The Supreme Court Takes on the First Amendment Privacy Conflict aud Stumbles: *Bartnicki v. Vopper*, the Wiretapping Act, and the Notion of Unlawfully Obtained Information

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INTRODUCTION

To what extent can the government constitutionally punish the publication and dissemination of truthful information in order to protect an individual's right of privacy? This inquiry, considered by the Supreme Court in a handful of cases over the past three decades,[1] has proved to be a remarkably troublesome corner of First Amendment law. Unlike the related areas of "false light" privacy and defamation, which have produced absolute rules to govern various factual scenarios,[2] these cases involving "true" privacy have produced only the narrowest, equivocal decisions adjudicated "in [their] discrete factual context[s]."[3]

Recent litigation involving the constitutionality of the antidisclosure provisions of the Electronic Communications Privacy Act[4] (the "Wiretapping Act") has given the Court the occasion to revisit the troublesome free expression/privacy conflict. The Wiretapping Act provides for criminal and civil penalties against any individnal who "intentionally discloses . . . to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information

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1. *See, e.g.*, Florida Star v. B.J.F., 491 U.S. 524 (1989); Smith v. Daily Mail Publ'g Co., 443 U.S. 97 (1979); Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975). See *infra* Part 1 for a discussion of these eases.

2. *Florida Star*, 491 U.S. at 530; *see also infra* note 110.

3. *Florida Star*, 491 U.S. at 530. The reason for the Supreme Court's reluctance can be attributed to the strength of both of the competing interests. On the one hand, publication of truthful information by its very nature satisfies the classic First Amendment interest of the pursuit of truth through a marketplace of ideas. *See* Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 876, 881-82 (1963). Particularly when the subject of the speech concerns public events or public figures, the speech touches the very core of the First Amendment. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (finding "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"). On the other hand, the "right to be left alone" is a particularly important governmental interest. *See, e.g.*, Bartnicki v. Vopper, 121 S. Ct. 1753, 1764 (2001); *Cox*, 420 U.S. at 487. Given a widespread public concern about the loss of privacy, the government should arguably have wide latitude in imposing sanctions against privacy intrusions. *See, e.g.*, *Bartnicki*, 121 S. Ct. at 1769 (Rehnquist, C.J., dissenting). As this Note suggests, the Supreme Court has not adequately resolved or even adequately addressed the difficult conflict between free expression and privacy in its cases.

4. Pub. L. No. 99-508, 100 Stat. 1848 (1986).

was obtained through the interception of [such a] communication."[5] Thus, under this provision, a newspaper publishing truthful information that had been obtained through an illegal wiretap by someone else would be liable so long as the newspaper "had reason to know" that the information was illegally obtained.

Three factually similar cases decided in various United States Circuit Courts of Appeals[6] reached widely conflicting conclusions about the constitutionality of the provision.[7] In an effort to resolve the conflict, the Court granted certiorari in *Bartnicki v. Vopper*[8] and ultimately held that the Wiretapping Act could not be applied to civilly punish the broadcast of a tape that had been intercepted by the illegal wiretap of an unknown third party.[9] However, like in the previous privacy cases, the Court failed to invoke any broad legal principle in reaching its decision and once again narrowly decided the case on its facts.[10] As a result, the state of First Amendment privacy law is no clearer after *Bartnicki* than it was before.

This Note analyzes the Court's treatment of the Wiretapping Act's constitutionality under *Bartnicki*. The ultimate concern of the Note, however, is broader; it is generally concerned with the Court's curious treatment of the conflict between free expression and privacy as a whole. The Note thus examines *Bartnicki* as the most recent extension of the Court's First Amendment privacy doctrine, and in the end finds it to be a poorly reasoned decision that adds little to and even obfuscates the state of the law.

Of particular interest to the analysis is the Court's finding that unlawfully obtained information should receive less (and possibly *no*) protection under the First Amendment when it is published.[11] This Note suggests that this inquiry about unlawfully obtained information—one that has become central to First Amendment privacy cases—is misplaced. In particular, this note argues that the "lawfully obtained" requirement has little to do with expression; that it is actually dangerous to free expression values; that it relies on circular reasoning; and that focusing on it tends to overshadow the actual conflict between free expression and privacy, which ought to be the true concern of the Supreme Court in these cases.

The Note itself is organized in three parts. Part I places *Bartnicki* in context by reviewing the necessary history of the Court's First Amendment privacy doctrine.

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5. 18 U.S.C. § 2511(1)(c) (1994).

6. Bartnicki v. Vopper, 200 F.3d 109 (3d Cir. 1999) *aff'd on other grounds*, 121 S. Ct. 1753 (2001); Boehner v. McDermott, 191 F.3d 463 (D.C. Cir. 1999), *vacated by* McDermott v. Boehner, 121 S. Ct. 2190 (2001); Peavy v. WFAA-TV, Inc., 221 F.3d 158 (5th Cir. 2000).

7. *See infra* note 89.

8. 121 S. Ct. 1753, 1756 (2001).

9. *Id.* at 1765.

10. *Id.* at 1762.

11. Since the Wiretapping Act forbids *disclosing*, not *receiving*, illegally wiretapped information, the media defendants in *Bartnicki* did not literally break any law in obtaining the information. *Id.* at 1760, 1764. Hence, their disclosures of the information were protected under the First Amendment. *Id.* at 1764-65. However, Congress might amend the Wiretapping Laws to criminalize the receipt of wiretapped information. In that case, future media defendants would then obtain the information "unlawfully" and seemingly their publications of the information could be afforded less (or no) constitutional protection. *See infra* Part II.B.2.

Part II then discusses the *Bartnicki* decision in light of the doctrine. Finally, Part III considers the possible explanations for the notion of unlawfully obtained information in the Court's First Amendment privacy cases. It concludes that the notion that information must be obtained lawfully to receive constitutional protection is a red herring of a free expression principle that is largely irrelevant to meaningful First Amendment analysis and dangerous to First Amendment values.

I. FIRST AMENDMENT PRIVACY DOCTRINE PRIOR TO *BARTNICKI V. VOPPER*

A federal district court, summarizing the state of the First Amendment privacy doctrine prior to *Bartnicki v. Vopper*, noted: "While the Supreme Court's treatment of the clash between First Amendment protections and privacy rights is not by any means exhaustive, its decisions have 'without exception upheld the press' right to publish....'"[12] Still, by no means did the Supreme Court adopt an absolutist position in favor of free expression. The Court repeatedly restricted its holdings to the cases' factual contexts.[13] The factual settings of all its decisions were narrow; each of the Court's cases involved either the publication of the name of a rape victim[14] or a juvenile offender.[15] Moreover, rather than tackling the free expression/privacy conflict head-on, the Court evaded the issue in most of the cases by concentrating on how the published information was obtained by the press or from what source the information originally came.[16] These factors, combined with the Court's insistence on narrowly construing the legal issue,[17] left ample uncertainty in the Court's doctrine and ample room for distinguishing later cases, such as those arising under the Wiretapping Act.

A. Cox Broadcasting Corp. v. Cohn

The Court first considered the privacy/free-expression conflict in 1975 in *Cox Broadcasting Corp. v. Cohn*.[18] In *Cox*, a teenage girl was raped and killed by six high school boys, who were subsequently indicted for rape and murder.[19] During their

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12. Peavy v. New Times, Inc., 976 F. Supp. 532, 538 (N.D. Tex. 1997) (quoting Florida Star v. B.J.F., 491 U.S. 524, 530 (1989)) (omission in original).

13. *Florida Star*, 491 U.S. at 530.

14. *See id.* at 524; *see also* Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975).

15. *See* Smith v. Daily Mail Publ'g Co., 443 U.S. 97 (1979); *see also* Oklahoma Publ'g Co. v. District Court, 430 U.S. 308 (1977).

16. *See Florida Star*, 491 U.S. at 538 (focusing on information obtained from police records); *see also Oklahoma Publ'g*, 430 U.S. at 310 (focusing on information that had been publicly revealed in a court proceeding); *Cox*, 430 U.S. at 496 (focusing on information obtained in court proceedings). In the fourth case, *Daily Mail*, the Supreme Court evaded the privacy/free expression conflict by characterizing the privacy interest of a juvenile offender as an interest in "anonymity." *Daily Mail*, 443 U.S. at 104. The Court in *Florida Star* later admitted the interest was one in privacy after all. *See Florida Star*, 491 U.S. at 530.

17. *Florida Star*, 491 U.S. at 532-33.

18. 420 U.S. 469 (1975).

19. *Id.* at 471.

hearing, a reporter obtained the name of the rape victim through his examination of court documents and later broadcast the victim's name over local television.[20] The father of the victim successfully brought suit for damages against the reporter and television station under a state criminal statute that prohibited the public disclosure of a rape victim's name.[21]

On appeal, the Supreme Court considered whether the First Amendment barred civil damages against the reporter and television station.[22] The Court first noted that the government had a strong interest in maintaining a sphere of privacy for individuals.[23] However, it found that "the interests in privacy fade when the information is on the public record."[24] Since the reporter obtained the rape victim's name from the indictment, a public court record, the Court held that he could not be constitutionally punished under the First Amendment.[25] Moreover, the Court found that crimes are "without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government."[26] Imposing liability on the press for publishing such lawfully

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20. *Id.* at 473.

21. *Id.* at 474. The statute provided:

> It shall be unlawful for any news media or any other person to print and publish, broadcast, televise, or disseminate through any other medium of public dissemination or cause to be printed and published, broadcast, televised, or disseminated in any newspaper, magazine, periodical or other publication published in this State or through any radio or television broadcast originating in the State the name or identity of any female who may have been raped or upon whom an assault with intent to commit rape may have been made. Any person or corporation violating the provisions of this section shall, upon conviction, be punished as for a misdemeanor.

GA. CODE ANN. § 26-9901 (1972) (current version at GA. CODE ANN. § 16-6-23 (1999 & Supp. 2001)), *held unconstitutional by* Dye v. Wallace, 553 S.E.2d 561 (Ga. 2001). The state trial court found that the criminal statute created a civil remedy and that the First Amendment did not shield the defendants from liability. *Cox*, 420 U.S. at 474. The Supreme Court of Georgia held that the criminal statute actually did not create a civil cause of action, but nevertheless that the plaintiff's lawsuit was justified under Georgia's public disclosure tort, irrespective of the First Amendment. *Id.*

22. *Cox*, 420 U.S. at 487.

23. *Id.* The Court cited Warren and Brandeis's classic article *The Right to Privacy* in finding privacy to be a state interest of considerable weight. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

24. *Cox*, 420 U.S. at 494-95. The Court observed that both the Restatement (Second) of Torts and Warren and Brandeis's article recognized that no liability arises when the defendant simply publishes private information already in the public domain. *Id.* at 494.

25. *Id.* at 496 ("At the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records.").

26. *Id.* at 492. The Court apparently did not consider the narrower question of whether the publication of the particular rape victim's name was a matter of legitimate public concern.

obtained,[27] important, and truthful information would hinder its ability to report the news and would cause an unnecessary chilling effect on publication.[28]

However, the Court declined to resolve in sweeping terms the conflict between free expression and privacy, and it specifically limited its holding to the particular facts before it. Thus, the Court went only so far as to say that it is unconstitutional to punish the publication of a rape victim's name when the name was obtained through an indictment document.[29] It left the broad question of "whether truthful publications may ever be subjected to civil or criminal liability consistently with the First and Fourteenth Amendments"[30] open for future cases.

B. Oklahoma Publishing Co. v. District Court

Two years later, the Supreme Court revisited the question of whether the government may restrict the truthful publication of information obtained from court proceedings. In *Oklahoma Publishing Co. v. District Court*,[31] an eleven-year-old boy was charged with second-degree murder after he allegedly shot a railroad switchman.[32] At a detention hearing, a reporter and photographer employed by Oklahoma Publishing Company learned the boy's name and took his picture.[33] The boy's name and picture were thereafter published in local newspapers and other media.[34] Subsequently, the local judge issued an injunction prohibiting the further dissemination of personal information about the boy, including his name and picture.[35]

Oklahoma Publishing Company challenged the judge's order as an unconstitutional prior restraint on speech.[36] On appeal to the Supreme Court, the state argued that the court proceeding was a private matter because a state statute provided for closed juvenile hearings unless the judge ordered otherwise, and the judge had not specifically declared the proceeding to be public.[37] The Court rejected this argument. In a brief opinion, it found that when the judge initially allowed the boy's name and photograph to be taken, they became, under *Cox*, public information "'revealed in connection with the prosecution of [a] crime'"; thereafter, the trial judge could not enjoin their publication.[38] By holding that the publication of a juvenile's name obtained from court proceedings could not be punished, *Oklahoma Publishing* reaffirmed *Cox* but went little further than its predecessor.[39]

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27. *Id.* at 496.
28. *Id.*
29. *Id.* at 491.
30. *Id.*
31. 430 U.S. 308 (1979) (per curiam).
32. *Id.*
33. *Id.* at 309.
34. *Id.*
35. *Id.* at 308-09.
36. *Id.* at 310.
37. *Id.* at 311.
38. *Id.* (quoting Cox Broad. Corp. v. Cohn, 420 U.S. 469, 471 (1975)).
39. Unlike the *Cox* Court, the *Oklahoma Publishing* Court made no mention of the

C. Smith v. Daily Mail Publishing Co.

Smith v. Daily Mail Publishing Co.,[40] the third of the Supreme Court's First Amendment privacy cases, also involved the publication of a juvenile's name. By tuning in to police radio frequencies, reporters heard that a fourteen-year-old student had shot another student at a junior high school.[41] Reporters from two newspapers, the Charleston Daily Mail and the Charleston Gazette, thereafter learned the name of the fourteen-year-old gunman by asking the police and witnesses at the school and published it in their respective newspapers.[42] The newspapers were subsequently indicted under a West Virginia statute that criminalized newspapers from publishing the names of juvenile offenders.[43]

The Court invalidated the statute.[44] Reflecting back on *Cox* and *Oklahoma Publishing*,[45] the Court finally adopted a standard of scrutiny for privacy cases: "[I]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order" (hereinafter the "highest order" standard).[46]

Under its new "highest order" standard, the Court rejected the state's asserted interest in protecting the anonymity of the juvenile offender.[47] The Court did not attempt to contradict the state's policy goals, but simply noted that the state's interest in the juvenile's anonymity did not rise to the level of "highest order" and consequently did not "justify application of a criminal penalty" on truthful expression.[48] Even assuming that anonymity was a governmental interest of the highest order, the Court found that punishing the newspapers would not be warranted because punishment was not necessary to protect the juvenile's anonymity.[49]

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privacy interests of the accused juvenile. Like *Cox*, it did not articulate a standard of scrutiny.

40. 443 U.S. 97 (1979).

41. *Id.* at 100.

42. *Id.*

43. *Id.* The law read: "[N]or shall the name of any child, in connection with any proceedings under this chapter, be published in any newspaper without a written order of the court . . . ." *Id.* at 98 (quoting W. VA. CODE § 49-7-3 (1976)). Note that the law said nothing about radio or television transmissions, but rather was narrowly focused on newspaper publication. In his concurrence, this was the only part of the law that Justice Rehnquist found objectionable. *See id.* at 110 (Rehnquist, J., concurring).

44. *Id.* at 103.

45. The court also relied on *Landmark Communications v. Virginia*, 435 U.S. 829 (1978), which held that punishing the dissemination of information obtained during judicial misconduct inquiries was unconstitutional. *Daily Mail*, 443 U.S. at 103. Since the asserted interests in *Landmark Communications* involved the judge's reputation and the integrity of judicial proceedings rather than privacy, the case will not be discussed here. *See Landmark Communications*, 435 U.S. at 841.

46. *Daily Mail*, 443 U.S. at 103.

47. *Id.* at 104.

48. *Id.*

49. *Id.* at 105 (noting that although all fifty states had some kind of law protecting the

Significantly, the Court did not view the governmental interest in *Daily Mail* as an interest in privacy per se. Instead, it characterized the governmental interest as simply the need to protect the juvenile's "anonymity."[50] Thus, *Daily Mail* did not resolve whether a governmental interest in "privacy" could satisfy the Court's "highest order" standard. Moreover, since *Daily Mail* involved information that was lawfully obtained, the Court did not determine whether the press may be constitutionally punished for publishing unlawfully obtained information.

D. Florida Star v. B.J.F.

Florida Star v. B.J.F.,[51] the Supreme Court's most elaborate opinion on the conflict between truthful speech and a person's privacy interests, reiterated and synthesized the themes of the Court's previous holdings in *Cox*, *Oklahoma Publishing*, and *Daily Mail*. The case arose out of the publication of a rape victim's name that was mistakenly included in a local newspaper after a reporter-trainee obtained the name from a police report filed in a public pressroom.[52] After the publication, the rape victim's mother was repeatedly harassed by a man threatening to rape the victim again.[53] For this and other reasons, the victim claimed extensive emotional damage stemming from the publication of her name.[54] She sued the newspaper under a Florida criminal statute that made it a misdemeanor to transmit or publish the name of a sexual offense victim.[55] The trial court found that the statute did not violate the First Amendment, and granted a directed verdict in favor of the victim for $75,000 in compensatory damages and $25,000 in punitive damages.[56]

On appeal to the Supreme Court, the *Florida Star* newspaper argued that its case

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anonymity of juvenile offenders, only five states actually punished the disclosure of the juvenile's name).

50. *See id.* at 104. One might question this characterization in light of the similarity of the facts of *Daily Mail* and *Cox*. Both cases involved the publication of the names of persons who arguably deserved protection from publication—rape victims and child offenders. There appears to be a significant tension in saying that the privacy interest is present in *Cox*, but is not implicated in *Daily Mail*. *See Cox*, 420 U.S. at 488. Perhaps sensing the tension, the Supreme Court later backed away from this distinction. *Florida Star v. B.J.F.*, 491 U.S. 524, 530 (1989) (treating *Cox*, *Oklahoma Publishing*, and *Daily Mail* as all involving the "conflict between truthful reporting and state-protected privacy interests").

51. 491 U.S. 524 (1989).

52. *Id.* at 527-28.

53. *Id.* at 528.

54. *Id.*

55. *Id.* At the time of the case, the statute provided:

> No person shall print, publish, or broadcast, or cause or allow to be printed, published, or broadcast, in any instrument of mass communication the name, address, or other identifying fact or information of the victim of any sexual offense within this chapter. An offense under this section shall constitute a misdemeanor of the second degree . . . ."

Id. at 526 n.1 (quoting FLA. STAT. ANN. § 794.03 (1987)).

56. *Id.* at 528.

was indistinguishable from *Cox* and that civil damages could not lie.[57] The majority disagreed. It observed that the central holding of *Cox*—that it was unconstitutional to punish a newspaper for publishing a rape victim's name—rested very narrowly on the fact that the name of the rape victim was obtained from public court records, and thus was justified by "the important role the press plays in subjecting trials to public scrutiny and thereby helping guarantee their fairness."[58]

The majority, faithful to the tradition of ruling narrowly in privacy cases, rejected the newspaper's suggestion that truthful speech can never be punished.[59] Instead, it rearticulated the *Daily Mail* "highest order" standard as the appropriate form of scrutiny.[60] Reflecting back on *Cox*, *Oklahoma Publishing*, and *Daily Mail*, the majority found that three considerations underlay the "highest order" standard, each of which focused on how the information was obtained or from what sources the information was obtained.

First, the Court found that the "highest order" standard "only protects the publication of information which a media member has '*lawfully obtain[ed]*.'"[61] According to the Court, by prohibiting the receipt or acquisition of information, "the government retains ample means of safeguarding significant interests upon which publication may impinge, including protecting a rape victim's anonymity."[62] The Court found that when information is possessed privately, the government may in some instances "forbid its nonconsensual acquisition, thereby bringing outside of the ["highest order" standard] the publication of any information so acquired."[63] On the other hand, the Court found that when the government is in control of sensitive information, it has even greater means of preventing disclosure besides criminalizing the publication; for example, the government can classify information.[64] As a result, the attempted punishment of truthful information obtained from government documents will be viewed particularly suspiciously.[65]

Second, the Court found that sanctioning the publication of *publicly available* information usually does not advance the state's asserted interest in preventing the

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57. *Id.* at 532.

58. *Id.*

59. *Id.* The Court has emphasized that even prior restraints (for example, injunctions), the form of regulation generally considered most hostile to First Amendment values, can be justified to prohibit the publication of truthful material where the governmental interest is extraordinarily compelling. *See, e.g.*, Near v. Minnesota, 283 U.S. 697, 716 (1931) ("[A] government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops."). For an interesting, more modern example of such a situation, see *United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis. 1979) (upholding an injunction against publication of detailed instructions on how to design a hydrogen bomb).

60. *Florida Star*, 491 U.S. at 534.

61. *Id.* at 534 (emphasis added).

62. *Id.* at 534.

63. *Id.*

64. That is, the government might make information classified. 491 U.S. at 534.

65. *Id.*

publication.[66] According to the Court, "it is a limited set of cases indeed where, despite the accessibility of the public to certain information, a meaningful public interest is served by restricting its further release by other entities, like the press."[67] Once information is released into the public sphere, the government can no longer prevent its further publication.[68]

Finally, the Court found that sanctioning the publication of truthful information causes "*timidity and self-censorship*" among publishers, who might refrain from publishing publicly important information due to the threat of punishment.[69] The Court found the problem to be most severe in cases where the government itself opens the information to the public through its records.[70] Punishing the publication of such information "would force upon the media the onerous obligation of sifting through government press releases, reports, and pronouncements to prune out material arguably unlawful for publication."[71]

Applying these principles to the facts of *Florida Star*, the Court held that imposition of civil liability on the newspaper was not justified for several reasons. First, the article was truthful and the information that it related had been obtained lawfully.[72] Second, the newspaper article discussed "a matter of public significance" generally; it was not necessary for the rape victim's name to be in itself a matter of public concern so long as its broader context concerned such matters.[73]

Third, the governmental interest in protecting the privacy of the rape victim, although significant, did not rise to the level of "highest order" under the particular facts of *Florida Star*.[74] Since the rape victim's name was obtained from a police report—a governmental record—punishment of the newspaper had a particular danger of chilling speech.[75] Furthermore, the statute had no culpability requirement, thus "engendering the perverse result that truthful publications challenged pursuant to this cause of action are less protected by the First Amendment than even the least protected defamatory falsehoods."[76] Even further, the Court found the statute to be substantially underinclusive; it proscribed the newspaper's publication of the rape victim's name, but it did not prohibit other forms of dissemination of the rape victim's name which would have caused even greater emotional harm to her.[77]

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66. *Id.* at 535 ("[W]here the government has made certain information publicly available, it is highly anomalous to sanction persons other than the source of its release.").

67. *Id.*

68. *Id.*

69. *Id.* (emphasis added).

70. *Id.* at 535-36.

71. *Id.* at 536.

72. *Id.*

73. *Id.* at 536-37. In dissent, Justice White argued vigorously that there is no public interest whatsoever in the name of a rape victim. *Id.* at 552-53 (White, J., dissenting).

74. However, the Court did not rule out the possibility that under some particularly compelling circumstance the governmental interest could rise to the level of highest order. *Id.* at 537.

75. *Id.* at 538.

76. *Id.* at 539; *see infra* Part II.B.2.

77. *Florida Star*, 491 U.S. at 540 (noting that such a circumstance might be the

Again stressing the narrowness of its holding,[78] the Court in *Florida Star* left as many questions unresolved as answered. It did not resolve the question of whether the government could punish the publication of information that had been obtained from private rather than governmental sources. It left open the question of whether a well-drafted law imposing clear culpability standards could satisfy constitutional requirements. It did not even resolve the seemingly narrow question of whether the truthful publication of a rape victim's name can ever be punished. Perhaps the most fundamental question left unanswered by *Florida Star*—or at least the one of particular significance to this Note—is what degree of constitutional protections will be given to published information that had been unlawfully obtained by a source.[79] Twelve years later when it considered the constitutionality of the Wiretapping Act, the Supreme Court was forced to grapple with the question in *Bartnicki v. Vopper*.[80]

E. Summary

Two themes are apparent in the four First Amendment privacy cases prior to *Bartnicki v. Vopper*. The first, already noted at length, is the tendency to narrowly decide each case on its facts.[81] Although the Court adopted the "highest order" standard, which seems to be heavily weighted in favor of free expression, the Court's narrow decisions suggest a limited applicability of the standard. In particular, *Florida Star*'s discussion of the three factors underlying the "highest order" standard focused primarily on publicly available information obtained from the government[82]—suggesting that the "highest order" standard's applicability might be limited only to such situations.

This brings us to the second theme: the Court's tendency to sidestep the actual free expression/privacy conflict by concentrating on the *source* of the published information.[83] In none of the cases did the Court explicitly attempt to balance the

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"malicious" dissemination of her name by coworkers).

78. The majority concluded its opinion as follows:

> We do not hold that truthful publication is automatically constitutionally protected, or that there is no zone of personal privacy within which the State may protect the individual from intrusion by the press, or even that a State may never punish publication of the name of a victim of a sexual offense. We hold only that where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order . . . .

Id. at 541.

79. The Supreme Court explicitly left this issue open. *Id.* at 535 n.8.

80. 121 S. Ct. 1753 (2001).

81. Contrast the Court's narrow treatment of the free expression/privacy conflict with the Court's structured and well-defined treatment of defamation and "false light" privacy. *See infra* note 110.

82. *Florida Star*, 491 U.S. at 534-36.

83. It may be said that the Court attempted to construe the privacy interest *in terms of* the source of the information, rather than evade the issue entirely. If this is so, dealing with the free expression/privacy conflict in this way misses the mark entirely. It should go without saying

psychological harm caused to rape victims and juvenile offenders by publishing their names against the free expression interest of the press and public in having them published. Indeed, there was surprisingly little detailed discussion of the plaintiff's privacy interests at all. Rather, the bulk of the Court's discussion instead went to the manner in which the press obtained the plaintiffs' names—for example, whether it was obtained from the government or from a public record, or whether it was obtained lawfully. Thus, the Court held that the government could not punish the publication of a rape victim's name when the name was obtained from an indictment[84] or from a police report,[85] and that a court could not enjoin publication of a juvenile offender's name after it has been obtained in a public court proceeding.[86]

These two themes, common to the Court's privacy doctrine, lived on in the Court's treatment of the Wiretapping Act in *Bartnicki*, as discussed in Part II. After a brief introduction of the Wiretapping Act's antidisclosure provisions and the ensuing litigation, Part II suggests that the *Bartnicki* decision continues to render the First Amendment privacy doctrine narrow and evasive, and worse, actually makes the doctrine less clear and analytically sound than it was before.

II. THE UNCONSTITUTIONALITY OF THE WIRETAPPING ACT'S ANTIDISCLOSURE PROVISIONS UNDER *BARTNICKI V. VOPPER*

A. An Overview of the Wiretapping Act

The Wiretapping Act was originally passed as Title III of the Omnibus Crime Control and Safe Streets Act of 1968,[87] and was later updated and broadened by the Electronic Communications Privacy Act of 1986.[88] The Act has two overriding purposes: "(1) to protect the privacy of wire and oral communications; and (2) to delineate on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized."[89] The Act not only contains detailed provisions criminalizing various interceptions of communications, but also punishes the subsequent dissemination of the information. These provisions, the source of the Act's First Amendment problems, subject to criminal punishment any person who:

> (c) intentionally discloses, or endeavors to disclose, to any person the contents of any wire, oral, or electronic communication, knowing or having reason to

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that the harm done to a rape victim by publishing her name without consent is hardly less if her name was obtained from a police report than it would be if her name was obtained from a court document or from the girl's nosy neighbor.

84. Cox Broad. Corp. v. Cohn, 420 U.S. 469, 496 (1975).

85. *Florida Star*, 491 U.S. at 538.

86. Oklahoma Publ'g Co. v. District Court, 430 U.S. 308, 311 (1979) (per curiam).

87. Pub. L. No. 90-351, 82 Stat. 211.

88. Pub. L. No. 99-508, 100 Stat. 1848.

89. Peavy v. Harman, 37 F. Supp. 2d 495, 506 (N.D. Tex. 1999), *aff'd in part, rev'd in part, vacated in part sub nom.* Peavy v. WFAA-TV, Inc., 221 F.3d 158 (5th Cir. 2000) (citing S. REP NO. 90-1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2153).

> know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; [or]
> (d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection . . . .[90]

The Act also creates a civil cause of action for a plaintiff "whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter."[91] Thus, the provisions subject newspapers, television stations, and other media members to criminal and civil liability for publishing or broadcasting information irrespective of its truth value or newsworthiness. They sanction pure First Amendment activity in the interest of a person's privacy—a "classic conflict"[92] in the line of *Cox* and *Florida Star*.

In the last few years, lawsuits brought against media defendants under the civil liability provisions have exposed the ambiguities in the Supreme Court's privacy doctrine. These cases typically involved suits by individuals who had a conversation illegally wiretapped and subsequently disseminated by a newspaper or television station that did not illegally wiretap the conversation itself, but acquired the information from someone who did.[93]

Federal courts addressing these cases—including the Third, Fifth, and D.C. Circuits—reached different conclusions about the extent to which the First Amendment precluded civil suits against media defendants under the Wiretapping Act.[94] The Supreme Court granted certiorari in *Bartnicki v. Vopper* to resolve the conflict among the circuit courts.[95] However, the Court's ruling, a fractured 4-2-3 decision, left open as many issues as it sought to resolve.

The following subparts consider the *Bartnicki* decision in light of the Court's previous First Amendment privacy doctrine. Part II.B sets out the facts of the case and the Court's opinion. Part II.B.1 and Part II.B.2 then consider the two themes of

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90. 18 U.S.C. § 2511 (1994).

91. *Id.* § 2520 (1994).

92. *Harman*, 37 F. Supp. 2d at 515.

93. *WFAA-TV, Inc.*, 221 F.3d 158; *see also* Bartnicki v. Vopper, 200 F.3d 109 (3d Cir. 1999), *aff'd*, 121 S. Ct. 1753 (2001); Boehner v. McDermott, 191 F.3d 463 (D.C. Cir. 1999), *vacated by* McDermott v. Boehner, 121 S. Ct. 2190 (2001); Peavy v. New Times, Inc., 976 F. Supp. 532 (N.D. Tex. 1997). One New York state court decision, *Natoli v. Sullivan*, 606 N.Y.S.2d 504 (N.Y. Sup. Ct. 1993), *aff'd*, 616 N.Y.S.2d 318 (N.Y. App. Div. 1994), also involved the application of the Wiretapping Act to sanction truthful publication. For a discussion of some of the cases, see generally Rex S. Heinke & Seth M.M. Stodder, *Punishing Truthful, Newsworthy Disclosures: The Unconstitutional Application of the Federal Wiretap Statute*, 19 LOY. L.A. ENT. L. REV. 279 (1999).

94. The Third Circuit *Bartnicki* court found that punishing the media defendants under the Wiretapping Act was unconstitutional. *Bartnicki*, 200 F.3d at 129. Both the Fifth and D.C. Circuits found that the Wiretapping Act could be constitutionally applied. *WFAA-TV, Inc.*, 221 F.3d at 193; *see also Boehner*, 191 F.3d at 478.

95. *Bartnicki*, 121 S. Ct. at 1753.

the Court's First Amendment privacy jurisprudence that reappear in *Bartnicki*: first, the refusal of the Court to consider broadly the free expression/privacy conflict beyond the facts of the cases; and second, the tendency of the Court to concentrate on the source of the information being published. The former theme is evident in the Court's indecision about a standard of scrutiny; and the latter theme is evident in the Court's clinging to the requirement that information must be obtained lawfully by the press for it to attain full constitutional protection. The subsequent subparts argue that the presence of these two themes prevents an adequate resolution of the privacy/free expression conflict, and also places free expression values at risk.

B. Bartnicki v. Vopper

In *Bartnicki v. Vopper*, an unknown person intercepted a telephone conversation between Gloria Bartnicki and Anthony Kane, prominent participants in a contentious public dispute with the local school district over teachers' contracts.[96] The interceptor taped their conversation in violation of the Wiretapping Act and put the tape in the mailbox of Jack Yocum, the leader of a taxpayer's union formed to oppose Bartnicki and Kane in the dispute.[97] In the taped conversation, Kane said, among other things, "[W]e're gonna have to go to their, their homes .... To blow off their front porches."[98] Yocum identified the voices, and gave a copy of the tape to local radio personalities, who repeatedly broadcast it to the chagrin of Bartnicki and Kane.[99] Bartnicki and Kane then sued both Yocum and the radio stations under the Wiretapping Act.

The Justices' opinions varied widely regarding the constitutionality of Wiretapping Act's antidisclosure provisions as applied against the delivery and broadcast of the tape. They split into three camps: a plurality which tacitly applied "highest order" scrutiny and concluded punishing the delivery and broadcast of the tape plainly violated the First Amendment;[100] a dissent that argued that punishing the broadcast of the tape was plainly constitutional;[101] and a concurring opinion that disagreed with the plurality's reasoning, but nevertheless concluded that under the case's narrow factual setting, punishing Yocum and the radio personalities would violate the First Amendment.[102]

In a somewhat muddled opinion, the *Bartnicki* plurality found that since the Wiretapping Act applies only to communications that are illegally intercepted, it singles out communications based on *source* rather than content, and hence is

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96. *Id.* at 1756.

97. *Id.* at 1757.

98. *Id.*

99. *Id.*

100. *Id.* at 1756. Justice Stevens authored the plurality opinion. Justices Ginsburg, Kennedy, and Souter joined in the plurality opinion.

101. *Id.* at 1772 (Rehnquist, C.J. dissenting). Justices Thomas and Scalia joined Chief Justice Rehnquist's dissent.

102. *Id.* at 1766. (Breyer, J., concurring). Justice O'Connor joined Justice Breyer's concurring opinion.

content-neutral.[103] The plurality conceded that content-neutral regulations are generally subjected only to an intermediate form of judicial scrutiny known as the *O'Brien* balancing test.[104] However, the plurality noted that the Wiretapping Act's "naked prohibition against disclosures is fairly characterized as a regulation of pure speech," as opposed to symbolic conduct.[105] Without any further analysis or explanation, the plurality articulated the "highest order" standard of *Florida Star* and *Daily Mail*, as opposed to intermediate scrutiny.[106]

Having articulated the standard, the plurality proceeded to characterize the issue in the case very narrowly: "Where the punished publisher of information has obtained the information in question in a manner lawful in itself but from a source who has obtained it unlawfully, may the government punish the ensuing publication of that information . . . ?"[107] Ultimately, the plurality answered in the negative.[108]

The plurality began its analysis by addressing the twin governmental purposes served by the statute: "removing an incentive for parties to intercept private conversations" and "minimizing the harm to persons whose conversations have been illegally intercepted."[109] The plurality dismissed the deterrence interest almost offhandedly, noting, "[t]he normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it. If the sanctions that presently attach to a violation of § 2511(1)(a) do not provide sufficient deterrence, perhaps those sanctions should be made more severe."[110] Furthermore, the plurality found that in the vast majority of wiretapping cases the interceptor was known and

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103. *Id.* at 1760-61. Content-neutral laws are laws "justified without reference to the content of regulated speech," Hill v. Colorado, 530 U.S. 703, 720 (2000), and are generally considered more tolerable under the First Amendment than content-based laws, which "regulat[e] . . . the subject matter of messages." *Id.* at 723. *See* GERALD GUNTHER & KATHLEEN A. SULLIVAN, CONSTITUTIONAL LAW 1204-11 (13th ed. 1997).

104. *See, e.g.*, City of Erie v. Pap's A.M., 529 U.S. 277, 290 (2000) (holding that *O'Brien* balancing test is appropriate scrutiny for content-neutral regulations of symbolic conduct). Under the *O'Brien* balancing test, a content-neutral law will be upheld

> if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

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

105. *Bartnicki*, 121 S. Ct. at 1761. The Court did not state any reason why symbolic speech and "pure speech" should be distinguished in determining a standard of scrutiny. Part II.B.1, *infra*, considers possible justifications for treating the two differently.

106. *Bartnicki*, 121 S. Ct. at 1761. Presumably, the plurality meant to *apply* the "highest order" standard in addition to simply articulating it. Yet, aside from one other passing reference to "highest order," *see id.* at 1763, the remainder of the plurality's analysis made no mention of it.

107. *Id.* at 1762.

108. *Id.* at 1765.

109. *Id.* at 1762.

110. *Id.*

capable of being punished.[111] Hence, an alternative means of deterring the wiretapping was usually available—simply punishing the wiretapper.[112]

In considering the state interest in protecting individuals' privacy, the plurality found that privacy was an important interest.[113] However, since the disclosures in *Bartnicki* involved matters of public concern, the plurality found that the interest in free expression trumped the privacy interest for two reasons. First, because the plaintiffs in *Bartnicki* were public figures, they were entitled to a lesser expectation of privacy in their communications.[114] Second, since previous cases held that "neither factual error nor defamatory content, nor a combination of the two, sufficed to remove the First Amendment shield from criticism of official conduct,"[115] the plurality found that "parallel reasoning require[d] the conclusion that a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern."[116] Thus, the plurality found that in the narrow circumstance that *Bartnicki* presented, civil sanctions on the publication of the wiretapped information were unconstitutional.[117]

The dissent of Chief Justice Rehnquist criticized the plurality's choice of standards of scrutiny.[118] According to the dissent, strict scrutiny standards, such as "highest

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111. *Id.* at 1763. The plurality noted that the identity of the wiretapper was unknown in only 5 of the 206 Wiretapping Act cases collected in the appendix to the respondent's brief. *Id.* at 1763 n.14, n.15. In this regard, *Bartnicki v. Vopper* was something of an anomaly because the wiretapper's identity was never discovered. *Id.*

112. *See id.*

113. *Id.* at 1764.

114. *Id.* at 1765; *see infra* note 115.

115. *Id.* In the defamation context, for public-figure plaintiffs to receive actual or punitive damages against a media defendant, the Supreme Court has required a finding that the defendant acted with "actual malice" (knowingly or recklessly publishing libelous statements). *See* New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964). Likewise, "actual malice" need be shown in order for a private-figure plaintiff to prevail in a defamation action involving an issue of public concern. *See* Gertz v. Welch, 418 U.S 323, 349 (1974). However, no actual malice need be shown for a private figure to prevail in a defamation action involving no such issue of public concern. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1985). In the "false light" privacy context, which involves the right to be free from "false or misleading information about one's [private] affairs," Cox Broad. Corp. v. Cohn, 420 U.S. 469, 490 (1975), the Court has also required a showing of actual malice before a plaintiff can receive damages. Time, Inc. v. Hill, 385 U.S. 374, 387 (1967).

116. *Bartnicki*, 121 S. Ct. at 1765. However, the plurality limited its holding only to instances in which a third party obtains information unlawfully. *See id.* at 1762. In situations in which the publisher itself obtains information unlawfully, it is unclear whether the same First Amendment protection applies. At the very least, the First Amendment provides no "license on either the reporter or his new sources to violate valid criminal laws," such as wiretapping laws. *Id.* at 1764 n.19. However, the plurality said nothing further about whether a reporter could be punished for *publishing* information that he obtained in violation of such valid criminal laws.

117. *Id.* at 1765-66.

118. *Id.* at 1770 (Rehnquist, C.J., dissenting). Justices Scalia and Thomas joined Chief

order" scrutiny, are to be invoked only in circumstances where the "government attempts to censor different viewpoints or ideas."[119] Since the Wiretapping Act's antidisclosure provision is based on the source of the information rather than its content, the dissent argued application of "highest order" scrutiny was misplaced.[120] According to the dissent, reliance on the *Florida Star* and *Daily Mail* line of cases was unjustified because "[e]ach of the laws at issue in the *Daily Mail* cases regulated the content or subject matter of speech."[121]

Moreover, the dissent narrowly construed the three considerations underlying the *Florida Star* decision and found that they did not justify application of "highest order" scrutiny.[122] The dissent read the "highest order" standard as applying only where the three considerations underlying the standard are met: first, where the information to be published had been obtained lawfully from the government; second, where the information was already publicly available; and third, where "timidity and self-censorship" would result from the lack of a culpability requirement in the statute.[123] In applying these underlying considerations, the dissent noted that the information in *Bartnicki* was obviously not obtained from the government nor was it publicly available since it had come from a wiretap conducted by a unknown private citizen.[124] Furthermore, the dissent found that since the statute prohibited only "intentional" disclosures, it was unlikely to result in a chilling effect on speech.[125]

Instead of finding the "highest order" standard applicable, the dissent argued that the Wiretapping Act's provisions "need only pass intermediate scrutiny,"[126] which requires the government to establish "a substantial governmental interest unrelated to the suppression of free speech."[127] The dissent had no difficulty finding that the interest in deterring the initial wiretapping and an interest of fostering private speech satisfied the standard.[128]

Finally, the concurring opinion of Justice Breyer took another approach entirely

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Justice Rehnquist in dissent.

119. *Id.*

120. *See id.*

121. *Id.* at 1771. The discussion *infra*, Part II.B.1 takes issue with this conclusion that a law's content-neutrality is at all meaningful when the law restricts "pure speech."

122. *See id.* at 1771-72.

123. *See Id.*

124. *Id.* at 1771.

125. *See id.* at 1772. While it is true that 18 U.S.C. § 2511(1)(c) (1994) imposes an "intentional" standard with respect to the act of disclosing, it imposes a bare minimum negligence standard with respect to the circumstance that the information was obtained unlawfully. *Id.* The latter culpability level, which the dissent ignores entirely, *see Bartnicki*, 121 S. Ct. at 1769-76 (Rehnquist, C.J., dissenting), is equally relevant (if not much more so) for determining whether the disclosure provisions chill speech.

126. *Bartnicki*, 121 S. Ct. at 1770 (Rehnquist, C.J., dissenting).

127. *Id.* at 1772. The distinction between a "substantial" or "important" governmental interest (under intermediate scrutiny) and a governmental interest of the "highest order" is considerable enough that the constitutionality of laws such as the Wiretapping Act often hinges on it. *See infra* note 139.

128. *Bartnicki*, 121 S. Ct. at 1773-76.

in analyzing the constitutionality of the Wiretapping Act.[129] At the outset, Justice Breyer rejected any sort of strict scrutiny standard, including the "highest order" standard, as being "out of place where, as here, important competing constitutional interests are implicated."[130] Instead, he proposed an amorphous sort of ad hoc balancing test:

> I would ask whether the statutes strike a reasonable balance between their speech-restricting and speech-enhancing consequences. Or do they instead impose restrictions on speech that are disproportionate when measured against their corresponding privacy and speech-related benefits, taking into account the kind, the importance, and the extent of these benefits, as well as the need for the restrictions in order to secure those benefits?[131]

The concurring Justices indicated that they were generally willing to find laws such as the Wiretapping Act constitutional under the standard because of the importance of preserving privacy and encouraging private speech.[132]

Nevertheless, under the particular facts of the case, the two concurring Justices found that application of the Wiretapping Act was unconstitutional. In the mind of the Justices, application of the Act did not "reasonably reconcile the competing constitutional objectives,"[133] because the radio station that broadcast the tape acquired it lawfully; because the speech had no legitimate privacy interest (it involved blowing off people's front porches); and because the speakers themselves were limited public figures who have only a limited expectation of privacy.[134] Oddly enough, the factors that the concurring Justices regarded as significant in finding the application of the Wiretapping Act unconstitutional were precisely the prerequisites for the *Florida Star* "highest order" test that they declined to follow—matters of public importance and whether information was unlawfully obtained.[135]

Because it strikes a middle ground between the plurality and dissent, the concurring opinion prevails as the law of the case. As a result, the holding of *Bartnicki* is very narrow indeed. The concurring opinion expressly states that it found the Wiretapping Act's application unconstitutional only because Yocum and "the radio broadcasters acted lawfully up to the time of final public disclosure."[136] Thus, the concurrence implies that if the Wiretapping Act criminalized *receiving* the

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129. *See id.* at 1766-69 (Breyer, J., concurring). Justice O'Connor joined Justice Breyer's concurrence.

130. *Id.* at 1766. The other "competing constitutional interest" mentioned here (besides free expression) was the "freedom not to speak publicly," not the interest in privacy. *Id.*

131. *Id.*

132. *See id.* at 1767.

133. *Id.*

134. *Id.* at 1767-68.

135. *Id.* at 1766. The third prerequisite to "highest order" scrutiny under *Florida Star*, that the publication was truthful, Florida Star v. B.J.F., 491 U.S 524, 533 (1989) (citing Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 103 (1979)), was a given in the case. *See Bartnicki*, 121 S. Ct. at 1757.

136. *Bartnicki*, 121 S. Ct. at 1766 (Breyer, J., concurring).

information, the radio broadcasters would have acted "unlawfully" and could possibly have been punished for broadcasting the tape.[137] Moreover, its holding appears to rest upon the narrow factual assumption that Anthony's Kane's comments about blowing off people's front porches constituted "a matter of unusual public concern[,] . . . a threat of potential physical harm to others."[138] Thus, on its face, the *Bartnicki* holding appears not to apply beyond the dissemination of information that involves an actual threat of violence.[139]

1. Standards of Scrutiny

Since deciding on a standard of scrutiny heavily influences the outcome of cases and the constitutionality of laws,[140] perhaps it should be of little surprise that a Supreme Court dedicated to resolving privacy cases as narrowly as possible would have difficulty settling on one standard. Even so, the divergence of opinion among the members of the Court about the proper method of reviewing the Wiretapping Act is somewhat remarkable. As discussed above, in *Bartnicki*, the plurality articulated the "highest order" standard, but stopped short of actually applying it to the facts of the case;[141] the dissent appeared to view the Wiretapping Act as little more than a garden variety content-neutral law that merited only intermediate form scrutiny;[142] and the concurring opinion proposed an amorphous standard of scrutiny that was so laden with open-ended considerations that two different lower courts applying the standard to the same set of facts would probably arrive at two different conclusions.[143] The

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137. *See id.* at 1766-69. The implications of this possibility are discussed *infra*, Part II.B.2.

138. *See Bartnicki*, 121 S. Ct. at 1766.

139. However, it should be noted that the Supreme Court summarily vacated and remanded the D.C. Circuit decision in *Boehner v. McDermott*, 191 F.3d 463 (D.C. Cir. 1999), which had previously upheld the application of the Wiretapping Act. McDermott v. Boehner, 121 S. Ct. 2190 (2001) (mem.), *vacating* 191 F.3d 463 (D.C. Cir. 1999). Since the published information at issue in *Boehner* involved potentially unethical conduct by a politician, *see Boehner*, 191 F.3d at 465, and *not* a threat of physical violence, the Court's vacating of *Boehner* may indicate that the constitutional protections it is willing to afford to publication are not quite as narrow as the quoted language of the concurring opinion suggests.

140. When the court applies a strict scrutiny standard, the almost inevitable result is that the law in question will be found unconstitutional. *See* Burson v. Freeman, 504 U.S. 191, 211 (1992). On the other hand, it is much more common for laws to survive intermediate scrutiny under the *O'Brien* balancing test. *See, e.g.*, Barnes v. Glen Theatre, Inc., 501 U.S. 560, 567 (1991) (upholding an antinudity ordinance as applied to nude barroom dancing under *O'Brien* intermediate scrutiny).

141. *See Bartnicki*, 121 S. Ct. at 1761-65.

142. *Id.* at 1772. Moreover, all three lower courts addressing the issue found the Wiretapping Act to be content-neutral and reviewed it under only intermediate scrutiny. *See* Peavy v. WAA-TV, Inc., 221 F.3d 158, 190-91 (5th Cir. 2000); Bartnicki v. Vopper, 200 F.3d 109, 123 (3d Cir. 1999), *aff'd on other grounds*, 121 S. Ct. 1753; *Boehner*, 191 F.3d at 467.

143. The proposed standard requires courts to generally determine whether laws "impose restrictions on speech that are disproportionate when measured against their corresponding

following discussion attempts to provide a clearer analysis of which standard of scrutiny is appropriate for analyzing the Wiretapping Act.

To begin with, an inquiry into the content-neutrality of the Wiretapping Act, as the dissent undertook in *Bartnicki*, is misplaced. Typically content-neutrality is an issue with two types of laws—general conduct statutes and speech-specific time, place, and manner regulations.[144] General conduct statutes are aimed at behavior rather than speech, and they are said to have an "incidental effect" when applied to punish symbolic conduct.[145] The classic example of a general conduct law is the statute in *United States v. O'Brien*[146] that prohibited destroying or mutilating draft cards.[147] On the other hand, speech-specific time, place, and manner regulations do target expression, but for reasons not related to the content of the speech.[148] An example of such a law is the New York City ordinance in *Ward v. Rock Against Racism*[149] that restricted the "manner" of speech by imposing volume limits on public concerts.[150]

The civil liability provisions of the Wiretapping Act cannot accurately be characterized as either a general conduct law or a time, place, and manner regulation. First, the provisions cannot be seen as a general conduct statute because they prohibit "disclosure" of information that has been unlawfully intercepted.[151] "Disclosure" is inherently communicative;[152] thus, the Wiretapping Act targets speech as opposed to conduct. As the Third Circuit *Bartnicki* court noted, "[i]f the acts of 'disclosing' and 'publishing' information do not coustitute speech, it is hard to imagine what does fall within that category, as distinct from the category of expressive conduct."[153]

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privacy and speech-related benefits." *Bartnicki*, 121 S. Ct. at 1766 (Breyer, J., concurring). With respect to both (1) privacy and (2) fostering private speech, the standard requires lower courts to (a) "tak[e] into account the kind," (b) "the importance," (c) and "the extent of these benefits," and (d) "the need for the restrictions in order to secure those benefits." *Id.* Since courts must review factors (a)–(d) with respect to both interests (1) and (2), the result is an eight-pronged inquiry which supposedly leads to a result that generally "strike[s] a reasonable balance." *Id.*

144. GUNTHER & SULLIVAN, *supra* note 103, at 1209-10.

145. *Id.* at 1209.

146. 391 U.S. 367 (1968).

147. *Id.* at 370. The Supreme Court held that the statute could be applied to punish O'Brien's symbolic, public burning of his draft card, because it advanced a substantial government interest and was narrowly tailored to serve that interest. *Id.* at 377-82.

148. GUNTHER & SULLIVAN, *supra* note 103, at 1209-10.

149. 491 U.S. 781 (1989).

150. *Id.* at 798-99.

151. 18 U.S.C. § 2511(1)(c) (1994).

152. *See* Bartnicki v. Vopper, 200 F.3d 109, 120 (3d Cir. 1999), *aff'd on other grounds*, 121 S. Ct. 1753 (2001).

153. *Id.* For examples of symbolic or expressive conduct as properly understood, see Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) (nude dancing); Texas v. Johnson, 491 U.S. 397 (1989) (flag burning); Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984) (homelessness demonstrations involving sleeping in a public park); Tinker v. Des Moines Indep. Cmty. School Dist., 393 U.S 503 (1969) (black armbands worn in school to protest the Vietnam War); United States v. O'Brien, 391 U.S. 367 (1968) (burning of draft card).

Second, the disclosure provisions cannot properly be understood as content-neutral speech-specific regulations. They neither regulate the time, nor the place,[154] nor the manner[155] of speech. Every person is prevented from disclosing at any time, in any place, and in any way information initially obtained from an illegal wiretap.[156] Consequently, the Wiretapping Act's liability provisions constitute a *total prohibition* on a particular class of speech—speech that was obtained through an illegal wiretap.[157]

The Wiretapping Act punishes the publication of truthful speech of public interest, and hence regulates the content of newspapers, television broadcasts, and radio shows that would otherwise disseminate the information. Even though facially neutral, the Wiretapping Act constrains publication just as effectively as a content-based statute when a particular matter falls within its net.[158] In *Bartnicki*, just like in *Cox*, the media defendants were being punished because of their "pure expression—the content of a publication—and not conduct or a combination of speech and nonspeech elements that might otherwise be open to regulation or prohibition."[159] It would indeed be an oxymoron to assert that a regulation that determines the contents of a publication can *ever* be truly "content-neutral."

"Inadvertent" or "incidental"[160] censorship of a newspaper publication or a radio broadcast under a content-neutral law of general applicability is an impossibility. Unlike symbolic speech cases (such as flag burning), where the government can assert a plausible argument that it is punishing conduct rather than speech, whenever the government creates a civil remedy to punish the contents of a newspaper or radio broadcast, there is nothing other than speech that is being punished.[161] The decision

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154. By contrast, consider the following place restrictions: Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992) (regulating solicitation and other speech in airports); Frisby v. Schultz, 487 U.S. 474 (1988) (prohibiting the picketing of individual homes); Members of the City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789 (1984) (prohibiting the posting of signs on public property).

155. By contrast, consider the following manner restrictions: Madsen v. Women's Health Ctr., Inc., 512 U.S. 753 (1994) (injunction limiting abortion clinic protests); *Rock Against Racism*, 491 U.S. at 781 (regulating volume levels of concerts); Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) (regulating billboard displays); Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981) (confining solicitation and distribution of literature to behind booths).

156. *See* 18 U.S.C. § 2511 (1994).

157. *Cf.* Justice Stevens' opinion in *City of Ladue v. Gilleo*, 512 U.S. 43, 45-59 (1994) (arguing that an ordinance banning residential signs was invalid irrespective of content-neutrality because it prohibited "too much" speech).

158. *Cf.* Cohen v. Cowles Media Co., 501 U.S. 663, 675 (1991) (Blackmun, J., dissenting) ("[T]he operation of Minnesota's doctrine of promissory estoppel in this case cannot be said to have a merely 'incidental' burden on speech; the publication of important political speech *is* the claimed violation." (emphasis in original)).

159. Cox Broad. Corp. v. Cohn, 420 U.S. 469, 495 (1975); *see also Bartnicki*, 121 S. Ct. at 1770 (Rehnquist, C.J., dissenting).

160. *See* Bartnicki v. Vopper, 121 S. Ct. 1753, 1774 (2000) (Rehnquist, C.J., dissenting).

161. *See Cohen*, 501 U.S. at 675 (Blackmun, J., dissenting).

to punish a publication or dissemination hence will always be a punishment directed at speech. This, perhaps, was ultimately the point the *Bartnicki* plurality attempted to make when it noted that the Wiretapping Act burdens pure speech and then articulated the "highest order" standard: laws that directly criminalize the publication of information are among the most hostile to the First Amendment and the most deserving of strict judicial scrutiny.[162]

Yet, the end result of *Bartnicki* is that the "highest order" standard is gone for the time being or at least in the context of the Wiretapping Act.[163] In its place is the standard of scrutiny articulated by Justice Breyer—one ideally suited for ad hoc decisionmaking. Under the standard, the government will generally have the constitutional power to punish free expression to promote an interest in individual privacy, except in certain, largely undefined circumstances where the Justices decide that the balance tips in favor of the First Amendment instead.[164] After *Bartnicki*, some of these factors to be considered involve instances when the information is unlawfully obtained, when the information concerns public figures, and when there is a "legitimate" privacy interest in the information.[165] But other than listing these three factors, the Court left the lower federal courts no reasonably applicable standard and consequently left the First Amendment privacy doctrine in disarray.

In a sense *Bartnicki* reaped what *Florida Star* and the previous First Amendment privacy cases had sown. By refusing to adopt broad, clearly-defined rules as the Court has adopted in other closely analogous contexts,[166] each of the *Florida Star* line of cases assured that the subsequent First Amendment privacy case would be one of legal "first impression" so long as the subsequent case's facts were modestly different from its predecessor's. With no broadly stated precedent to invoke, the *Bartnicki* court grappled with fundamental questions of what the basic governing law of First Amendment privacy is and should be. Unfortunately, the *Bartnicki* decision continues this tradition of legal uncertainty in the guise of "flexibility."[167] With its narrow holding, *Bartnicki* not only gave little guidance to the lower federal courts but it actually further obfuscated the state of First Amendment privacy doctrine. Indeed, after *Bartnicki*, the net effect for First Amendment privacy is that the Court (via the concurring opinion) took the reasonably defined prerequisites for "highest order" scrutiny under *Florida Star*—truthfulness, public interest, and lawfully obtained information—and rearticulated them in such a manner as to make their analytical effect murky at best, and nonexistent at worst.[168]

2. The Problem of Unlawfully Obtained Information

To this point, the discussion has been concerned with the Supreme Court's ad hoc

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162. *See Bartnicki*, 121 S. Ct. at 1761.

163. *See id.* at 1766 (Breyer, J., concurring).

164. *See id.* at 1767 (Breyer, J., concurring).

165. *Id.*

166. *See supra* note 115 (discussing the Court's clearer rules for defamation and false light privacy).

167. *Bartnicki*, 121 S. Ct. at 1768-69 (Breyer, J., concurring).

168. *See id.* at 1766-67.

privacy decisionmaking and its ensuing struggle for a standard of scrutiny. Now the inquiry shifts to the second theme of the First Amendment privacy doctrine, the Court's tendency to emphasize the source of the published information rather than directly address the competing interests of privacy and free expression. In *Cox* and *Florida Star*, the Court focused on the fact that a rape victim's name was obtained from public government documents,[169] and hence avoided actually weighing the psychological harm caused by publishing her name compared with the free expression interest in publishing it. Likewise, in *Bartnicki*, the Court focused heavily on whether or not the illegally taped conversations had been "lawfully obtained" by the press.[170] If the information had been unlawfully obtained, the information would not (necessarily) have received First Amendment protections—irrespective of the value of the information to the public.[171]

As this subpart will explore, the *Bartnicki* court's focus on whether information has been unlawfully obtained amounts to something of an abdication of its responsibility to decide the free expression/privacy conflict. By making "lawfully obtained" a prerequisite to constitutional protection, the Court allows Congress to determine the constitutionality of punishing speech by proscribing certain means of receiving information. The situation is all the more strange since laws proscribing the receipt of information raise serious First Amendment issues themselves. Paradoxically, the result in some situations may be that the constitutionality of punishing truthful information depends on the existence of a law that could not constitutionally be applied against a media member.[172]

Before exploring the paradox in greater detail, it is helpful first to recall the origins of the notion of unlawfully obtained information and its history prior to *Bartnicki*. The notion officially entered First Amendment privacy jurisprudence in *Daily Mail*,[173] when the Supreme Court articulated it as a prerequisite for the application of the "highest order" standard.[174] However, the Court did not have the occasion to directly address a situation where information had been unlawfully obtained by the press or a third party, and in *Florida Star*, the Court expressly declined to resolve the question of how unlawfully obtained information would be treated.[175]

Thus, prior to *Bartnicki*, the Supreme Court never had the opportunity to fully explain what the notion of "lawfully obtained" information actually entailed. During

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169. Fla. Star v. B.J.F., 491 U.S. 524, 538 (1989); *see also* Cox Broad. Corp. v. Cohn, 420 U.S. 469, 496 (1975).

170. *Bartnicki*, 121 S. Ct. at 1762; *id.* at 1766 (Breyer, J., concurring); *see also id.* at 1772 (Rehnquist, C.J., dissenting).

171. *See id.* at 1766 (Breyer, J., concurring).

172. An example of such a law would exist if Congress amended the Wiretapping Act to criminalize receipt of illegally wiretapped information. *See infra* text accompanying notes 187-90.

173. Smith v. Daily Mail Publ'g Co., 443 U.S. 97 (1979).

174. *Id.* at 103. Even earlier, in *Cox*, the Supreme Court emphasized that the name of the rape victim had been lawfully obtained. *Cox*, 420 U.S. at 496. Not until *Daily Mail*, however, did it become clear that the First Amendment protections afforded to information would depend on the notion. *Daily Mail Publ'g Co.*, 443 U.S. at 104.

175. Florida Star v. B.J.F., 491 U.S. 524, 535 n.8. (1989).

the course of the federal wiretapping litigation preceding *Bartnicki*, various judges in the lower federal courts interpreted the phrase in considerably different ways. The district court in *Peavy v. Harman*[176] and the dissenting judge in *Boehner v. McDermott*[177] interpreted "lawfully obtained" in a literal sense by finding that the defendants had not, themselves, broken any law in obtaining tapes of conversations even though they knew the conversations had been illegally wiretapped.[178] Likewise, in *Peavy v. New Times, Inc.*,[179] the district court found that the newspaper had lawfully obtained the transcript of Peavy's conversation by taking it from the public school board records, irrespective of the fact that the conversation was initially illegally intercepted.[180] However, in *Boehner*, the majority and concurring judges both explicitly rejected the idea that "unlawfully obtained" is only limited to the violation of some law.[181] Instead, both the majority and concurrence concluded that the defendant "unlawfully obtained" a tape-recorded conversation merely by acquiring it with the knowledge the conversation was illegally wiretapped.[182]

The split of the lower federal courts over the meaning of "lawfully obtained" was paralleled in the divergent approaches to the issue in *Bartnicki v. Vopper*.[183] A majority of the Justices understood the notion as requiring the publisher or deliverer to personally obtain the information in violation of some law.[184] According to these Justices, it was not enough simply that some third party violated a law in obtaining the information. Since the Wiretapping Act does not specifically criminalize *receiving* illegally wiretapped information (just *disclosing* it), the plurality and concurring Justices stated that the defendants did not "unlawfully obtain" the information from the unknown wiretapper.[185]

The dissent, however, critiqued the plurality's interpretation of the notion of

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176. 37 F. Supp. 2d 495 (N.D. Tex. 1999), *aff'd in part, rev'd in part, vacated in part sub nom.* Peavy v. WFAA-TV, Inc., 221 F.3d 158 (5th Cir. 2000).

177. 191 F.3d 463 (D.C. Cir. 1999).

178. *Id.* at 484-85 (Santelle, J., dissenting); *see also Harman*, 37 F. Supp. 2d at 516.

179. 976 F. Supp. 532 (N.D. Tex. 1997).

180. *Id.* at 538.

181. *Boehner*, 191 F.3d at 473; *see also id.* at 479 (Ginsburg, J., concurring).

182. *Id.* at 473; *see also id.* at 479 (Ginsburg, J., concurring). In reaching its conclusion, the *Boehner* court compared the receipt of wiretapped information to the receipt of a stolen tape—a case where there would be no doubt that it was unlawfully obtained. *Id.* at 469. The court made the analogy as follows:

> Suppose Boehner had tape recorded his conference call. Suppose as well that the Martins later break into Boehner's office, steal the tape and give it to McDermott, who then acts exactly as he is alleged to have acted here: he accepts the tape from the Martins and delivers it to the press. In the hypothetical, there is no doubt . . . he could be prosecuted for receiving stolen property. With respect to McDermott, it is hard to see any practical constitutional distinction between the hypothetical and the facts alleged here.

Id. at 469 (citation omitted).

183. 121 S. Ct. 1753 (2001).

184. *See id.* at 1765; *see also id.* at 1766 (Breyer, J., concurring).

185. *See id.* at 1760; *see also id.* at 1767 (Breyer, J., concurring).

unlawfully obtained information. According to the dissent, the fact that the Wiretapping Act does not criminalize the receipt of wiretapped information "hardly renders those who knowingly receive and disclose such communications 'law-abiding.'"[186] The dissent found this to be true for two reasons: first, the communication from the eavesdropper to the media defendant was a prohibited *disclosure*;[187] and second, the dissemination by the media defendants to the public was also a prohibited *disclosure*.[188] Yet, this reasoning appears circular since the constitutionality of the punishment of those disclosures was the very issue in the case.

Notwithstanding, the dissent made one particularly important point: "the Court places an inordinate amount of weight upon the fact that the receipt of an illegally intercepted communication has not been criminalized."[189] The plurality and concurring opinions both emphasized that the holding of *Bartnicki* "does not apply to punishing parties for obtaining the relevant information unlawfully."[190] Thus, publications by newspapers would not (necessarily) be protected by the First Amendment if the newspapers were responsible for the initial wiretap. The statement, however, begs a larger question: if Congress were simply to criminalize the receipt of the information illegally wiretapped by a third party, would the First Amendment protections afforded to the media defendants in *Bartnicki* suddenly vanish?

Under a literal interpretation of at least the concurring opinion, the answer appears to be yes.[191] Justice Breyer expressly states—more than once—that when the published information has been unlawfully obtained by the press, the holding of *Bartnicki* would not apply.[192] Thus, if Congress amended the Wiretapping Act to criminalize the receipt of information obtained through an illegal wiretap, future media defendants obtaining information like the broadcaster in *Bartnicki* would then obtain it unlawfully. As a result, publication of the information would suddenly not be protected by the First Amendment.

Supposing the new hypothetical law is itself constitutional, the absurd result is that Congress might simply legislate around *Bartnicki* and the First Amendment. By making the receipt of the wiretapped information unlawful, Congress would render punishment of the disclosures constitutional.

Yet, therein lies a paradox. Any law that criminalizes the receipt of information raises serious First Amendment issues in its own right. This fact is particularly true

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186. *Id.* at 1772 (Rehnquist, C.J., dissenting) (quoting *id.* at 1762).

187. *Id.* The dissent's analysis here is rendered difficult to understand by the repeated use of the ambiguous term "third party." *Id.* The third party referred to could conceivably be either Yocum, who delivered the tape, or the media defendants, who disseminated the tape, or both. *See id.* at 1757.

188. *Id* at 1772 (Rehnquist, C.J., dissenting).

189. *Id.*

190. *Id.* at 1764 n.19; *see also id.* 1767 (Breyer, J., concurring).

191. The plurality opinion notes that the governmental interest (in deterring wiretapping) served through applying the Wiretapping Act against "an otherwise *innocent* disclosure of public information is plainly insufficient." *Id.* at 1764 (emphasis added). The apparent implication is that if the disclosure is not "innocent," that is, because information was unlawfully obtained, then punishing the disclosure might be constitutional.

192. *Id.* at 1766-67 (Breyer, J., concurring).

in light of *Bartnicki*, which held that the *delivery* of information obtained from an illegal wiretap receives the same First Amendment protections as the publication of information so obtained.[193] Surely if such delivery of information is protected under the First Amendment, its *receipt* must be as well; it takes (at least) two to engage in meaningful free expression activity—one to speak and the other to listen. It is altogether probable, for example, that the hypothetical law proscribing receipt of illegally wiretapped information would itself be unconstitutional.[194]

Relying on a law forbidding the receipt of information in order to determine the constitutionality of the ensuing publication, the Court begs the question of whether the law forbidding the receipt of information is constitutional. The "unlawfully obtained" requirement, thus, simply shifts the inquiry from the constitutionality of the disclosure to the constitutionality of the receipt of the information. Yet, the notion itself provides no analytical framework for determining the constitutionality of the underlying law. It does not specify what level of culpability a media member "unlawfully obtaining" information would have to act with before it could be constitutionally punished. With no culpability levels specified, it seems entirely probable that a media member's publication might be punished based on nothing more than an underlying, negligent act committed in the process of newsgathering. Even if not, the notion of "unlawfully obtained" information is, to say the least, not a particularly useful analytical device for determining whether a publication should be entitled to First Amendment protection.

This discussion itself begs one final question: why does the notion of unlawfully obtained information exist as such a major consideration in the Supreme Court's First Amendment privacy doctrine? The short answer: there is no good reason. The following Part discusses why the notion is present in First Amendment privacy cases, why it is irrelevant, and why the Court should simply abandon this troublesome concept altogether.

III. "LAWFULLY OBTAINED" INFORMATION AS A FIRST AMENDMENT PRINCIPLE

As discussed in detail above, the idea of when information has been unlawfully obtained is crucial for determining whether the subsequent publication of that information is protected under the First Amendment. The notion of "lawfully obtained" information, together with newsworthiness and truth, is one of a triad of prerequisites for the application of "highest order" scrutiny against a statute under *Florida Star* and *Daily Mail*.[195] Likewise, under the prevailing law of *Bartnicki*, if information is "unlawfully obtained" by the press, its publication will not

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193. *See id.* at 1761. Consequently, the Court treated Yocum, who delivered the illegally wiretapped conversation to the radio station, the same as they treated the radio broadcasters. *Id.* at 1760 n.8.

194. In *Florida Star*, the Court implied that only laws prohibiting "nonconsensual" acquisition of information would be constitutional. *See* Florida Star v. B.J.F., 491 U.S. 524, 534 (1989).

195. *See id.* at 533; *see also* Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 103 (1979). In this aspect, the notion of "unlawfully obtained" information is only important to the extent that the highest order standard still has life after *Bartnicki*, which seems unclear.

(necessarily) receive First Amendment protection.[196]

However, unlike the sister concepts of newsworthiness and truth, which are solidly grounded in First Amendment theory,[197] the notion of "lawfully obtained" cannot properly be construed as a principle for determining the expressive value of a communication. Information, when communicated by the press, is either valuable or not valuable, irrespective of how that information was obtained. Information can be lawfully obtained and be minimally important; likewise, information can be vital to the public interest and yet be illegally obtained. A classic example of the latter situation is the Pentagon Papers case,[198] where the Court invalidated a federal court injunction that prohibited the publication of a classified study on American Vietnam policy[199] that was widely known to have been illegally obtained at the time of the Court's decision.[200] An example of the former situation is tabloid journalism.[201]

A principle determining the constitutionality of expression should logically have *something* to do with expression; if it does not, there should be some compelling justification for its existence. One should then question what place a notion that does not distinguish speech of vital importance from tabloid journalism ought to have as a prerequisite for protecting expression under the First Amendment. As *Cox* and

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196. *See Bartnicki*, 121 S. Ct. at 1764;*see also id.* at 1767 (Breyer, J., concurring).

197. The pursuit of truth is one of the obvious and traditional justifications for First Amendment protections. *See* Emerson, *supra* note 3, at 881-82. Likewise, the First Amendment protections given to published defamatory material vary according to the degree to which the publication involves a public figure plaintiff or is a matter of public concern. *See supra* note 110. According to the *Cox* majority, the uninhibited publication of newsworthy information is vital to a functioning democracy:

> [I]n a society in which each individual has but limited time and resources with which to observe at first hand the operation of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations .... Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinion on the administration of government generally.

Cox Broad. Corp. v. Cohn, 420 U.S. 469, 491-92 (1975).

198. N.Y. Times Co. v. United States, 403 U.S. 713 (1971) (per curiam).

199. *Id.* at 714.

200. Boehner v. McDermott, 191 F.3d 463, 473 (D.C. Cir. 1999).

201. The original sponsors of the privacy tort were apparently motivated by a disdain for the publication of such non-newsworthy information as the details of private life. In one often quoted passage, Warren and Brandeis write

> The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers .... When personal gossip attains the dignity of print, and crowds the space available for matters of real interest to the community, what wonder that the ignorant and thoughtless mistake its relative importance.

Cox, 420 U.S. at 487 n.16 (quoting Warren & Brandeis, *supra* note 23, at 196).

Florida Star demonstrated, concentrating on the source of information can overshadow the actual conflict between privacy and free expression that should be at the core of the analysis.[202] In those cases, the Court's concentration on the fact that information was obtained from public records precluded consideration of the rape victims' interest in having their names kept out of the paper and the psychological harm caused by having them published.[203]

After *Bartnicki*, the Court's focus on the notion of unlawfully obtained information cuts the other way. If a court finds that information was unlawfully obtained by the press, it need not even evaluate the interest in free expression.[204] The information may be constitutionally punished, regardless of whether it is true, newsworthy, or even of vital public importance. A court blindly adhering to the "lawfully obtained" requirement not only would be capable of punishing valuable speech, but worse, without even so much as a consideration of its value.

Indeed, under the antidisclosure provisions of the Wiretapping Act, there was a particular danger that the media may be prevented from publishing "unlawfully obtained" information of vital public importance because of the threat of civil and criminal liability. The dissenting judge in *Boehner* stated the problem in this way:

> I can envision felonious eavesdroppers . . . obtaining not marginally embarrassing information about congressmen but information of critical public importance about, for example, some public official's accepting a bribe or committing perjury or obstruction of justice. Even if those hypothetical felons dumped information of that critical nature not into the hands of politicians but of a newspaper publisher or a television news network, the public could never know of the wrongdoing, because . . . those news media would be barred from further publication of that information.[205]

This concern was well founded. Each of the federal wiretapping cases involved the attempted (sometimes successful) punishment of the publication of information of public importance: in *Boehner*, the tape exposed potentially unethical conduct by a prominent politician;[206] in *Bartnicki*, Anthony Kane's recorded comments about blowing off peoples' front porches, even if not taken seriously as a threat, were still comments made by a public figure regarding a public dispute;[207] and in the *Peavy* cases, a public school trustee was revealed to be a bigot and potentially corrupt.[208] Prior to the Supreme Court's decision in *Bartnicki*, two of the three courts of appeals reviewing the cases actually determined that punishing the true publicly-important

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202. *See supra* text accompanying notes 83-86.

203. *Id.*

204. *See* Bartnicki v. Vopper, 121 S. Ct. 1753, 1767-68 (2001) (Breyer, J., concurring).

205. *Boehner*, 191 F.3d at 484 (Scntelle, J., dissenting).

206. *Id.* at 465.

207. Bartnicki v. Vopper, 200 F.3d 109, 113 (3d Cir. 1999), *aff'd on other grounds*, 121 S. Ct. 1753 (2001).

208. Peavy v. WFAA-TV, Inc., 221 F.3d 158, 164-66 (5th Cir. 2000); *see also* Peavy v. New Times, Inc., 976 F. Supp 532, 533 (N.D. Tex. 1997).

information was constitutional based on the fact that it was unlawfully obtained.[209]

The *Bartnicki* decision largely alleviated the concern in the Wiretapping Act context by limiting the "unlawfully obtained" principle to the literal breaking of some law by the individual claiming a First Amendment right in disseminating information.[210] However, *Bartnicki* does not decide the constitutionality of punishing the press in the event that Congress criminalizes the receipt of illegally wiretapped information.[211] Moreover, with respect to other criminal and civil laws, *Bartnicki* still stands for the proposition that publishing illegally obtained information might be punished without so much as an inquiry into the value or newsworthiness of the expression.

So why does the notion of unlawfully obtained information have such a prominent role in the Court's First Amendment privacy jurisprudence?[212] The actual reason is quite dubious. The Court in *Florida Star* cryptically explained the notion by stating that, "because the ["highest order" standard] only protects the publication of information which a newspaper has 'lawfully obtain[ed],' the government retains ample means of safeguarding significant interests upon which publication may impinge."[213] To the extent that information is privately possessed, the Court noted that the government might pass laws forbidding nonconsensual acquisition of information; and to the extent the information rests in government hands, the Court noted that the government might classify information.[214]

Although it is unclear precisely what the Court intended to say,[215] the Court appears to have meant that the "unlawfully obtained" requirement allows for the

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209. *See WFAA-TV*, 221 F.3d at 191; *see also Boehner*, 191 F.3d at 469-70; *id.* at 479 (Ginsburg, J., concurring). The fourth case, *Peavy v. New Times, Inc.*, 976 F. Supp. at 532, was not reviewed by a circuit court.

210. *See Bartnicki v. Vopper*, 121 S. Ct. 1753, 1762 (2001).

211. *See id.* at 1760.

212. Professor Robert O'Neil has identified and catalogued three approaches to unlawfully obtained information in First Amendment cases: "those where First Amendment protection is so clear that conduct apparently does not matter; those at the other extreme where First Amendment interests are insufficient . . . ; and a third . . . group of cases where conduct seems critical to the scope of First Amendment rights." Robert M. O'Neil, *Tainted Sources: First Amendment Rights and Journalistic Wrongs*, 4 WM. & MARY BILL RTS. J. 1005, 1008-09 (1996) (footnotes omitted). First Amendment privacy cases, not surprisingly, fall into the latter category. *See id.* at 1012-13.

213. Florida Star v. B.J.F., 491 U.S. 524, 534 (1989) (alteration in original) (citation omitted) (quoting Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 103 (1979)).

214. *Id.*

215. Professor O'Neil suggested the following explanation: "This passage suggests that although government may not punish or even enjoin publication of truthful information that has been lawfully obtained, the trade-off is that government retains substantial latitude in defining what constitutes 'unlawful' for these purposes." O'Neil, *supra* note 212, at 1013. If Professor O'Neil is correct, then the Court's explanation does not amount to any sort of justification (or in the Court's words, underlying "consideration") for the presence of the "unlawfully obtained" principle, but rather simply a clarification of its scope. *Florida Star*, 491 U.S. at 534.

government to serve important interests through alternative means besides directly punishing speech. If this were the original objective, the end result is perverse. Rather than providing an *alternate means* of serving important governmental interests, the existence of a law forbidding the acquisition of information actually *enables* punishing the publication, because under the "highest order" standard, the constitutionality of the punishment depends on the existence of the law.[216]

A more coherent explanation is that a newspaper should not be permitted to profit by publishing information that it had a hand in illegally obtaining.[217] Understood in this way, the notion of "lawfully obtained" information functions in an analogous manner to the exclusionary rule in Fourth Amendment jurisprudence, which denies the admission of evidence that has been illegally obtained by police.[218] By denying the police the fruits of its labor, the rule seeks to curtail abusive police practices.[219] Likewise, by denying the newspaper the ability to publish illegally obtained information—the fruits of the wrongdoer's labor—the government attempts to discourage the taking of the information and violating the law in the first place.[220]

In the event that a newspaper or other member of the media purposefully participates in the unlawful interception of a conversation, trespasses, steals documents, or intentionally acts in violation of some other law in order to obtain information for a story, the argument for the "unlawfully obtained" principle to limit the constitutional protection of the publication is most compelling. By punishing the publication of the information, the government really does "deny[] the wrongdoer the fruits of his labor."[221] It might be said that where the press purposefully breaks the law to obtain information, it has, in a sense, relinquished its free speech rights in publishing the information.[222]

Yet, the "unlawfully obtained" principle does not, itself, distinguish such circumstances where the press is most culpable from situations where it is less culpable but still breaks some law.[223] It treats information as equally unprotected, regardless of whether a reporter obtained it by purposefully burglarizing an office building or by negligently receiving stolen documents. Nor does the unlawfully obtained principle distinguish between the breaking of criminal laws and committing torts. And finally, it treats vitally important public information no differently than

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216. *Cf. Florida Star*, 491 U.S. at 533-34 (articulating the "highest order" standard).

217. This argument has been advanced by some commentators and seems as reasonable of a justification as any for the notion of unlawfully obtained information. *See* John J. Walsh et al., *Media Misbehavior and the Wages of Sin: The Constitutionality of Consequential Damages for Publication of Ill-Gotten Information*, 4 WM. & MARY BILL RTS. J. 1111 (1996).

218. *See id.* at 1116.

219. According to the Supreme Court, the exclusionary rule is a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right." *United States v. Calandra*, 414 U.S. 338, 348 (1974).

220. *See* Walsh, *supra* note 217, at 1116.

221. Bartnicki v. Vopper, 200 F.3d 109, 125 (3d Cir. 1999), *aff'd on other grounds*, 121 S. Ct. at 1753 (2001).

222. *See* Walsh, *supra* note 217, at 1112.

223. These include, for example, circumstances in which the press negligently or knowingly receiving stolen goods or information.

gossip.[224]

It should not be overlooked that laws or injunctions directly burdening publication are inherently harmful under the First Amendment,[225] particularly when they are supported by the "overarching 'public interest, secured by the Constitution, in the dissemination of truth.'"[226] If one begins from the premise that laws burdening publication are hostile to the Constitution and should be avoided where possible, it is evident that the civil and criminal punishment for publishing illegally acquired information is unnecessary. The government can deter the initial crime just as effectively by enforcing tough criminal laws against that crime. In the language of the *Bartnicki* plurality, "[i]f the sanctions that presently attach to a violation of [a law] do not provide sufficient deterrence, perhaps those sanctions should be made more severe."[227]

Moreover, the rights of the press are not the only rights at stake; burdening the dissemination of information also touches on the independent right of the public to receive true, newsworthy information, irrespective of its origin.[228] Even if a publisher has obtained information by illegal means, the threat of punishment that attaches to publication may be sufficiently strong to prevent the press from disseminating valuable information to the public.[229] In particular, an injunction can never be justified on the basis of denying the wrongdoer the fruits of his labor because it prevents the public from ever hearing the information.[230] The right of the public to receive the information is one that a newspaper simply should not be permitted to give away.

CONCLUSION

Bartnicki is much like the Supreme Court's previous First Amendment privacy cases in that it was narrowly decided on its facts. Unlike its predecessors, however, *Bartnicki*'s fractured 4-2-3 ruling muddied the constitutional waters by its indecision

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224. *See supra* notes 197-201 and accompanying text.

225. After all, the First Amendment does read: "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I.

226. Florida Star v. B.J.F., 491 U.S. 524, 533 (1989) (quoting Cox Broad. Corp. v. Cohn, 420 U.S. 469, 491 (1975)) (internal quotation omitted).

227. Bartnicki v. Vopper, 121 S. Ct. 1753, 1762 (2001).

228. *See supra* note 197 and accompanying text. However, it might be thought that in cases where a newspaper is subsequently punished for publishing information that it has purposefully, illegally obtained (whether by theft, wiretapping, or otherwise), the right of the public is not implicated because the public has already received the information.

229. *See* O'Neil, *supra* note 212, at 1005-06 (discussing how CBS decided not to air a *60 Minutes* segment about the tobacco industry after it had induced the breach of contract of a former tobacco executive because it feared civil liability).

230. *See* N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam) (invalidating an injunction preventing dissemination of publicly important information that had been illegally obtained); *see also* O'Neil, *supra* note 212, at 1024 ("Bad conduct never justifies prior restraint."). *See generally* GUNTHER & SULLIVAN, *supra* note 103, at 1344-45 (discussing reasons for the Court's distinction between prior restraints and subsequent punishment).

on a standard of scrutiny. The plurality embarked on an invisible, "tacit application"[231] of "highest order" scrutiny; the concurrence proposed an impossible-to-apply ad hoc balancing test; and the dissent proposed the intermediate scrutiny ordinarily reserved for time-place-manner restrictions and restrictions on symbolic conduct, which is entirely out of place where a law burdens pure speech. Moreover, the Court appears to have created a loophole whereby Congress can circumvent the First Amendment. In light of *Bartnicki*, Congress might simply pass a law criminalizing the receipt of wiretapped information. Supposing that such a law is constitutional, a media defendant publishing under a factual setting identical to that in *Bartnicki* would suddenly be subject to criminal and civil punishment, because the defendant would have received information unlawfully.

It is unfortunate that future First Amendment privacy cases will hinge on whether or not information has been "lawfully obtained." The notion of "unlawfully obtained" information is a troublesome concept that has become far more important to First Amendment privacy than it logically should be. It has nothing to do with expression, and the First Amendment can largely do without it under any circumstance. The question of whether the publication of information is constitutionally protected should be determined on its own merits, rather than determined by the existence of criminal laws passed by Congress or the states. Focusing on whether information was unlawfully obtained obscures the exceptionally difficult issue at the heart of First Amendment privacy cases: the conflict between a person's right to privacy and the public's right to information, an issue that has eluded all of the Court's attempts to effectively confront it.

231. *Bartnicki*, 121 S. Ct. at 1770 (Rehnquist, C.J., dissenting).