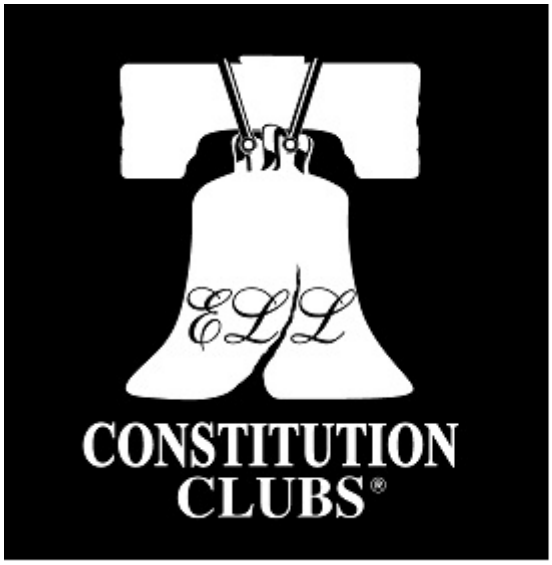


BARTNICKI v. VOPPER

SUPREME COURT OF THE UNITED STATES
532 U.S. 514
May 21, 2001
[6 - 3]

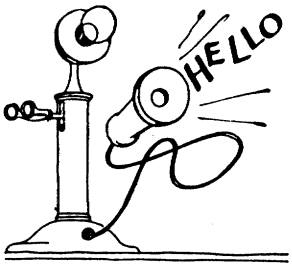
OPINION: Justice Stevens...Despite the fact that federal law has prohibited [disclosure of illegally intercepted communications] since 1934, this is the first time that we have confronted [the] issue.

The suit at hand involves the repeated intentional disclosure of an illegally intercepted cellular telephone conversation about a public issue. The persons who made the disclosures did not participate in the interception, but they did know -- or at least had reason to know -- that the interception was unlawful. Accordingly, these cases present a conflict between interests of the highest order -- on the one hand, the interest in the full and free dissemination of information concerning public issues, and, on the other hand, the interest in individual privacy and, more specifically, in fostering private speech. The Framers of the First Amendment surely did not foresee the advances in science that produced the conversation, the interception, or the conflict that gave rise to this action...[W]e are firmly convinced that the disclosures made by respondents in this suit are protected by the First Amendment.

During 1992 and most of 1993, the Pennsylvania State Education Association, a union representing the teachers at the Wyoming Valley West High School, engaged in collective-bargaining negotiations with the school board. Petitioner Kane, then the president of the local union, testified that the negotiations were "contentious" and received "a lot of media attention." In May 1993, petitioner Bartnicki, who was acting as the union's "chief negotiator," used the cellular phone in her car to call Kane and engage in a lengthy conversation about the status of the negotiations. An unidentified person intercepted and recorded that call.

In their conversation, Kane and Bartnicki discussed the timing of a proposed strike, difficulties created by public comment on the negotiations, and the need for a dramatic response to the board's intransigence. At one point, Kane said: "If they're not gonna move for three percent, we're gonna have to go to their...homes...To blow off their front porches, we'll have to do some work on some of those guys. Really, uh, really and truthfully because this is, you know, this is bad news..."

In the early fall of 1993, the parties accepted a non-binding arbitration proposal that was generally favorable to the teachers. **In connection with news reports about the settlement, respondent Vopper, a radio commentator who had been critical of the union in the past, played a tape of the intercepted conversation on his public affairs talk show.** Another station also broadcast the tape, and local newspapers published its contents. After filing suit against Vopper and other representatives of the media, Bartnicki and Kane (hereinafter petitioners) learned through discovery that Vopper had obtained the tape from Jack Yocum, the head of a local taxpayers' organization that had opposed the union's demands throughout the negotiations. Yocum, who was added as a defendant, testified that he had found the tape in his mailbox shortly after the interception and recognized the voices of Bartnicki and Kane. Yocum played the tape for some members of the school board, and later delivered the tape itself to Vopper...



[P]etitioners alleged that their telephone conversation had been surreptitiously intercepted by an unknown person using an electronic device, that Yocum had obtained a tape of that conversation, and that he intentionally disclosed it to Vopper, as well as other individuals and media representatives. Thereafter, Vopper and other members of the media repeatedly published the contents of that conversation. **The...complaint alleged that each of the defendants "knew or had reason to know" that the recording of the private telephone conversation had been obtained by means of an illegal interception.** Relying on both federal and Pennsylvania statutory provisions, petitioners sought...damages...

Respondents contended that they had not violated the statute because (a) they had nothing to do with the interception, and (b) in any event, their actions were not unlawful since the conversation might have been intercepted inadvertently. Moreover, even if they had violated the statute by disclosing the intercepted conversation, those disclosures were protected by the First Amendment. The District Court rejected the first statutory argument because, under the plain statutory language, an individual violates the federal Act by intentionally disclosing the contents of an electronic communication when he or she "knows or has reason to know that the information was obtained" through an illegal interception. Accordingly, actual involvement in the illegal interception is not necessary in order to establish a violation of that statute. With respect to the second statutory argument, the District Court agreed that petitioners had to prove that the interception in question was intentional, but concluded that the text of the interception raised a genuine issue of material fact with respect to intent. That issue of fact was also the basis for the District Court's denial of petitioners' motion. Finally, the District Court rejected respondents' First Amendment defense because the statutes were

content-neutral laws of general applicability that contained "no indicia of prior restraint or the chilling of free speech."

Thereafter, the District Court granted a motion for an interlocutory appeal...It certified as controlling questions of law: "(1) whether the imposition of liability on the media Defendants under the wiretapping statutes solely for broadcasting the newsworthy tape on the Defendant Vopper's radio/public affairs program, when the tape was illegally intercepted and recorded by unknown persons who were not agents of the Defendants, violates the First Amendment; and (2) whether imposition of liability under the aforesaid wiretapping statutes on Defendant Jack Yocum solely for providing the anonymously intercepted and recorded tape to the media Defendants violates the First Amendment."

...All three members of the panel agreed with petitioners and the Government that the federal and Pennsylvania wiretapping statutes are "content neutral" and therefore subject to "intermediate scrutiny." **Applying that standard, the majority concluded that the statutes were invalid because they deterred significantly more speech than necessary to protect the privacy interests at stake. The court remanded the case with instructions to enter summary judgment for respondents. In dissent, Senior Judge Pollak expressed the view that the prohibition against disclosures was necessary in order to remove the incentive for illegal interceptions and to preclude compounding the harm caused by such interceptions through wider dissemination... We granted certiorari...**

In *Berger v. New York,* we held that New York's broadly written statute authorizing the police to conduct wiretaps violated the Fourth Amendment. Largely in response to that decision, and to our holding in *Katz v. United States*[1] that the attachment of a listening and recording device to the outside of a telephone booth constituted a search, Congress undertook to draft comprehensive legislation both authorizing the use of evidence obtained by electronic surveillance on specified conditions, and prohibiting its use otherwise. The ultimate result of those efforts was Title III of the Omnibus Crime Control and Safe Streets Act of 1968, entitled Wiretapping and Electronic Surveillance.

One of the stated purposes of that title was "to protect effectively the privacy of wire and oral communications." In addition to authorizing and regulating electronic surveillance for law enforcement purposes, Title III also regulated private conduct. One part of those regulations... defined five offenses punishable by a fine of not more than $10,000, by imprisonment for not more than five years, or by both. Subsection (a) applied to any person who "willfully intercepts...any wire or oral communication." Subsection (b) applied to the intentional use of devices designed to intercept oral conversations; subsection (d) applied to the use of the contents of illegally intercepted wire or oral communications; and subsection (e) prohibited the unauthorized disclosure of the contents of interceptions that were authorized for law enforcement purposes. **Subsection (c), the original version of the provision most directly at issue in this case, applied to any person who "willfully**

[1]Case 4A-2 on this website.

discloses...to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection." The oral communications protected by the Act were only those "uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation."

As enacted in 1968, Title III did not apply to the monitoring of radio transmissions. In the Electronic Communications Privacy Act of 1986, however, Congress enlarged the coverage of Title III to prohibit the interception of "electronic" as well as oral and wire communications. By reason of that amendment, as well as a 1994 amendment which applied to cordless telephone communications, Title III now applies to the interception of conversations over both cellular and cordless phones. Although a lesser criminal penalty may apply to the interception of such transmissions, the same civil remedies are available whether the communication was "oral," "wire," or "electronic"...

We accept petitioners' submission that the interception was intentional, and therefore unlawful, and that, at a minimum, respondents "had reason to know" that it was unlawful. Accordingly, the disclosure of the contents of the intercepted conversation by Yocum to school board members and to representatives of the media, as well as the subsequent disclosures by the media defendants to the public, violated the federal and state statutes [and that, pursuant to these statutes,]...petitioners are thus entitled to recover damages from each of the respondents. The only question is whether the application of these statutes **in such circumstances** violates the First Amendment.

...[W]e accept...three factual matters...[as true]. First, respondents played no part in the illegal interception. Rather, they found out about the interception only after it occurred, and in fact never learned the identity of the person or persons who made the interception. Second, their access to the information on the tapes was obtained lawfully, even though the information itself was intercepted unlawfully by someone else...Third, the subject matter of the conversation was a **matter of public concern**. If the statements about the labor negotiations had been made in a public arena -- during a bargaining session, for example -- they would have been newsworthy. This would also be true if a third party had inadvertently overheard Bartnicki making the same statements to Kane when the two thought they were alone.

...As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based. In determining whether a regulation is content based or content neutral, we look to the purpose behind the regulation; typically, "government regulation of expressive activity is content neutral so long as it is '*justified* without reference to the content of the regulated speech.'" *Ward v. Rock Against Racism (1989).*

In this case, the basic purpose of the statute at issue is to "**protect the privacy** of wire, electronic, and oral communications." The statute does not distinguish based on the content of the intercepted conversations, nor is it justified by reference to the content of those conversations. Rather, the

communications at issue are singled out by virtue of the fact that they were illegally intercepted -- by virtue of the source, rather than the subject matter.

On the other hand, the naked prohibition against disclosures is fairly characterized as a regulation of pure speech. Unlike the prohibition against the "use" of the contents of an illegal interception in §2511(1)(d), subsection (c) is not a regulation of conduct. It is true that the delivery of a tape recording might be regarded as conduct, but given that the purpose of such a delivery is to provide the recipient with the text of recorded statements, it is like the delivery of a handbill or a pamphlet, and as such, it is the kind of "speech" that the First Amendment protects. As the majority below put it, "if the acts of 'disclosing' and 'publishing' information do not constitute speech, it is hard to imagine what does fall within that category, as distinct from the category of expressive conduct."

As a general matter, "state action to punish the publication of truthful information seldom can satisfy constitutional standards." More specifically, this Court has repeatedly held that "if 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...of the highest order."

Accordingly, in *New York Times v. United States*[2], the Court upheld the right of the press to publish information of great public concern obtained from documents stolen by a third party. In so doing, that decision resolved a conflict between the basic rule against prior restraints on publication and the interest in preserving the secrecy of information that, if disclosed, might seriously impair the security of the Nation. In resolving that conflict, the attention of every Member of this Court was focused on the character of the stolen documents' contents and the consequences of public disclosure. Although the undisputed fact that the newspaper intended to publish information obtained from stolen documents was noted in Justice Harlan's dissent, neither the majority nor the dissenters placed any weight on that fact.

However, *New York Times* raised, but did not resolve the question "whether, in cases where information has been acquired *unlawfully* by a newspaper or by a source, government may ever **punish** not only the unlawful acquisition, but the ensuing publication as well." The question here, however, is a narrower version of that still-open question. Simply put, the issue here is this: "**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 based on the defect in a chain?**"

...[W]e consider whether, given the facts of this case, the interests served by §2511(1)(c) can justify its restrictions on speech.

The Government identifies two interests served by the statute -- first, the interest in removing an incentive for parties to intercept private conversations, and second, the interest in minimizing the

[2]Case 1A-P-3 on this website.

harm to persons whose conversations have been illegally intercepted. We assume that those interests adequately justify the prohibition in §2511(1)(d) against the interceptor's own use of information that he or she acquired by violating §2511(1)(a), but it by no means follows that punishing disclosures of lawfully obtained information of public interest by one not involved in the initial illegality is an acceptable means of serving those ends.

The 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. But **it would be quite remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party...**

Although this case demonstrates that there may be an occasional situation in which an anonymous scanner will risk criminal prosecution by passing on information without any expectation of financial reward or public praise, surely this is the exceptional case. Moreover, **there is no basis for assuming that imposing sanctions upon respondents will deter the unidentified scanner from continuing to engage in surreptitious interceptions.** Unusual cases fall far short of a showing that there is a "need of the highest order" for a rule supplementing the traditional means of deterring antisocial conduct...Accordingly, the Government's first suggested justification for applying §2511(1)(c) to an otherwise innocent disclosure of public information is plainly insufficient.

The Government's second argument, however, is considerably stronger. Privacy of communication is an important interest and Title III's restrictions are intended to protect that interest, thereby "encouraging the uninhibited exchange of ideas and information among private parties..." Moreover, the fear of public disclosure of private conversations might well have a chilling effect on private speech.

"In a democratic society privacy of communication is essential if citizens are to think and act creatively and constructively. Fear or suspicion that one's speech is being monitored by a stranger, even without the reality of such activity, can have a seriously inhibiting effect upon the willingness to voice critical and constructive ideas." President's Commission on Law Enforcement and Administration of Justice.

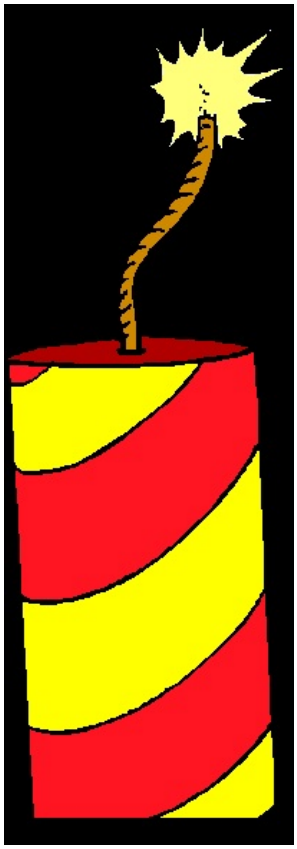
...[W]e acknowledge that some intrusions on privacy are more offensive than others, and that the disclosure of the contents of a private conversation can be an even greater intrusion on privacy than the interception itself. As a result, there is a valid independent justification for prohibiting such disclosures by persons who lawfully obtained access to the contents of an illegally intercepted message, even if that prohibition does not play a significant role in preventing such interceptions from occurring in the first place.

...The enforcement of [§2511(1)(c)] in this case, however, implicates the core purposes of the First Amendment because it imposes sanctions on the publication of truthful information of public concern.

In this case, privacy concerns give way when balanced against the interest in publishing matters of public importance...One of the costs associated with participation in public affairs is an attendant loss of privacy...

Our opinion in *New York Times Co. v. Sullivan*[3] reviewed many of the decisions that settled the "general proposition that freedom of expression upon public questions is secured by the First Amendment." Those cases all relied on our "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open." It was the overriding importance of that commitment that supported our holding 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.

We think it clear that parallel reasoning requires 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... The judgment is affirmed.



CONCURRENCE: Justice Breyer/O'Connor...I join the Court's opinion because I agree with its "narrow" holding, limited to the special circumstances present here: (1) the radio broadcasters acted lawfully (up to the time of final public disclosure); and (2) the information publicized involved a matter of unusual public concern, namely a threat of potential physical harm to others. I write separately to explain why, in my view, the Court's holding does not imply a significantly broader constitutional immunity for the media.

...[T]he question before us -- a question of immunity from statutorily imposed civil liability -- implicates competing constitutional concerns. The statutes directly interfere with free expression in that they prevent the media from publishing information. At the same time, they help to protect personal privacy -- an interest here that includes not only the "right to be let alone," but also "the interest...in fostering private speech." Given these competing interests "on both sides of the equation, the key question becomes one of proper fit."

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? What this Court

[3]Case 1A-S-12 on this website.

has called "strict scrutiny" -- with its strong presumption against constitutionality -- is normally out of place where, as here, important competing constitutional interests are implicated...

The statutory restrictions before us directly enhance private speech...The statutes ensure the privacy of telephone conversations much as a trespass statute ensures privacy within the home. That assurance of privacy helps to overcome our natural reluctance to discuss private matters when we fear that our private conversations may become public. And the statutory restrictions consequently encourage conversations that otherwise might not take place.

At the same time, these statutes restrict public speech directly, deliberately, and of necessity. They include media publication within their scope not simply as a means, say, to deter interception, but also as an end. Media dissemination of an intimate conversation to an entire community will often cause the speakers serious harm over and above the harm caused by an initial disclosure to the person who intercepted the phone call. And the threat of that widespread dissemination can create a far more powerful disincentive to speak privately than the comparatively minor threat of disclosure to an interceptor and perhaps to a handful of others. Insofar as these statutes protect private communications against that widespread dissemination, they resemble laws that would award damages caused through publication of information obtained by theft from a private bedroom.

As a general matter, despite the statutes' direct restrictions on speech, the Federal Constitution must tolerate laws of this kind because of the importance of these privacy and speech-related objectives. Rather than broadly forbid this kind of legislative enactment, the Constitution demands legislative efforts to tailor the laws in order reasonably to reconcile media freedom with personal, speech-related privacy.

Nonetheless,...the statutes, as applied in these circumstances...disproportionately interfere with media freedom. For one thing, the broadcasters here engaged in no unlawful activity other than the ultimate publication of the information another had previously obtained. They "neither encouraged nor participated directly or indirectly in the interception."...And...the statutes do not forbid the receipt of the tape itself. The Court adds that its holding "does not apply to punishing parties for obtaining the relevant information *unlawfully*."

For another thing, the speakers had little or no *legitimate* interest in maintaining the privacy of the particular conversation. That conversation involved a suggestion about "blowing off ...front porches" and "doing some work on some of these guys," thereby raising a significant concern for the safety of others. Where publication of private information constitutes a wrongful act, the law recognizes a privilege allowing the reporting of threats to public safety...Even where the danger may have passed by the time of publication, that fact cannot legitimize the speaker's earlier privacy expectation. Nor should editors, who must make a publication decision quickly, have to determine present or continued danger before publishing this kind of threat.

Further, **the speakers themselves**, the president of a teacher's union and the union's chief negotiator,

were "limited public figures," for **they voluntarily engaged in a public controversy**. **They thereby subjected themselves to somewhat greater public scrutiny and had a lesser interest in privacy than an individual engaged in purely private affairs**.

This is not to say that the Constitution requires anyone, including public figures, to give up entirely the right to private communication, *i.e.*, communication free from telephone taps or interceptions. But the subject matter of the conversation at issue here is far removed from that in situations where the media publicizes truly private matters. *Michaels v. Internet Entertainment Group, Inc.* (broadcast of videotape recording of sexual relations between famous actress and rock star not a matter of legitimate public concern)...

Thus, in finding a constitutional privilege to publish unlawfully intercepted conversations of the kind here at issue, the Court does not create a "public interest" exception that swallows up the statutes' privacy-protecting general rule. Rather, it finds constitutional protection for publication of intercepted information of a special kind. **Here, the speakers' legitimate privacy expectations are unusually low, and the public interest in defeating those expectations is unusually high. Given these circumstances, along with the lawful nature of respondents' behavior, the statutes' enforcement would disproportionately harm media freedom...**I...agree...that the statutes **as applied here** violate the Constitution...

DISSENT: Chief Justice Rehnquist/Scalia/Thomas...We are placed in the uncomfortable position of not knowing who might have access to our personal and business e-mails, our medical and financial records, or our cordless and cellular telephone conversations. In an attempt to prevent some of the most egregious violations of privacy, the United States, the District of Columbia, and 40 States have enacted laws prohibiting the intentional interception and knowing disclosure of electronic communications. **The Court holds that all of these statutes violate the First Amendment insofar as the illegally intercepted conversation touches upon a matter of "public concern," an amorphous concept that the Court does not even attempt to define. But the Court's decision diminishes, rather than enhances, the purposes of the First Amendment: chilling the speech of the millions of Americans who rely upon electronic technology to communicate each day...**

[Congressional] concern for privacy was inseparably bound up with the desire that personal conversations be frank and uninhibited, not cramped by fears of clandestine surveillance and purposeful disclosure:

> "In a democratic society privacy of communication is essential if citizens are to think and act creatively and constructively. Fear or suspicion that one's speech is being monitored by a stranger, even without the reality of such activity, can have a seriously inhibiting effect upon the willingness to voice critical and constructive ideas." President's Commission.

To effectuate these important privacy and speech interests, Congress and the vast majority of States

have proscribed the intentional interception and knowing disclosure of the contents of electronic communications...The Court correctly observes that these are "content-neutral laws of general applicability" which serve recognized interests of the "highest order": "the interest in individual privacy and...in fostering private speech." It nonetheless subjects these laws to the strict scrutiny normally reserved for governmental attempts to censor different viewpoints or ideas. There is scant support, either in precedent or in reason, for the Court's tacit application of strict scrutiny.

A content-neutral regulation will be sustained 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.'" *Turner Broadcasting System.*

Here, Congress [has] acted "without reference to the content of the regulated speech." *Renton v. Playtime Theatres, Inc.* There is no intimation that these laws seek "to suppress unpopular ideas or information or manipulate the public debate" or that they "distinguish favored speech from disfavored speech on the basis of the ideas or views expressed." *Turner Broadcasting.* The anti-disclosure provision is based solely upon the manner in which the conversation was acquired, not the subject matter of the conversation or the viewpoints of the speakers. The same information, if obtained lawfully, could be published with impunity...As the concerns motivating strict scrutiny are absent, these content-neutral restrictions upon speech need pass only intermediate scrutiny.

The Court's attempt to avoid these precedents by reliance upon the *Daily Mail* string of newspaper cases is unpersuasive. In these cases, we held that statutes prohibiting the media from publishing certain truthful information -- the name of a rape victim, the confidential proceedings before a state judicial review commission, and the name of a juvenile defendant -- violated the First Amendment. In so doing, we stated that "if 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." *Daily Mail.* Neither this *Daily Mail* principle nor any other aspect of these cases, however, justifies the Court's imposition of strict scrutiny here...

Undaunted, the Court places an inordinate amount of weight upon the fact that the **receipt** of an illegally intercepted communication has not been criminalized. But this hardly renders those who knowingly receive and disclose such communications "law-abiding" and it certainly does not bring them under the *Daily Mail* principle. The transmission of the intercepted communication from the eavesdropper to the third party is itself illegal; and where, as here, the third party then knowingly discloses that communication, another illegal act has been committed. The third party in this situation cannot be likened to the reporters in the *Daily Mail* cases, who lawfully obtained their information through consensual interviews or public documents.

These laws are content neutral; they only regulate information that was illegally obtained; they do not restrict republication of what is already in the public domain; they impose no special burdens upon the media; they have a scienter requirement to provide fair warning; and they promote the

privacy and free speech of those using cellular telephones. It is hard to imagine a more narrowly tailored prohibition of the disclosure of illegally intercepted communications, and it distorts our precedents to review these statutes under the often fatal standard of strict scrutiny. These laws therefore should be upheld if they further a substantial governmental interest unrelated to the suppression of free speech, and they do.

Congress and the overwhelming majority of States reasonably have concluded that sanctioning the knowing disclosure of illegally intercepted communications will deter the initial interception itself, a crime which is extremely difficult to detect. It is estimated that over 20 million scanners capable of intercepting cellular transmissions currently are in operation, notwithstanding the fact that Congress prohibited the marketing of such devices eight years ago. As Congress recognized, "all too often the invasion of privacy itself will go unknown. Only by striking at all aspects of the problem can privacy be adequately protected."

Nonetheless, the Court faults Congress for providing "no empirical evidence to support the assumption that the prohibition against disclosures reduces the number of illegal interceptions" and insists that "there is no basis for assuming that imposing sanctions upon respondents will deter the unidentified scanner from continuing to engage in surreptitious interceptions." **It is the Court's reasoning, not the judgment of Congress and numerous States regarding the necessity of these laws, which disappoints.**

The "quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Nixon v. Shrink Missouri Government PAC.* "Courts must accord substantial deference to the predictive judgments of Congress." *Turner Broadcasting.* This deference recognizes that, as an institution, **Congress is far better equipped than the judiciary to evaluate the vast amounts of data bearing upon complex issues...**" Although we must nonetheless independently evaluate such congressional findings in performing our constitutional review, this "is not a license to re-weigh the evidence...or to replace Congress' factual predictions with our own."

The "dry up the market" theory, which posits that it is possible to deter an illegal act that is difficult to police by preventing the wrongdoer from enjoying the fruits of the crime, is neither novel nor implausible. It is a time-tested theory that undergirds numerous laws, such as the prohibition of the knowing possession of stolen goods...We ourselves adopted the exclusionary rule based upon similar reasoning, believing that it would "deter unreasonable searches" by removing an officer's "incentive to disregard the Fourth Amendment." *Elkins v. United States.*

The same logic applies here and demonstrates that the incidental restriction on alleged First Amendment freedoms is no greater than essential to further the interest of protecting the privacy of individual communications. Were there no prohibition on disclosure, an unlawful eavesdropper who wanted to disclose the conversation could anonymously launder the interception through a third party and thereby avoid detection. Indeed, demand for illegally obtained private information would only increase if it could be disclosed without repercussion. **THE LAW AGAINST INTERCEPTIONS, WHICH**

THE COURT AGREES IS VALID, WOULD BE UTTERLY INEFFECTUAL WITHOUT THESE ANTI-DISCLOSURE PROVISIONS...

At base, the Court's decision to hold these statutes unconstitutional rests upon nothing more than the bald substitution of its own prognostications in place of the reasoned judgment of 41 legislative bodies and the United States Congress...These statutes also protect the important interests of deterring clandestine invasions of privacy and preventing the involuntary broadcast of private communications...These statutes undeniably protect this venerable right of privacy. Concomitantly, they further the First Amendment rights of the parties to the conversation. "At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broadcasting.* By "protecting the privacy of individual thought and expression," these statutes further the "uninhibited, robust, and wide-open" speech of the private parties. *New York Times Co. v. Sullivan.* Unlike the laws at issue in the *Daily Mail* cases, which served only to protect the identities and actions of a select group of individuals, these laws protect millions of people who communicate electronically on a daily basis. The chilling effect of the Court's decision upon these private conversations will surely be great: An estimated 49.1 million analog cellular telephones are currently in operation.

Although the Court recognizes and even extols the virtues of this right to privacy, these are "mere words" overridden by the Court's newfound right to publish unlawfully acquired information of "public concern." The Court concludes that the private conversation between Gloria Bartnicki and Anthony Kane is somehow a "debate...worthy of constitutional protection." Perhaps the Court is correct that "if the statements about the labor negotiations had been made in a public arena -- during a bargaining session, for example -- they would have been newsworthy." The point, however, is that Bartnicki and Kane had no intention of contributing to a public "debate" at all, and it is perverse to hold that another's unlawful interception and knowing disclosure of their conversation is speech "worthy of constitutional protection." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc. (1995)*[4] ("One important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say'"). **The Constitution should not protect the involuntary broadcast of personal conversations. Even where the communications involve public figures or concern public matters, the conversations are nonetheless private and worthy of protection. Although public persons may have forgone the right to live their lives screened from public scrutiny in some areas, it does not and should not follow that they also have abandoned their right to have a private conversation without fear of it being intentionally intercepted and knowingly disclosed.**

...More mystifying still is the Court's reliance upon the "Pentagon Papers" case...which involved the United States' attempt to prevent the publication of Defense Department documents relating to the Viet Nam War. In addition to involving Government controlled information, that case fell squarely under our precedents holding that prior restraints on speech bear "a heavy presumption against... constitutionality." Indeed, it was this presumption that caused Justices Stewart and White to join the

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[4]Case 1A-A-3 on this website.

6-to-3 *per curiam* decision...By no stretch of the imagination can the statutes at issue here be dubbed "prior restraints."...