 (N.D. Cal. 1978).
113. Jaffee v. Redmond, 518 U.S. 1, 116 S. Ct. 1923 (1996).
114. Hardy v. Reiser, 309 F. Supp. 1234 (N.D. Miss. 1970).
115. U.S. v. Allery, 526 F.2d 1362 (8th Cir. 1975).

and are fairly easy to intercept as evidenced by this case. Nonetheless, this ease of interception shows why protection is necessary. Protection of these conversations will encourage dialogue on subjects regardless of how embarrassing or controversial they may be. Encouraging this discourse will be beneficial to the individuals and the public at large.

Admittedly, there are some circumstances where privilege does not stand, nor should it. Perhaps the most famous case of denial of privilege is *United States v. Nixon.*[116] In that case, President Nixon was ordered to produce tapes of conversations that took place in the oval office. Nixon invoked executive privilege in hopes of preventing disclosure of these tapes. The Supreme Court did not agree that privilege should apply. The Court held that while such a privilege does exist, it was outweighed in this case by the need to develop all the relevant facts in a criminal trial.[117] Therefore, our conversations do not deserve absolute protection from disclosure. No rights are absolute. As we see in *Nixon*, where the benefit of disclosure outweighs the benefit of protection, the privilege should not prevail. However, this is not the case in *Bartnicki*. A criminal prosecution was not at stake without the disclosure of the conversation between Bartnicki and Kane. There was no imminent threat to the public. Therefore, the conversation deserves protection from disclosure under the same principles that underlie privileges.

Privacy also serves a useful function in the daily operation of government. In *Tribes on the Hill,* J. McIver Weatherford describes how the process of creating legislation in Congress has become open to the public, specifically the media.[118] The first members of Congress were few in number and knew each other quite well. This allowed them to speak plainly and conduct the business at hand with little fanfare.[119] Space for meeting was limited, which put them largely beyond the public eye and beyond the need for dramatic displays to the galleries or to reporters.[120] In this somewhat isolated environment, Congress operated efficiently.[121]

Gradually, Americans realized the decisions made in Congress had a great impact on their lives and demanded the opening of the proceedings to the public.[122] At the same time, the size of Congress was growing as more states joined the union. The combination of

116. U.S. v. Nixon, 418 U.S. 683, 94 S. Ct. 3090 (1974).
117. *Id.*
118. J. McIver Weatherford. *Tribes on the Hill,* (Massachusetts: Bergin & Garvey, 1981).
119. *Id.* at 167.
120. *Id.*
121. *Id.* at 167-68.
122. *Id.* at 170.

increased size and publicity had a profound impact on congressional procedure; it became markedly more cumbersome.[123] Meetings of the House, with over one hundred Congressmen and even more onlookers, saw little careful legislative thought.[124] This impractical situation led to the real work of government retreating from the public eye, and the committee system developed.[125] It was in the privacy of committees that the real work of drafting legislation took place.

The same pressure to open the floor of the House and Senate to the public was applied to disclose the business of the committees. In 1946, the Legislative Reorganization Act opened all committee hearings to the public and the press.[126] Unfortunately, the same consequences of disclosing the business of the floor of Congress were soon to follow. The proceedings in the committees became circus-like and legislative efficiency suffered. Again, the result was the retreat of Congress to get their work done behind the scenes.[127] As expected, the public has clamored for access to these meetings as well. The result has been an endless cycle of "hide and seek" causing some legislation to take several years to reach Congress.[128]

The need for Congress to retract from public scrutiny provides another example of the need for privacy in communication. As there is less privacy, society becomes less efficient. If we know we are being watched or listened to, we behave and speak much differently than if we have complete privacy. As Weatherford points out, this is the problem Congress was plagued with as their proceedings became open to the public.[129] Congress changed the way they conducted their business because they were being watched. This lack of privacy created a shift from open, frank discussions to a circus-like atmosphere designed to play to the constituency. The result was an inefficient organization with more style than substance.

The decision in *Bartnicki* will have a similar effect on our personal lives. While the negotiations of the Wyoming Valley West Teachers Association pale in national importance to the work of Congress, the same principle still applies. Allowing public disclosure of private conversations that are of public concern will lead to a retreat from the public's eyes and ears into a "back room" of inefficiency. If Bartnicki and Kane knew their conversation was being recorded for public disclosure they undoubtedly would have chosen their words more carefully. Perhaps they would have decided

123. Weatherford, *supra* note 118, at 171.
124. *Id.*
125. *Id.* at 173.
126. *Id.* at 179.
127. *Id.* at 183.
128. Weatherford, *supra* note 118, at 186.
129. *Id.*

not to have the conversation at all. Certainly, there was a strong need for them to keep their strategy for the union out of the hands of the school board. The possibility of disclosure creates an incentive to lie about their true intentions, delay the conversation until it can be conducted with no one listening, or not have the conversation at all. Regardless of what people like Bartnicki and Kane choose, the end result will be an inefficient process of negotiating. Just like Congress, the union will seek a more private means of developing their strategy. This will add more layers to the process, as well as lengthen it. Making matters worse, the same problem will exist for the school board. If what the union is saying is of public concern, then certainly what the school board has to say is of public concern, and therefore similarly subject to disclosure.

Freedom of the press is an important value in America. Its citizens look to the press to inform them about the happenings in their communities. The media's ability to report freely is especially important in regard to matters of great public concern. However, *Bartnicki* stretches that freedom too far. At some point, the need for privacy outweighs the public's need to know. *Bartnicki* represents that point. Suppose the Wyoming Valley West teachers decide to strike. If inefficiency in the negotiating process increases because of fear of disclosure of private conversations of either side, the teachers will be on strike for much longer than necessary. Certainly, this will have a negative impact on the community. While the teachers are on strike, their students are not in school. Without a doubt, the parents of those students would much rather not know what the union's negotiating strategies are than being faced with the unexpected need for child care. While this example may be extreme, it is nonetheless plausible. The sensitive nature of Bartnicki and Kane's conversation precluded it from being publicly held while still achieving their agenda. Instead, they chose to have the conversation in private, and that decision should be respected.

V. *BARTNICKI'S* IMPACT ON LOUISIANA

Bartnicki has particular significance for Louisiana. Louisiana Revised Statutes 15:1303[130] has nearly the same language as those statutes declared unconstitutional in *Bartnicki*. Its viability, in light of *Bartnicki*, is now in jeopardy. Rather than repeal the statute, however, the Louisiana legislature should revise it to meet the *Bartnicki* standard.

The only real difference in the Louisiana statute is the mens rea requirement and the absence of protection for electronic

130. La. R.S. 15:1303 (2001).

communications. The Louisiana statute makes it unlawful for any person to "willfully intercept, endeavor to intercept, or procure any other person to intercept or endeavor to intercept, any wire or oral communication."[131] Disclosure is also prohibited, as the statute makes it unlawful for any person to "willfully disclose, or endeavor to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection."[132]

After *Bartnicki*, the disclosure provision of the Louisiana statute is now unconstitutional on its face. There are several ways the legislature can remedy this problem. In order to maintain most of the substance of the current provision, the legislature should read *Bartnicki* as narrowly as possible when amending Louisiana Revised Statutes 15:1303. For example, one could narrowly read *Bartnicki* to only apply to conversations on cellular phones. With that reading, the legislature could leave most of the current statute intact and merely make an exception for cellular phones. All other forms of oral or wire communications could remain protected. The legislature could also read *Bartnicki* narrowly to make an exception only for matters of public concern. The majority relied heavily on the fact that the conversation at issue was of public concern. They used this to justify finding the media's interest outweighed the privacy interest. The problem with a public concern exception, however, is that it is an extremely nebulous concept. This will once again leave application of the statute in the hands of the courts. Alternatively, the legislature could incorporate both exceptions.

Now that Louisiana Revised Statutes 15:1303 is facially unconstitutional, the legislature should amend it. As this article points out, the privacy interest protected by the statute is an important one; therefore, repealing the statute should not be an option. Instead, the legislature should create exceptions to the disclosure provision based on a narrow reading of *Bartnicki*.

VI. CONCLUSION

The Supreme Court's decision in *Bartnicki v. Vopper* is incorrect for several reasons. Nearly every legislative body in the United States made a sound judgment to protect illegally intercepted phone conversations from public disclosure. Congress and 40 state legislatures recognized the importance of keeping telephone conversations protected from government and private interests. The

131. La. R.S. 15:1303(A)(1) (2001).
132. La. R.S. 15:1303(A)(3) (2001).

Court ignored that judgment and replaced it with its own. The decision also applied the wrong standard of review. The statutes involved are content neutral laws. This dictates the application of intermediate scrutiny. Nonetheless, following a line of cases reviewing content based laws, the Court improperly applied strict scrutiny. Finally, the Court's decision is wrong because it ignores social reality. Privacy of communication is a long recognized interest of great importance. Without it, society and government become less efficient. *Bartnicki* erodes the protection we have to speak privately and creates exactly the outcome it purports to prevent: the chilling of free speech.

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