Loyola of Los Angeles
Entertainment Law Review

Volume 19
Number 2 *Symposium—The Right of Privacy versus the Right to Know: The War Continues*

Article 4

1-1-1999

Punishing Truthful, Newsworthy Disclosures: The Unconstitutional Application of the Federal Wiretap Statute

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PUNISHING TRUTHFUL, NEWSWORTHY DISCLOSURES: THE UNCONSTITUTIONAL APPLICATION OF THE FEDERAL WIRETAP STATUTE

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I. INTRODUCTION

On December 21, 1996, several Republican leaders of the House of Representatives, including former House Speaker Newt Gingrich and Representative Richard Armey, participated in a conference call to discuss potential responses to the House Ethics Committee's probe of Speaker Gingrich.[1] Republican Conference Committee Chairman, Ohio Representative John Boehner, also participated in the conference call from a Florida restaurant parking lot, via a cellular telephone.[2] Unbeknownst to the participants in the conference call, a Florida couple, Alice and John Martin, apparently had followed Representative Boehner to the parking lot and intercepted Boehner's cellular transmission using a police scanner.[3] After listening to the conference call, the Martins determined that the conversation was politically damaging to the House Republicans and delivered a tape recording of the conversation to Democratic Representative Kay Thurman of Florida.[4]

In January 1997, Representative Thurman apparently[5] discussed the contents of the tape with House Minority Whip David Bonior.[6] Bonior

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1. Boehner v. McDermott, No. CIV. 98-594 TFH, 1998 WL 436897, at *1 (D.D.C. July 28, 1998).

2. *Id.*

3. *Id.*

4. *Id.*

5. *See id.* at *1 n.1. As noted by the district judge in *Boehner* the actual facts of the case—and especially the acts of some of the participants—are unknown and unproven. Accordingly, the

then allegedly advised Thurman to tell the Martins to give the tape to Democratic Representative James A. McDermott, a member of the House Ethics Committee, the body investigating Speaker Gingrich's conduct.[7]

On January 8, 1997, the Martins delivered a copy of the tape to McDermott's office with a letter allegedly explaining the origins of the tape.[8] In the letter, the Martins apparently stated that Representative Thurman had told them that McDermott would arrange for them to receive immunity from any criminal prosecution related to the interception of the conference call.[9] After accepting the tape and the letter, McDermott distributed copies to at least three publications, *The New York Times*, *The Atlanta Journal-Constitution* and *Roll Call*.[10] On January 10, 1997, *The New York Times* broke the story concerning the conference call without mentioning Representative Boehner's name.[11]

The Martins' conduct may have been illegal under the federal law governing intercepted conversations (commonly called "wiretaps").[12] In relevant part, 18 U.S.C. section 2511(1) imposes liability on any person who:

> (a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;
>
> (b) intentionally uses, or endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communications [under a variety of conditions];
>
> (c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of [the wiretap statute];
>
> (d) intentionally uses, or endeavors to use, the contents of any

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discussion in *Boehner* and in this Article rests on the allegations as stated in the plaintiff John A. Boehner's Complaint and assumes *arguendo* that the allegations are true. This distinction is irrelevant to the legal issues addressed in this Article.

6. *Id.*

7. *Boehner*, 1998 WL 436897, at *1.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*; *see* Adam Clymer, *Gingrich Is Heard Urging Tactics In Ethics Case*, N.Y. TIMES, Jan 10, 1999, at A1, A20.

12. *See* 18 U.S.C. § 2511(1) (West Supp. 1998).

> 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 [the wiretap statute].[13]

Applying the elements of the federal wiretapping statute, the Martins apparently intercepted the communication using a device, disclosed the contents of the communication, and arguably "used" the contents of the communication.[14] As a result, the Martins faced criminal charges[15] and could have been subject to a civil suit for injunctive relief, damages, and attorneys' fees.[16] Upon failing to obtain immunity, the Martins pled guilty on April 23, 1997, and were fined $500.[17]

However, the other participants, McDermott and the publications, were not subjected to any criminal liability. Presumably, McDermott knew the origins of the tape recording; indeed, the Martins' letter to him allegedly stated this fact explicitly.[18] Therefore, when McDermott turned over copies of the tape to the publications, he may have intentionally disclosed the contents of a wire, oral, or electronic communication, knowing that the information was obtained through interception of a wire, oral, or electronic communication in violation of the wiretap statute.[19] Hence, McDermott's conduct arguably violated the law. Furthermore, the publications arguably violated the law to the extent that they knew the origin of the tape when they published its contents.

Thus, on March 9, 1998, Representative Boehner sued McDermott for violating the wiretap statute, as well as the analogous Florida statute.[20] On July 28, 1998, however, United States District Judge Thomas F. Hogan dismissed Boehner's lawsuit, finding that McDermott could not be held liable for disclosing information that he had lawfully acquired from the Martins, even though the Martins had unlawfully acquired the information.[21] Judge Hogan relied primarily on the principles announced by the Supreme Court of the United States in *Cox Broadcasting Corp. v.*

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13. *Id.* § 2511(1)(a)–(d).

14. *Boehner*, 1998 WL 436897, at *3.

15. 18 U.S.C. § 2511(4).

16. *Id.*

17. *Boehner*, 1998 WL 436897, at *2. According to the *Boehner* decision, the Martins were prosecuted only for their actual interception of the call based on 18 U.S.C. section 2511(1)(a); they were not prosecuted for the use of the scanner or the disclosure or use of the intercepted communication.

18. *Id.* at *1.

19. *See* 18 U.S.C. § 2511(1)(c).

20. *See* 18 U.S.C. § 2520(a), FLA. STAT. ANN. § 934.10 (West 1998).

21. *See Boehner*, 1998 WL 436897, at *1.

Cohn[22] and its progeny. Representative Boehner has appealed the judge's decision and the case is currently pending in the United States Court of Appeals for the District of Columbia Circuit.

This Article addresses the precise question raised in *Boehner*: can or should an individual or company be held liable for disclosing truthful information of public significance, knowing the information was originally obtained unlawfully? Basic and well-established First Amendment and common law principles mandate that the answer is no.[23] The First Amendment will not tolerate the punishment of individuals or organizations for disclosing truthful, newsworthy information that they have lawfully obtained.

II. THE STATUTORY FRAMEWORK

The federal wiretap statute was originally enacted by Congress in 1968, as Title III of the Omnibus Crime Control and Safe Streets Act (hereinafter "Act").[24] Section 2511(1) has essentially remained the same ever since, except that in 1986 and in 1994, it was expressly broadened to include all "wire, oral, and *electronic* communications."[25]

In its current form, section 2511(1) bars not only the interception of wire, oral, and electronic communications, but also prohibits the knowing disclosure of illegally intercepted communications and their intentional use, knowing they were illegally obtained.[26] Accordingly, the federal wiretap statute appears to cover the *Boehner* situation, prohibiting the disclosure of electronic communications, even by those who have lawfully obtained the information.

Congress expressly recognized the potential constitutional problems with the legislation. The Senate Report concerning the bill notes that "[t]he disclosure of the contents of an intercepted communication that had already become 'public information' or 'common knowledge' would not be prohibited."[27] Yet the plain language of the statute contains no such

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22. 420 U.S. 469 (1975).

23. This Article only addresses the question raised in *Boehner*. It does not address the additional lurking question of whether the First Amendment prohibits punishment for the disclosure of information that the *discloser* has illegally obtained.

24. Pub. L. No. 90-351, 82 Stat. 197 (1968).

25. *See* Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, § 101(c)(1)(A), 100 Stat. 1851 (1986) (substituting "wire, oral, or electronic communication" for "wire and oral communication") (emphasis added); Pub. L. No. 103-414, 108 Stat. 4279 (1994) (adding among other things specific references to wireless and electronic communications).

26. 18 U.S.C. § 2511(1)(c)-(d).

27. S. REP. NO. 90-1097, at 2181 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2181.

limitation. Since 1968, despite the various amendments to the wiretap statute, the legislative history has been silent as to the law's potential impact on free speech and free press.

III. THE *BOEHNER* DECISION

A. Boehner v. McDermott

In *Boehner*, Judge Hogan ruled that the provisions of the federal wiretap statute, and an analogous Florida statute which barred the disclosure of the contents of illegally intercepted communications, could not be applied constitutionally to McDermott's conduct.[28] Accordingly, the court dismissed Representative Boehner's lawsuit against McDermott.[29]

The *Boehner* court proceeded in three basic steps. First, Judge Hogan concluded that Representative McDermott had lawfully obtained the tape from the Martins.[30] Although the Act prohibits the Martins' interception and disclosure of the tape to Thurman and McDermott, the Act does not prohibit McDermott's receipt of the tape.[31] The court found that McDermott did not break any laws in taking possession of the tape because he lawfully obtained that information.[32] Indeed, neither the federal wiretap statute nor the analogous Florida statute expressly bars the receipt of information that was originally obtained unlawfully. Thus, under the plain language of both statutes, McDermott obtained the information lawfully, although the information was originally obtained unlawfully.[33]

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28. Throughout the opinion, the *Boehner* court erroneously refers to 18 U.S.C. section 2511(c), instead of section 2511(1)(c). Representative Boehner sued Representative McDermott under section 2511(1)(c), not section 2511(c). Section 2511(c) expressly permits officers under color of law to record conversations to which they are parties, a situation not presented in *Boehner*. This error is clearly inadvertent and is immaterial to the *Boehner* court's analysis. *See* FLA. STAT. ANN. § 934.03(1)(c) (West 1996).

29. Boehner v. McDermott, No. Civ. 98-594 TFH, 1998 WL 436897, at *7 (D.D.C. July 28, 1998).

30. *Id.* at *4.

31. *Id.*

32. *Id.*

33. Republican Representative Henry J. Hyde, Chairman of the House Judiciary Committee, disagrees with Judge Hogan's interpretation of 18 U.S.C. section 2511, "express[ing] concern over Hogan's determination that wiretap statutes did not outlaw McDermott's receipt of the tape-recorded conversation." *Civil Lawsuit Over Release of Tapes of Congressional Phone Call Dismissed*, THE NEWS MEDIA & THE LAW, Fall 1998, at 35. As stated by Representative Hyde, "[t]his certainly was not the intent of the Congress in enacting the statute, and I do not believe it should be read to produce that result[.]" *Id.* This statement is a direct quote from a letter Representative Hyde wrote to Representative Boehner. *Id.*

Second, having determined that McDermott obtained the tape lawfully, Judge Hogan concluded that under prevailing Supreme Court authority, the Act could only be applied to McDermott's conduct if Boehner met the strict scrutiny standard. In other words, the statute must further "a state interest of the highest order."[34] Judge Hogan found that this result was mandated by four Supreme Court decisions: *Cox Broadcasting Corp. v. Cohn*,[35] *Oklahoma Publishing Co. v. Oklahoma County*,[36] *Smith v. Daily Mail*,[37] and *Florida Star v. B.J.F.*[38] These cases hold that "the First Amendment prevents sanction for publishing truthful, lawfully acquired, information of public significance, absent a state interest of the highest order."[39] Because McDermott had lawfully acquired the information, and the information clearly was of public significance, the federal and Florida wiretap statutes could only punish McDermott's disclosure of the information if the strict scrutiny test was met.[40]

Finally, Judge Hogan determined that Boehner's rights in the privacy of his cellular telephone conversations were not an interest "of the highest order" sufficient to overcome McDermott's First Amendment right to disclose the information.[41] Judge Hogan reasoned that if the Supreme Court could conclude in *Florida Star* that the identity of a rape victim did not meet that test, Boehner's privacy interest certainly could not either.[42] Accordingly, Judge Hogan dismissed Boehner's lawsuit against McDermott.

B. The Foundations of the Boehner *Decision—A Jurisprudence of Cautiously Recognizing the Primacy of First Amendment Principles*

As discussed above, Judge Hogan relied upon four Supreme Court decisions in dismissing Boehner's lawsuit. Each case represents an attempt by the Supreme Court to fashion some dividing line between the privacy rights of individuals and the First Amendment rights of the press and public. In each decision the Court has continually refused to establish a bright line rule, stating that it is only deciding the particular case before it.

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34. *Boehner*, 1998 WL 436897, at *6 (quoting Florida Star v. B.J.F., 491 U.S. 524, 541 (1989)).

35. 420 U.S. 469 (1975).

36. 430 U.S. 308 (1977).

37. 443 U.S. 97 (1979).

38. 491 U.S. 524 (1989).

39. *Boehner*, 1998 WL 436897, at *5 (citing *Florida Star*, 491 U.S. at 533).

40. *Id.* at *6.

41. *Id.* at *7.

42. *Id.*

1. *Cox Broad. Corp. v. Cohn*

Any analysis of this area of the law must begin with the Court's 1975 decision in *Cox Broadcasting Corp. v. Cohn*.[43] In *Cox*, a television news reporter, in the process of broadcasting a story concerning the guilty plea of six individuals to rape or attempted rape, also broadcasted the name of the seventeen year-old rape victim.[44] The reporter obtained the victim's name by reviewing the indictments of the perpetrators, which were public records generally available for inspection.[45] The victim's father then brought an action against both the reporter and the television station, asserting that the disclosure had violated a Georgia law, that prohibited persons from publishing the identity of a rape victim.[46]

On appeal, the Georgia Supreme Court held that although the Georgia law did not provide a civil cause of action, the father had stated a claim for invasion of his privacy by the publication of his daughter's name.[47] The court held that the First and Fourteenth Amendment guarantees of free speech and free press did not impact the analysis because the name of a rape victim was "not a matter of public concern."[48] Accordingly, the Georgia Supreme Court determined that section 26-9901 was constitutional and a "legitimate limitation on the right of freedom of expression contained in the First Amendment."[49]

In a majority opinion written by Justice Byron White, the United States Supreme Court reversed the decision. While recognizing in principle the interest in protecting the privacy of individuals from invasion by the press,[50] the Court held that the government "may not impose sanctions on the publication of truthful information contained in official court records open to public inspection."[51] Public records by their very nature are of interest to those concerned with the administration of government.[52] Hence, the freedom of the press to publish that information is of critical importance to "our type of government in which the citizenry

43. 420 U.S. 469 (1975).

44. *Id.* at 472–74.

45. *Id.* at 472–73.

46. *Id.* at 471–72 (citing GA. CODE ANN. § 26-9901 (Harrison 1972)).

47. *Id.* at 474.

48. *Id.* at 475 (quoting Cox Broad. Corp. v. Cohn, 200 S.E.2d 127, 134 (Ga. 1973)).

49. *Cox*, 200 S.E.2d at 134.

50. *Cox*, 420 U.S. at 487 (citing Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890)).

51. *Id.* at 495.

52. *Id.*

is the final judge of the proper conduct of public business."[53] Therefore, the Court placed the burden of preserving the confidentiality of private information revealed during official proceedings on the State, not the press.[54]

In reaching this result, the Court was careful to the narrow the scope of its decision. Indeed, in his concurrence, Justice Douglas urged the Court to set forth a broader rule, "that the First Amendment . . . prohibits the use of state law to impose damages for merely discussing public affairs."[55] But the majority rejected Justice Douglas' invitation stating:

> In this sphere of collision between claims of privacy and those of the free press, the interests on both sides are plainly rooted in the traditions and significant concerns of our society. Rather than address the broader question whether truthful publications may ever be subjected to civil or criminal liability consistently with the First and Fourteenth Amendments, . . . it is appropriate to focus on the narrower interface between press and privacy that this case presents, namely, whether the State may impose sanctions on the accurate publication of the name of a rape victim obtained from public records—more specifically, from judicial records which are maintained in connection with a public prosecution and which themselves are open to public inspection.[56]

The *Cox* Court cautioned against setting forth a rule of broad applicability. Despite the unbroken string of decisions invalidating attempts to restrict the press' ability to publish truthful information, this caution has persisted in all the Court's subsequent decisions in this area.

2. *Oklahoma Publ'g Co. v. Oklahoma County*

The Court's next opportunity to address the tension between privacy interests and the First Amendment came in 1977 with *Oklahoma Publishing Co. v. Oklahoma County*.[57] In *Oklahoma Publishing*, a federal district court enjoined the news media from "publishing, broadcasting, or disseminating, in any manner, the name or picture" of an eleven year-old

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53. *Id.*

54. *Id.* at 496.

55. *Id.* at 500–01 (Douglas, J., concurring) (quoting from Justice Black's concurring opinion in New York Times Co. v. Sullivan, 376 U.S. 254, 295 (1964) (Black, J., concurring)).

56. *Cox*, 420 U.S. at 491.

57. 430 U.S. 308.

juvenile who was charged in the murder of a railroad switchman.[58] The juvenile's name had been revealed during a detention hearing in Oklahoma County Juvenile Court where the accused child appeared.[59] Reporters were allowed to attend the hearing.[60] Various newspapers and broadcast stations disseminated the boy's name and picture in their reports on the proceedings.[61] After these disclosures, the district judge entered the order in question, relying upon an Oklahoma statute providing that juvenile records are open to public inspection only if ordered by the Court.[62]

In a *per curiam* opinion, the Supreme Court vacated the district court's order, relying on both *Cox* and *Nebraska Press Ass'n v. Stuart*.[63] Because the name and picture of the juvenile were publicly revealed in connection with the prosecution of a crime, the case was indistinguishable from *Cox*.[64] The press, therefore, had a First Amendment right to publish the publicly revealed information. Citing similar language in *Nebraska Press*, the Court further commented that, under certain circumstances, the trial court could have closed the juvenile proceedings to the public.[65] However, if the public were allowed to attend the trial, the judge could not suppress the publication of information from the hearing.[66] As stated by the Court in *Nebraska Press*, "once a public hearing ha[s] been held, what transpired there could not be subject to prior restraint."[67]

3. *Landmark Communications, Inc. v. Virginia*

In reaching its decision in *Oklahoma Publishing*, the Court relied in part on the fact that there was no evidence that the press acquired the information unlawfully or without the State's implicit approval.[68] One year later, however, in *Landmark Communications, Inc. v. Virginia*,[69] the

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58. *Id.*

59. *Id.* at 309.

60. *Id.*

61. *Id.*

62. *Id.* at 309–10 (quoting OKLA. STAT. ANN., tit. 10, §§ 1111, 1125 (Supp. 1976)).

63. Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) (invalidating order prohibiting the press from publishing information tending to show the defendant's guilt in an impending criminal trial).

64. *Oklahoma Publ'g*, 430 U.S. at 311–12 (quoting *Cox*, 420 U.S. at 469, 471 (1975)).

65. *Id.* at 311.

66. *Id.* (citing *Nebraska Press*, 427 U.S. at 568).

67. *Id.*

68. *Id.*

69. 435 U.S. 829 (1978). Although the *Boehner* court did not expressly rely on *Landmark*, *Landmark* is discussed here because it is an essential part of the Court's constitutional architecture in this area.

Supreme Court was presented with an instance where the press had received the information without the State's implicit approval.

In *Landmark*, the *Virginia Pilot* had published an article accurately reporting on a pending inquiry by the Virginia Judicial Inquiry and Review Commission, and named the specific judge whose conduct was being investigated.[70] Virginia law made all proceedings of the Commission confidential.[71] To implement this mandate, Virginia law further provided that information concerning these proceedings could not be divulged by any person to anyone except the Commission and any person who did divulge the information would be guilty of a misdemeanor.[72] Thus, one month after the *Pilot* revealed the confidential proceedings of the Commission, a grand jury indicted the *Pilot's* publisher, Landmark, for violating the statute.[73] Landmark was subsequently convicted and fined $500.[74]

The United States Supreme Court reversed the conviction.[75] Because none of the *Pilot* reporters had been present during Commission proceedings,[76] the *Pilot* must have obtained the information from an individual who, in violation of Virginia law, breached the Commission's confidentiality. Thus, the Supreme Court framed the issue as "whether the First Amendment permits the criminal punishment of third persons who are strangers to the inquiry, including the news media, for divulging or publishing truthful information regarding confidential proceedings of the Judicial Inquiry and Review Commission."[77] The Court held that regardless of the original breach of confidentiality by an unknown party, which could conceivably be punishable, the State could not punish the *Pilot*.[78] The *Pilot* could disseminate "accurate factual information about a legislatively authorized inquiry" that it had lawfully obtained.[79] Yet, once

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70. *Id.*

71. *Id.* at 830–31 n.1 (citing VA. CONST. art. VI, § 10; VA. CODE ANN. § 2.1-37.13 (Michie 1973)).

72. *Id.* at 831 n.1 (citing VA. CODE ANN. § 2.1-37.13 (Michie 1973)).

73. *Id.* at 831.

74. *Id.* at 832.

75. *Landmark*, 435 U.S. at 834.

76. *Id.* at 832.

77. *Id.* at 837.

78. *Id.* at 838.

79. *Id.* at 839. In his opinion concurring in the judgment, Justice Stewart focused more precisely on the ability of the state to punish a newspaper in this situation. *Id.* As stated by Justice Stewart, in language that would later be echoed in *Florida Star*:

> [i]f the constitutional protection of a free press means anything, it means that government cannot take it upon itself to decide what a newspaper may and may not publish. Though government may deny access to information and punish its theft,

again the Court refused to establish a bright line rule of general applicability, preferring instead to resolve the narrower issues in the case before it.[80]

4. *Smith v. Daily Mail Publ'g Co.*

In *Smith v. Daily Mail Publishing Co.*,[81] the Court was presented with another chance to address the issue. *Smith* involved a challenge to a West Virginia statute barring newspapers from publishing the name of any child in connection with a juvenile court proceeding without the written order of the court.[82] In *Smith*, two West Virginia newspapers published the name and picture of a juvenile who was the main suspect in a shooting of a fifteen year-old high school student.[83] The papers learned of the shooting by routine monitoring of the police band radio frequency, and learned of the juvenile's name by asking various witnesses, the police, and an assistant prosecuting attorney who were at the school.[84] Several weeks after the publication, a grand jury indicted the newspapers for violating a West Virginia law, which prohibited the publication of the name of any child involved in a juvenile proceeding.[85] The West Virginia Supreme Court of Appeals issued a writ prohibiting this prosecution, holding that the statute violated the First Amendment.[86]

In affirming the decision, the Supreme Court interpreted *Cox*, *Oklahoma Publishing*, and *Landmark* to mean that if the press "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."[87] The Court further held that it was insignificant that the West Virginia newspapers had not received the information from the government, as in *Cox*, *Oklahoma Publishing*, and *Landmark*, but had instead received the information through "routine newspaper reporting techniques."[88] As stated by the

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government may not prohibit or punish the publication of that information once it falls into the hands of the press, unless the need for secrecy is manifestly overwhelming.

Id. at 849 (Stewart, J., concurring).

80. *Id.* at 838.

81. 443 U.S. 97 (1979).

82. *Id.* at 98 (citing W. VA. CODE § 49-7-3 (West 1976)).

83. *Id.* at 99–100.

84. *Id.* at 99.

85. *Id.* at 100.

86. *Id.* (citing Smith v. Daily Mail Publ'g Co., 248 S.E.2d 269 (W. Va. 1978)).

87. *Smith*, 443 U.S. at 103.

88. *Id.*

Court, "[a] free press cannot be made to rely solely upon the sufferance of government to supply it with information."[89] Thus, the Court came close to establishing a bright line rule by holding that where truthful information concerning a matter of public significance is lawfully obtained, "state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order."[90]

5. *Florida Star v. B.J.F.*

Ten years later, in *Florida Star v. B.J.F.*,[91] the Supreme Court expanded the *Smith* holding. In *Florida Star*, the Court reviewed the constitutionality of a Florida statute that made it unlawful to "'print, publish, or broadcast . . . in any instrument of mass communication' the name of the victim of a sexual offense."[92] In October 1983, an alleged victim of a robbery and sexual assault reported the incident to the Duval County Sheriff's Department. After preparing a report, the Sheriff inadvertently placed an unredacted copy in the pressroom, where there were restrictions on access to police reports.[93] While in the pressroom reviewing recent reports for the *Florida Star's* "Police Reports" section, a reporter-trainee copied the report verbatim, including the victim's name.[94] There were signs in the pressroom making it clear that the names of rape victims were not matters of public record and were not to be published.[95]

Nevertheless, after receiving the verbatim report from the trainee, a *Florida Star* reporter drafted an article summarizing it, again including the victim's name.[96] This article was then published in violation of *The Florida Star*'s internal policy of not publishing the names of alleged sexual

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89. *Id.* at 104.

90. *Id.* at 103. In his concurring opinion, Justice Rehnquist criticized the Court's balance of the First Amendment rights of the newspapers against the state's interests in assuring the confidentiality of juvenile proceedings. *Id.* Justice Rehnquist concluded that such confidentiality *was* an interest of the "highest order," justifying the "minimal interference with freedom of the press." *Id.* at 107–08 (Rehnquist, J., concurring). Nevertheless, Justice Rehnquist concurred in the Court's finding that, given the statute's narrow focus on newspaper publishers (exempting the electronic media and other forms of publication), the statute "[did] not accomplish its stated purpose," and therefore could not pass muster under the First Amendment. *Id.* at 110. Indeed, in *Smith*, three radio stations had broadcast the alleged juvenile assailant's name before the *Charleston Daily Mail* published it, and, under the statute, the radio stations were exempt from prosecution. *Id.*

91. 491 U.S. 524 (1989).

92. *Id.* at 526 (citing FLA. STAT. ANN. § 794.03 (West 1987)).

93. *Id.* at 527.

94. *Id.*

95. *Id.* at 546 (White, J., dissenting).

96. *Id.* at 527.

offense victims.[97] The alleged victim, "B.J.F.," subsequently filed suit against *The Florida Star* and the Sheriff's Department, claiming that they had negligently violated the State law. At the close of a subsequent jury trial, *The Florida Star* was found liable under the statute, and B.J.F. was awarded $100,000 in compensatory and punitive damages.[98]

The United States Supreme Court reversed, restating the rule announced in *Smith v. Daily Mail*: "'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.'"[99] Recognizing the privacy interests various statutes have sought to protect, the Court concluded that the government generally had other means of protecting these interests. For example, "[t]o the extent sensitive information rests in private hands, the government may under some circumstances forbid its nonconsensual acquisition, thereby bringing outside of the *Daily Mail* principle the publication of any information so acquired."[100] And, "[t]o the extent sensitive information is in the government's custody, it has even greater power to forestall or mitigate the injury caused by its release."[101]

Thus, the *Florida Star* Court concluded that the *Smith* rule applied and that imposing liability on *The Florida Star* was not necessary to further a State interest of the highest order.[102] As stated by the Court, "[w]here . . . the government has failed to police itself in disseminating information, it is clear under *Cox Broadcasting*, *Oklahoma Publishing*, and *Landmark Communications* that the imposition of damages against the press for its subsequent publication can hardly be said to be a narrowly tailored means of safeguarding anonymity."[103]

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97. *Florida Star*, 491 U.S. at 528.

98. *Id.* (stating that B.J.F. had previously settled with the Sheriff's Department for $2,500).

99. *Id.* at 533 (quoting *Smith*, 443 U.S. at 97, 103); *see* Fred H. Cate, *Privacy and Telecommunications*, 33 WAKE FOREST L. REV. 1, 30 (1998) ("[T]he United States Supreme Court has ruled that lawfully obtained, truthful information on a matter of public significance can never be the subject of legal liability, at least not without satisfying the requirements of strict scrutiny.").

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

101. *Id.*

102. *Id.* at 537–41. *But see* Ashcraft v. Conoco, Inc., No. 7:95-CV-187-BR(3), 1998 WL 404491, at *1 (E.D.N.C. Jan. 21, 1998) (holding news reporter in contempt for reviewing confidential settlement agreement inadvertently provided by court clerk, informing her editor of its contents, and then publishing its contents). *Ashcraft* is squarely in conflict with *Oklahoma Publ'g* and *Florida Star* to the extent that it permits punishment for the disclosure of truthful, newsworthy information that has voluntarily, albeit inadvertently, been provided by the court.

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

The Court further held that the statute's "negligence per se" standard was overbroad because liability follows automatically from publication, without the need for any factual findings concerning the circumstances of the disclosure.[104] Finally, the Court found the statute to be underinclusive because it only prohibits disclosures through instruments of mass communication, and does not reach other types of disclosures.[105] This finding thus rendered the selective ban incapable of "satisfactorily accomplish[ing] its stated purpose."[106]

C. Legal Support for the Boehner *Decision*

Reluctantly, Judge Hogan found that his decision was controlled by *Florida Star*.[107] But the *Cox / Florida Star* line of cases do not expressly control Judge Hogan's ruling. The Supreme Court has never been presented with the precise factual scenario as in *Boehner*, namely, where the media's source has obtained the information illegally.

However, Judge Hogan's decision in *Boehner* is correct and is supported by the case law. It stands simply as a logical application of the *Cox / Florida Star* rule. Given Congress's failure to prohibit the receipt of illegally intercepted communications, McDermott obtained the information legally. Moreover, there is no evidence that McDermott conspired with the Martins to obtain the information. McDermott was simply a third party who happened to have the fruits of their criminal activity presented to him. Consistent with the *Cox / Florida Star* line of cases, McDermott was free to disclose, publish, or "use" this information as he wished.

Although *Landmark* was not expressly relied upon in *Boehner*, it provides strong support for Judge Hogan's ruling. In *Landmark*, as here, the defendant's source illegally disclosed the information to the defendant—in that case by violating the Virginia statutes ensuring that the proceedings of the Judicial Inquiry and Review Commission remain

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104. *Id.* at 539.

105. *Id.* at 540–41.

106. *Id.* Justice White, joined by Chief Justice Rehnquist and Justice O'Connor, dissented from the Court's ruling, asserting that Justice Marshall's opinion had the effect of "obliterat[ing] one of the most noteworthy legal inventions of the 20th Century: the tort of the publication of private facts." *Id.* at 550 (White, J., dissenting).

107. Indeed, throughout the opinion, Judge Hogan continually criticizes the application of the First Amendment in this context. Boehner v. McDermott, No. CIV. 98-594 TFH, 1998 WL 436897, at *4 (D.D.C. July 28, 1998). Judge Hogan writes that the application of *Florida Star's* principles to the *Boehner* case "effectively undermines the protection that wiretap statutes supposedly afford[.]" *Id.* For reasons discussed later in this Article, Judge Hogan's concern is misplaced, but this language aptly demonstrates his discomfort with the result he ultimately reached.

confidential.[108] Nevertheless, the *Landmark* Court found that the *Virginia Pilot* had lawfully obtained the information, thus making the ultimate disclosure not punishable.[109] In short, the source's illegal conduct could not be imputed to the *Virginia Pilot* absent a clear agency relationship or proven conspiracy. Similarly in *Boehner*, Judge Hogan found that the Martins' illegal act could not be imputed to McDermott to render his acquisition of the information unlawful.[110]

The facts presented in *Boehner* are also similar to those presented in *Pearson v. Dodd*,[111] a venerable opinion by Judge Skelly Wright concerning the removal and copying of papers from the office of then Connecticut Senator Thomas Dodd.[112] In *Pearson*, two former employees of Senator Dodd entered his office without his authority and copied numerous documents that proved damaging to Dodd.[113] The former employees then gave copies of these documents to newspaper columnist Jack Anderson, who was aware of how the employees had illegally obtained the documents.[114] Anderson and columnist Drew Pearson then published articles containing information taken from the Dodd documents.[115] Dodd sued Pearson and Anderson for invasion of privacy and conversion.

Rejecting Dodd's suit, the District of Columbia Circuit stated:

> If we were to hold appellants liable for invasion of privacy on these facts, we would establish the proposition that one who receives information from an intruder, knowing it has been obtained by improper intrusion, is guilty of a tort. In an untried and developing area of tort law, we are not prepared to go so far. A person approached by an eavesdropper with an offer to share in the information gathered through the eavesdropping would perhaps play the nobler part should he spurn the offer and shut his ears. However, it seems to us that at this point it would place

108. Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 830–31 (1978).

109. *Id.* at 837.

110. *Boehner*, 1998 WL 436897, at *4.

111. Pearson v. Dodd, 410 F.2d 701 (D.C. Cir. 1969), *cert. denied*, 395 U.S. 947 (1969).

112. *Id.*

113. *Id.* at 703. Anderson's secretary may have also helped with the secret copying of the documents, although the record in the case is unclear. *See id.* at 705 n.20. This fact was not definitively established in either the district court or the D.C. Circuit opinions. *Id.*; *see* Dodd v. Pearson, 279 F. Supp. 101, 102 (D.D.C. 1968).

114. *Pearson*, 410 F.2d at 703.

115. *Id.*

> too great a strain on human weakness to hold one liable in damages who merely succumbs to temptation and listens.[116]

Moreover, the *Pearson* court summarily rejected Dodd's publication claim, emphasizing that "[i]t has always been considered a defense to a claim of invasion of privacy by publication . . . that the published matter complained of is of general public interest."[117] Clearly, that was the case in *Pearson*, as well as in *Boehner*.

The California Court of Appeal's decision, in *Nicholson v. McClatchy Newspapers*[118] also supports Judge Hogan's ruling in *Boehner*. In *Nicholson*, the defendant newspaper reported that the California Commission on Judicial Nominees Evaluation found the plaintiff "not qualified" for judicial appointment.[119] The information was confidential and the disclosure to the newspapers violated California law.[120] The plaintiff sued the newspapers for invasion of privacy, contending that the newspapers improperly obtained and published the confidential information.[121]

The California court rejected the plaintiff's claim. Relying primarily on the factually analogous *Landmark* case, the *Nicholson* court strongly emphasized that "[w]hile the government may desire to keep some proceedings confidential and may impose the duty upon participants to maintain confidentiality, it may not impose criminal or civil liability upon the press for obtaining and publishing newsworthy information through routine reporting techniques."[122] Under this principle, the newspapers could not be held liable for publishing the newsworthy information because the papers had obtained the confidential information as a result of non-tortious interviews with sources possibly within the Commission—a routine newsgathering technique that did not violate any laws. Therefore, the illegal activity by the source, disclosing the confidential information for which the source might be punished, could not be imputed to the newspapers and, thus, could not justify liability for publication.

Judge Hogan's opinion in *Boehner* stands for the same principle. Representative McDermott obtained the illegally intercepted communication by means of non-tortious activity—simply receiving it

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116. *Id.* at 705.
117. *Pearson*, 410 F.2d at 703.
118. 177 Cal. App. 3d 509 (1986).
119. *Id.* at 512.
120. *Id.*
121. *Id.*
122. *Id.* at 519–20 (citing *Landmark*, 435 U.S. at 837–38 (1978)).

from the Martins.[123] Accordingly, under the direct holding of *Florida Star*, the First Amendment could not permit the imposition of liability on McDermott for his subsequent publication of this information.[124] In short, as in *Nicholson*, the Martins' illegal activity could not be imputed to McDermott.

In *Peavy v. New Times, Inc.*,[125] the one other published federal court decision to consider the proper constitutional reach of 18 U.S.C. sections 2511(c) and (d) in an analogous situation, the court similarly ruled that the First Amendment does not permit liability for the publication of lawfully obtained information of public significance. In *Peavy*, an unknown person illegally wiretapped several private telephone conversations in which a public school board trustee made numerous racial slurs and profane comments.[126] Audiotapes of the wiretapped conversations were delivered anonymously to other trustees who then authorized a written transcript of the conversations to be read into the minutes of a public school board meeting.[127] The defendant newspaper obtained a copy of the meeting minutes through a public records act request and published the complete transcript of the illegally intercepted conversations.[128] The plaintiff sued the newspaper, contending that this publication violated the federal wiretap statute.[129]

The federal district court rejected the claim, due to the fact that the newspaper had obtained the tape transcripts lawfully from school board records, open to the public, and that the plaintiff's racist views were clearly a matter of public concern.[130] The court held that even if the newspaper knew that the conversations had been illegally intercepted, the First Amendment would not tolerate a finding of liability.[131]

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123. *See Boehner*, 1998 WL 436897, *1.

124. *See* Florida Star v. B.J.F., 491 U.S. 524 (1989).

125. 976 F. Supp. 532 (N.D. Tex. 1997).

126. *Id.* at 534.

127. *Id.*

128. *Id.* at 535. Apparently, the *Dallas Morning News* also received a tape of the conversations. *Id.* at 535 n.8. It is unclear how the *Dallas Morning News* obtained this tape. *Id.*

129. *Id.* at 536–37.

130. *Id.* at 538–40.

131. *Peavy*, 976 F. Supp at 538–39. In a parallel case, on February 19, 1999, United States District Court Judge Jerry Buchmeyer similarly granted summary judgement in favor of WFAA-TV, dismissing similar claims. *See* Peavy v. WFAA-TV, No. 3:96-CV-2945-R (N.D. Tex. Feb. 19, 1999).

D. Contrary Views

As discussed above, Judge Hogan's opinion in *Boehner* is consistent with the Supreme Court's interpretation of the First Amendment, as expressed in the *Cox / Florida Star* line of cases. However, none of these cases discussed above are directly on point with *Boehner*. In comparison, *Cox*, *Smith*, *Oklahoma Publishing*, and *Florida Star* all involved information voluntarily given by the government or private parties (albeit in *Florida Star*, unintentionally). Moreover, although *Landmark* and *Nicholson* involved information that was illegally disclosed, neither involved information illegally obtained in the first place, as in *Boehner*. Rather, the confidential information was simply illegally disclosed by those entrusted with it to the press, who then published it. *Peavy* is distinguishable because the newspaper obtained the illegally intercepted information from the minutes of a public school board meeting and not from the person who originally taped the information. Thus, the information in question was already a matter of public record.

Moreover, in *Natoli v. Sullivan*,[132] a New York lower court held that the First Amendment did not bar a finding of liability under 18 U.S.C. section 2511(1)(c).[133] In *Natoli*, several individuals intercepted and recorded several telephone conversations that were relevant to an upcoming local mayoral campaign.[134] A tape of these conversations was obtained by an individual who distributed it to two newspapers.[135] Both newspapers published the information knowing the information was originally obtained in violation of the federal wiretap statute.[136] Relying on the *Cox / Florida Star* line of cases, the defendants moved to dismiss.

The New York court denied the motion holding that "[t]here is no general rule of law protecting the newspapers from liability for statutory damages for publication of contents of conversations illegally intercepted by others but obtained lawfully by the newspapers."[137] The *Natoli* court distinguished *Landmark*, and the other seemingly dispositive cases involving illegal disclosures on the ground that in those cases "the information published was not the product of wrongdoing or statutory violation in the first instance, but was, in fact, information properly part of

132. 606 N.Y.S.2d 504 (Sup. Ct. 1993), *aff'd*, 616 N.Y.S.2d 318 (N.Y. App. Div. 1994).
133. *Id.*
134. *Id.* at 505.
135. *Id.* at 506.
136. *Id.*
137. *Id.* at 507.

the public records, albeit protected by statutory confidentiality[.]"[138] As stated in *Natoli*, "[t]he material published was not merely leaked in violation of a statute requiring it to be kept secret—it was illegally created in the first instance—the fruit of an illegal wiretap."[139]

The information at issue in *Natoli* was always in private hands and never in governmental custody. Hence, there was no overriding governmental interest to be protected, nor any issue of government having placed the information in the public domain.[140] The court also noted that although the material published was of public interest, it was not of paramount public significance or import.[141] Accordingly, the *Natoli* court allowed the plaintiff's case to proceed.

However, the *Natoli* formulation contravenes the *Cox / Florida Star* line of cases and is suspect. In *Florida Star*, the Supreme Court emphatically 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."[142] Clearly, the newspapers in *Natoli* obtained the information lawfully. They had no involvement in the original interception and were simply given the material. Thus, even with the Supreme Court's avoidance of the precise issue presented in *Boehner* and *Natoli*, the New York court's imposition of liability on the newspapers contravenes the essential rule established by the *Cox / Florida Star* line of cases: the government cannot punish an individual or entity for disclosing truthful information of public significance that it has lawfully acquired, absent a state interest of the highest order.[143]

Moreover, the *Natoli* distinction between the publication of confidential information illegally disclosed (as in *Landmark*) and obtained (as in *Natoli* and *Boehner*) makes little sense. In both circumstances, private information was illegally disclosed and made public. It is irrelevant that in one instance the information already existed but was disclosed illegally, and in the other, the information was both captured and disclosed illegally.

In addition, *Natoli*'s distinction between material in private custody versus that in government custody has no support in the case law. Indeed,

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138. *Natoli*, 606 N.Y.S.2d at 509.

139. *Id.*

140. *Id.*

141. *Id.*

142. Florida Star v. B.J.F., 491 U.S. 524, 533 (1989) (quoting Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 103 (1979)).

143. *Id.*

in *Smith v. Daily Mail*, the press did not obtain the information in question from the government but through witness interviews and other routine newspaper reporting techniques.[144] In response to the argument that the *Cox* rule should only apply to information obtained from the government, the Supreme Court responded that "[a] free press cannot be made to rely solely upon the sufferance of government to supply it with information."[145] Moreover, the distinction makes little sense. The point of the *Cox / Florida Star* line of cases is to preserve the public's ability to receive information of "public significance."[146] Whether that publicly significant information is obtained from the government or from private actors matters little in determining the public's right to receive the information or the media's right to disclose it.

Finally, *Natoli*'s distinction between matters of "public interest" and matters of "paramount public significance or import" has no support in the case law.[147] Indeed, as recounted in *Boehner*, the name of a rape victim hardly has paramount public significance or import, yet, the Supreme Court in *Florida Star* still found it was of sufficient public significance to invoke the First Amendment to permit the disclosure by the press.[148] Hence, conversations relevant to a local mayoral campaign, at issue in *Natoli*, meet that First Amendment litmus test as well.[149] In both circumstances, the matters in question involve government or political affairs, the disclosure and discussion of which have always been at the core of First Amendment protection.[150] Thus, even if one accepts *Natoli*'s "paramount public significance" standard, it is hard to think of anything of higher First Amendment importance than free and unfettered reporting about governmental proceedings and political matters.

In contrast, the government's interest in suppressing the disclosures presented in *Natoli* and *Boehner* is particularly weak, especially given the government's ability to punish those who actually intercepted the cellular transmissions. The government's weak interest here is illustrated by the relatively minor punishment inflicted upon those wrongdoers. In the case

144. Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 103 (1979).

145. *Id.* at 104.

146. *See Florida Star*, 491 U.S. at 533.

147. It is difficult to assess the *Natoli* discussion of newsworthiness given that none of the details of the communications at issue were revealed in the opinion.

148. *See Florida Star*, 491 U.S. at 533.

149. *Natoli*, 606 N.Y.S.2d at 683.

150. *See* Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 838–39 (1978) (referring to Mills v. Alabama, 384 U.S. 214, 218 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.")).

of the Martins, their sole punishment was a fine of merely *$500*.[151] In addition, the government's interest in protecting the privacy of cellular communications (at issue in *Boehner*) is particularly suspect given that cellular transmissions are easily overheard. Accordingly, there is a lesser expectation of privacy with regard to cellular communications.[152] Further, to the extent that the government wants to deter future illegal interceptions, there are numerous alternatives other than suppressing speech—such as increasing penalties on the interceptors or completely banning scanning devices.

Accordingly, the *Natoli* holding is wrong and contravenes fundamental First Amendment principles. The government's interest in protecting the privacy of cellular transmissions simply does not rise to the requisite level warranting an intrusion upon the fundamental First Amendment interest in protecting the unfettered disclosure of truthful information about matters of public significance.

E. A Neutral Law of General Applicability? The Impact of Cohen v. Cowles Media Co. *and Other Cases Concerning Speech Neutral Laws*

Another line of argument used to attack the *Boehner* holding exists. Some would argue that the wiretap statute is not directed at the press, or at suppressing speech *per se*, it is a neutral law of general applicability, and therefore valid under *Cohen v. Cowles Media Co.*[153] A related argument posits that because the wiretap statute is a general law that imposes only an incidental burden on speech and is not content-discriminatory, it need only satisfy intermediate scrutiny.[154]

Currently pending before the Third Circuit is *Bartnicki v. Vopper*,[155] which squarely presents these arguments. In *Bartnicki*, the plaintiffs, an employee of the Pennsylvania State Educational Association ("PSEA") and a teacher at Wyoming Valley West High School and President of the Teachers' Union, were both involved in heated negotiations with the

151. *Landmark*, 435 U.S. at 832.

152. *See* Communications Assistance for Law Enforcement Act, Pub. L. No. 103-414, 108 Stat. 4279 (1994). Indeed, Congress did not change the law to explicitly include cellular communications until 1994. This further demonstrates the government's lackluster interest in punishing the disclosure of cellular communications.

153. *See* Cohen v. Cowles Media Co., 501 U.S. 663 (1991) (holding 5-4 that a newspaper could be held liable under a promissory estoppel theory for failing to adhere to a promise of confidentiality to a source).

154. Brief for Appellees at 17, Bartnicki v. Vopper, No. 3 Civ. 94-1201 (M.D. Pa. 1998) (No. 98-7156).

155. *Id.* at 1.

Wyoming Valley West School District for pay raises.[156] In May 1993, the plaintiffs, Bartnicki and Kane had a conversation on a cellular telephone concerning the negotiations, during which Kane made several colorful statements concerning the teachers' tactics.[157] Unbeknownst to them, this conversation was scanned and recorded by an unknown individual.[158]

The unknown individual then provided a copy of the tape recording to Jack Yocum, the President of the Wyoming Valley West Taxpayers' Association and an opponent of the wage increase.[159] After concluding that the voices on the tape were those of Bartnicki and Kane, Yocum gave copies to various radio stations, two newspapers, and two television stations.[160] The newspapers, radio stations, and television stations then published transcripts and/or broadcast portions of the illegally recorded cellular conversation.[161]

Bartnicki and Kane then sued Yocum and the various media organizations, contending that the defendants' actions violated the federal wiretap statute and the analogous Pennsylvania statute.[162] Judge Kosik held that because the wiretap statute was a law of general applicability, and did not single out the press, it passed muster under *Cohen*.[163]

Yocum and the media defendants appealed this ruling. In defense of the district court's ruling, the plaintiffs essentially reiterated the district court's argument founded upon *Cohen*, in addition to arguing that the *Cox / Florida Star* line of cases did not apply because the information was unlawfully obtained in the first place.[164] The United States Department of Justice filed a Brief supporting the Appellee's position in the case and defending the constitutionality of the wiretap statute.[165] In addition to raising the *Cohen* argument, the government has argued that only intermediate scrutiny applies because the statute is a content-neutral law and only incidentally burdens speech.[166]

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156. *Id.* at 3.

157. *See id.* at 4. At one point, Kane stated that "[i]f [the School Directors] are not going to move for three percent (3%), 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." *Id.*

158. *See id.* at 2. This individual, apparently, remains unknown.

159. *Id.* at 5.

160. Brief of Appellees at 5, *Bartnicki* (No. 98-7156).

161. *See id.*

162. 18 PA. CONS. STAT. ANN. §§ 5701, 5725 (West 1999).

163. Brief of Appellees at 17, *Bartnicki* (No. 98-7156).

164. *Id.* at 21–23.

165. *See id.* at 1.

166. *Id.* at 12.

1. The Impact of *Cohen v. Cowles Media Co.*

Cohen raised the question of whether a plaintiff could recover damages under a promissory estoppel theory for a journalist's breach of a promise of confidentiality, given in exchange for information.[167] During the 1982 Minnesota gubernatorial race, a Republican activist named Dan Cohen, who was associated with Independent-Republican candidate Wheelock Whitney, approached reporters from two newspapers.[168] Cohen offered to provide documents relating to a candidate in the election.[169] Cohen apparently told the reporters that he would provide the information only under a promise of confidentiality.[170] The reporters accepted this condition and received the documents which concerned the 1969 and 1970 arrests of the candidate for Lieutenant Governor, Marlene Johnson, for unlawful assembly and petit theft.[171]

The newspapers published Cohen's name in connection with their stories concerning Johnson, despite their reporters' previous promises.[172] In subsequent stories, the newspapers identified Cohen as the source of the documents, indicated his connection to the Whitney campaign, and included denials by the Whitney campaign of any involvement in the matter.[173] Cohen was fired by his employer the same day.[174] Cohen then sued the newspapers, alleging fraud and breach of contract, and was awarded $200,000 in compensatory damages and $500,000 in punitive damages.[175]

The Minnesota Supreme Court reversed the compensatory damage award, finding that the fraud and breach of contract claims failed as a matter of law.[176] However, the Minnesota court considered the question of whether the claim founded on promissory estoppel might be valid, ultimately concluding that such a claim would violate the First Amendment.[177]

The Supreme Court reversed the Minnesota court's ruling. Finding the *Cox / Florida Star* cases inapplicable to this situation, even though the

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167. Cohen v. Cowles Media Co., 501 U.S. 663, 665 (1991).
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.* at 666.
173. *Cohen*, 501 U.S. at 666.
174. *Id.*
175. *Id.*
176. *Id.*
177. Cohen v. Cowles Media Co., 457 N.W. 2d 199 (1990).

newspapers had published newsworthy information lawfully acquired, the Supreme Court concluded that the press could be held liable under the principle that "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news."[178]

Justices Blackmun, Marshall, Souter, and O'Connor dissented. Justice Blackmun, joined by Justices Marshall and Souter, contended that the case was controlled by *Hustler Magazine, Inc. v. Falwell*.[179] In *Falwell*, the Supreme Court held that the use of a claim of intentional infliction of emotional distress to impose liability for the publication of a satirical critique violated the First Amendment.[180] In Justice Blackmun's view, *Hustler* and *Cohen* were indistinguishable because they both involved laws of general applicability (intentional infliction of emotional distress and promissory estoppel), which were not designed to suppress speech.[181] Moreover, the application of the promissory estoppel doctrine was not an incidental burden on speech because the publication of the political speech (*i.e.*, revealing Cohen's identity) was the alleged violation.[182] Thus, following *Smith v. Daily Mail*[183] and *Hustler*, Justice Blackmun contended that strict scrutiny should apply.[184]

In a separate dissent joined by Justices Blackmun, Marshall, and O'Connor, Justice Souter offered a more nuanced analysis. Justice Souter considered the majority's conception of a neutral law of general applicability as begging and ultimately ignoring the real question of whether the law actually suppressed or chilled activity protected by the First Amendment.[185] As stated by Justice O'Connor in her concurring opinion in *Employment Div., Dept. of Human Resources of Ore. v. Smith*,[186] "[t]here is nothing talismanic about neutral laws of general applicability."[187] In Justice Souter's view, "such laws may restrict First Amendment rights just as effectively as those directed at speech itself."[188] Thus, according to Justice Souter, when presented with a law of general

178. *See Cohen*, 501 U.S. at 669.

179. Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988).

180. *Cohen*, 501 U.S. at 674 (Blackmun, J., dissenting) (citing *Hustler*, 485 U.S. 46 (1998)).

181. *Id.* at 675.

182. *Id.*

183. 443 U.S. 97 (1979).

184. *Cohen*, 501 U.S. at 676.

185. *See id.* at 677 (Souter, J., dissenting).

186. Employment Div., Dept. of Human Resources of Or. v. Smith, 494 U.S. 872 (1990).

187. *Cohen*, 501 U.S. at 677 (citing Justice O'Connor's concurring opinion in *Employment Div., Dept. of Human Resources of Or.*, 494 U.S. at 901).

188. *Id.* at 677 (Souter, J., dissenting).

applicability, a court must "articulate, measure, and compare the competing interests involved . . .to determine the legitimacy of burdening constitutional interests."[189]

For Justice Souter, the importance of the public's interest in a free, unhindered press was integral to the balance that should have been struck in *Cohen*.[190] Because of the fact that Cohen's identity "expanded the universe of information relevant to the choice faced by Minnesota voters. . .the publication. . .was thus the sort quintessentially subject to strict First Amendment protection."[191] Applying his fact specific analysis, Justice Souter concluded that the newspapers were not liable because the State's interest in enforcing a newspaper's promise of confidentiality was insufficient to outweigh the interest in unfettered publication of the information revealed about Cohen.[192]

Regardless of how *Cohen* was decided, Justice Souter's more complex view, and the one followed in *Florida Star*, was correct. This approach focused on the newsworthiness of the material by balancing the public's need for the information versus the government's desire to protect its citizens.[193] The majority's formulation approving generally applicable laws is also entirely undercut by the Supreme Court's application of First Amendment limits to defamation cases, which also involve generally applicable law. Thus, the majority's formulation in *Cohen* is wrong.

But a thorough analysis of all aspects of *Cohen* is beyond the scope of this Article. Suffice it to say, however, Judge Kosik's application of *Cohen* to the wiretap situation is incorrect. Unlike the *Bartnicki* or *Boehner* situations, in *Cohen*, the newspapers voluntarily accepted a limitation on their right to publish newsworthy information. Ultimately, the newspapers broke their promises. Hence, the imposition of compensatory damages could be viewed as a cost of doing business.[194] In this way, *Cohen* is indistinguishable from the other cases cited and distinguished in *Boehner*.[195] As stated by Judge Hogan, *Cohen* and the other cases all

189. *Id.*

190. *Id.* at 678.

191. *Id.*

192. *See id.* at 678–79. Applying his balancing approach, Justice Souter also envisioned circumstances where the media *might* be held liable, such as where "the injured party is a private individual, whose identity is of less public concern than that of" Cohen. *Id.*

193. *Cohen*, 501 U.S. at 678–79.

194. *Id.* at 670. As Justice White put it, "a generous bonus to be paid to a confidential news source." *Id.*

195. *See* United States v. Aguilar, 515 U.S. 593 (1995) (upholding a conviction of a federal judge who disclosed the existence of a wiretap to the subject of the surveillance, in violation of federal law); Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984) (upholding a protective order

involved instances where "information was lawfully obtained only pursuant to a duty not to disclose; thus, in each case, the [law] at issue merely enforced a pre-existing, independent prohibition against disclosure, without which the information could not have been lawfully obtained."[196]

Indeed, Judge Hogan's point is borne out by the facts of *Landmark*, which also involved a neutral law of general applicability. In *Landmark*, the Supreme Court held that a general law prohibiting any person from divulging information concerning the proceedings of the Virginia Judicial Inquiry and Review Commission could not constitutionally be used to punish the media for disclosing such information that it had lawfully obtained.[197] As stated by the Court, regardless of whether the law was one of general applicability, the State could not punish the media's dissemination of "accurate factual information about a legislatively authorized inquiry."[198] In light of *Landmark*, *Cohen* must be limited to its facts; specifically, where the press only obtained the information pursuant to an enforceable promise not to disclose the identity of the source. *Landmark* bars the imposition of liability where the press has not voluntarily assumed such a restriction on its First Amendment right of disclosure, but instead has been involuntarily restricted by statute, unless the strict scrutiny standard is satisfied.

Cohen merely stands for the proposition that the media must play by generally applicable rules. *Cohen* does not hold that the government may suppress speech or disclosures concerning matters of public concern simply on the ground that it does so pursuant to a law of general applicability. To interpret *Cohen* in such a fashion would undercut not only *Landmark*, but also decades of First Amendment jurisprudence.[199] Accordingly, Judge Kosik's application of *Cohen* in the *Bartnicki* case is flawed and cannot withstand scrutiny.

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prohibiting a news media litigant from disclosing information lawfully obtained in discovery); Snepp v. United States, 444 U.S. 507 (1980) (upholding a judgment against a former CIA agent who wrote a book disclosing secrets that he lawfully obtained on the job).

196. Boehner v. McDermott, No. CIV. 98-594 TFH, 1998 WL 436897, at *6 (D.D.C. July 28, 1998).

197. Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 837 (1978).

198. *Id.* at 839.

199. *See, e.g.*, New York Times v. Sullivan, 376 U.S. 254 (1964). Here, the Supreme Court ruled that certain generally applicable laws, such as common law defamation, are severely limited by the First Amendment. *Id.*

2. Intermediate Scrutiny

In *Bartnicki* and in *Boehner*, the government has argued that the wiretap statute should only be subjected to intermediate scrutiny, instead of the strict scrutiny applied in *Florida Star*, because it does not "single out" speech, or particular points of view.[200] Rather, the government argues, the burden on speech imposed by the statute is only incidental and therefore only intermediate scrutiny should apply.[201] The government rests its argument primarily on cases involving laws which are not specifically directed at speech, such as *United States v. O'Brien* [202] and *Barnes v. Glen Theater, Inc.*[203]

The problem with the government's argument, however, is that the wiretap statute *is* directed at speech, specifically, the disclosure of information that, while acquired lawfully by the media, was originally acquired unlawfully. As in *Boehner* and *Bartnicki*, the speech at issue is newsworthy political speech, which has traditionally received the highest First Amendment protection.[204] This hardly constitutes an "incidental" burden on speech. Thus, the application of *O'Brien* to defend the constitutionality of the wiretap statute is not persuasive.

Another argument posited by the government is that intermediate scrutiny should apply because, even if directed at speech, the law is content-neutral.[205] The law does not prohibit the disclosure of only certain illegally obtained information, it prohibits the disclosure of all of it, therefore, it is content-neutral.[206]

However, the content-neutrality argument is severely undercut by *Butterworth v. Smith*.[207] In *Butterworth*, the Supreme Court unanimously

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200. Boehner, 1998 WL 436897, at *4–*6 (D.D.C. July 28, 1998); *see* Brief for the United States at 12, Bartnicki v. Vopper, No. 3 Civ. 94-1201 (M.D. Pa. 1998) (No. 98–7156).

201. Brief for United States at 12, *Bartnicki* (No. 98-7156).

202. 391 U.S. 367 (1968) (applying a variant of intermediate scrutiny to affirm the conviction of an individual for burning his Selective Service registration card).

203. 501 U.S. 560 (1991) (applying the *O'Brien* intermediate scrutiny test to affirm the application of a public indecency law to a nude dancing establishment).

204. *See* Meyer v. Grant, 486 U.S. 414, 425 (1988) (stating that political speech is "an area in which the importance of First Amendment protections is 'at its zenith'").

205. *See Boehner*, 1998 WL 436897, at *4–*6.

206. The government relies on a few cases in support of its argument. The first case is *Turner Broad. System, Inc. v. Federal Communications Comm'n*, 512 U.S. 622 (1994). In *Turner*, the Supreme Court applied intermediate scrutiny to evaluate the constitutionality of the "must carry" provisions of the Cable Television Consumer Protection Act of 1992. *Id.* In a second case, *Clark v. Community for Creative Non-Violence*, the Court applied intermediate scrutiny to evaluate the constitutionality of the National Park Service's denial of a permit for protesters to camp in Washington, D.C.'s National Mall or Lafayette Park. 468 U.S. 288 (1984).

207. 494 U.S. 624 (1990).

invalidated a Florida statute[208] prohibiting a grand jury witness from disclosing the content of his or her own testimony after the grand jury's term has ended.[209] The witness in question, a news reporter, was called to testify before the grand jury concerning information he had obtained while gathering news regarding alleged improprieties committed by the Charlotte County State Attorney's Office and Sheriff's Department.[210] After the grand jury terminated its investigation, the reporter unsuccessfully sought to publish a news story concerning the investigation.[211] The reporter sued the Florida Attorney General, seeking a declaration that the Florida statute was an unconstitutional abridgment of free speech.[212]

Applying *Landmark* and other cases in the *Cox / Florida Star* line, the Supreme Court agreed.[213] The Court noted that the interests advanced by the State were not sufficiently compelling to overcome the reporter's First Amendment right to make a truthful statement of information which he acquired on his own.[214]

As with the wiretap statute, the *Butterworth* statute did not specifically target speech based on its content.[215] Rather, it prohibited all witnesses from disclosing their testimony, whatever its content.[216] Nonetheless, contrary to the government's argument in *Boehner* and *Bartnicki*, the *Butterworth* Court applied the strict scrutiny test established in *Florida Star*, *Smith*, and *Landmark* stating "where a person 'lawfully obtains truthful information about a matter of public significance, . . . state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.'"[217]

The Ninth Circuit's decision in *Lind v. Grimmer*[218] similarly undermines the content-neutrality argument.[219] In *Lind*, the plaintiff filed a complaint against the University of Hawaii Professional Assembly contending that the Assembly had failed to disclose certain campaign

208. FLA. STAT. ANN. § 905.27 (West 1999).

209. *See Butterworth*, 494 U.S. at 624.

210. *Id.* at 626.

211. *Id.* at 628.

212. *Id.*

213. *Id.* at 632.

214. *Id.* at 636.

215. *See generally Butterworth*, 494 U.S. at 627 (citing the FLA. STAT. ANN. § 905.27 (West 1998)).

216. *Id.*

217. *Id.* at 632 (quoting Smith v. Daily Mail, 443 U.S. 97, 103 (1979)); *see* Florida Star v. B.J.F., 491 U.S. 524, 533 (1989).

218. 30 F.3d 1115 (9th Cir. 1994).

219. *See id.*

contributions made in support of Hawaii Governor John D. Waihee.[220] A Hawaii statute required that all aspects of the Commission's activities remain confidential while a complaint is pending.[221] The plaintiff, the publisher of the *Hawaii Monitor*, filed an action in federal court seeking a declaration that the statute prohibiting publication was unconstitutional.[222] Following *Butterworth*, the Ninth Circuit held that "[b]ecause [the concerns addressed by the statute] all stem from the direct communicative impact of speech, . . . [the statute] regulates speech on the basis of its content."[223] Accordingly, the Ninth Circuit applied the *Cox / Florida Star* strict scrutiny test and struck down the statute as unconstitutionally repressing the disclosure of truthful information.[224] In light of these authorities, any argument seeking intermediate scrutiny on the basis of content-neutrality should fail.[225]

IV. THE LARGER CONTEXT

Judge Hogan's resolution in *Boehner* is correct under prevailing law, and *Natoli* was wrongly decided. In the *Cox / Florida Star* line of cases, the Supreme Court established that where information of public significance has been lawfully obtained by the press, the First Amendment generally prohibits the government from punishing its subsequent disclosure.[226] If the Supreme Court were to agree with *Natoli*, that a person or organization that lawfully obtains private information of public

220. *See id.* at 1117.

221. HAW. REV. STAT. § 11-216(d) (Supp. 1997).

222. *Lind*, 30 F.3d at 1117.

223. *Id.* at 1118.

224. *Id.* at 1120–21.

225. The *Landmark* case itself also undermines the "content-neutrality" argument, for the anti-disclosure rule is arguably "content-neutral" banning *all* disclosures concerning the Judicial Inquiry and Review Commission. Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 831 (1978) (citing VA. CODE § 2.1-37.13 (Michie 1995)). Similarly here, the wiretap statute purportedly bans *all* disclosures of information originally obtained in violation of the wiretap statute. *Id.* Ultimately, *Landmark* stands for the fundamental principle that "[o]nce a fact is deemed newsworthy, First Amendment interests in speaking the truth about it are held universally to override the attendant incursion into the plaintiff's privacy rights[.]" Jonathan B. Mintz, *The Remains of Privacy's Disclosure Tort: An Exploration of the Private Domain*, 55 MD. L. REV. 425, 442 (1996). This is true regardless of whether the law is deemed "content-based" or "content-neutral."

226. This issue is quite separate from the question of whether the government may restrain the press from publishing such information (i.e., by imposing a prior restraint). As illustrated by the United States Supreme Court's decision in the "Pentagon Papers" case, *New York Times Co. v. United States*, 403 U.S. 713 (1971), and reemphasized by the Sixth Circuit in *Proctor & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219 (6th Cir. 1996), such prior restraints are almost invariably unconstitutional.

significance cannot then disclose that information, this would constitute a major change of course for the Court. As recognized by Justice Marshall in *Florida Star*, in each case involving these matters, the Court has "without exception upheld the press' right to publish [matters of public significance]."[227]

There is good reason for this consistency to continue, especially in the context of claims under the federal wiretap statute. The press' publication of information obtained from a source who violates the law, or a private legal duty, in obtaining the information, has been at the heart of some of the most significant news stories of the last few decades.[228] Clearly, the Court continually seeks to ensure that the press is unfettered in its ability to communicate truthful, newsworthy information, and the *Cox / Florida Star* formulation gives substance to that commitment. Failure to apply that rule in the *Boehner*-type situation would constitute a major retreat from that fundamental principle.

Moreover, as a statute that ostensibly seeks to prevent intrusions into private communications, the law makes little sense because it punishes innocent parties, such as the press, for the wrongdoings of others, namely, those who illegally intercept the communications. In this way, it contradicts the common sense reasoning in *Pearson*, which refused to impute to the press any wrongdoing committed by Senator Dodd's former employees.[229] In short, only the person who intercepted the communication actually intruded on the privacy of the plaintiff, not the person who simply received the information.

As an anti-disclosure statute, the law is similarly muddled and raises serious constitutional concerns. As a general rule, "where the claim is that private information concerning plaintiff has been published, the question of whether that information is genuinely private or is of public interest should not turn on the manner in which it has been obtained."[230] But, the disclosure claim created by the wiretap statute flips this principle. The key to the statutory violation is the original intrusion and not the content of the allegedly wrongful disclosure. Once the intrusion occurs, liability to the ultimate discloser is assured, if the discloser knows or should know the source of the information. This is true regardless of whether the information is of public significance or not. As such, the statute is

227. Florida Star v. B.J.F., 491 U.S. 524, 530 (1989).

228. These include the Pentagon Papers and the internal documents concerning the tobacco company's knowledge of the harmful effects of cigarettes.

229. *See* Pearson v. Dodd, 410 F.2d 701, 705 (D.C. Cir. 1969), *cert. denied*, 395 U.S. 947 (1969).

230. *Id.*

overbroad because it unconstitutionally restricts the public's access to information of public concern, and punishes the media's disclosure of this information.[231]

This contradicts decades of case law attempting to fashion a balance between the protection of privacy and the First Amendment's guarantee of free speech and a free press. As stated by the Supreme Court, the disclosure of true, But private information tort is where "claims of privacy most directly confront the constitutional freedoms of speech and press."[232] As one commentator has put it, "[o]nce a fact is deemed newsworthy, First Amendment interests in speaking the truth about it are held universally to override the attendant incursion into the plaintiff's privacy rights, which generally are not viewed as possessing constitutional roots."[233] As far back as 1890, the cardinal rule of privacy jurisprudence has been that "the right to privacy does not prohibit any publication which is of public or general interest."[234]

This constitutionally required newsworthiness principle is viewed broadly. As discussed in the *Restatement of Torts*, it includes within its scope not only "the use of names, likenesses or facts in giving information to the public for purposes of education, amusement, or enlightenment, when the public may reasonably be expected to have a legitimate interest in what is published."[235] The newsworthiness principle also includes matters that are discussed in connection with the news or that bear some substantial relevance to the newsworthy material.[236] Thus, even if particular facts about a plaintiff are not newsworthy in and of themselves, they are still protected disclosures to the extent that they are discussed in connection with matters of public significance.[237]

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231. Moreover, given that the speech at issue is true, the application of the wiretap statute in *Boehner* produces precisely the "perverse" anomaly envisioned by the Supreme Court in *Florida Star*, where "truthful publications . . . are less protected by the First Amendment then even the least protected defamatory falsehoods: those involving purely private figures[.]" *Florida Star*, 491 U.S. at 539. In such cases where matters of public concern are at issue, truth is an absolute defense and the plaintiff has the burden of proving falsity. *See* Philadelphia Newspapers, Inc. v. Hepps, 474 U.S. 767 (1986). And in such a case, even if the plaintiff proves the speech is false, the plaintiff, at a minimum, must show, with "convincing clarity," actual malice to obtain presumed or punitive damages. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

232. Cox Broad. Corp. v. Cohn, 420 U.S. at 469, 489 (1975).

233. Jonathan B. Mintz, *The Remains of Privacy's Disclosure Tort: An Exploration of the Private Domain*, 55 MD. L. REV. at 425, 442 (1996).

234. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 214 (1890); *see* RESTATEMENT (SECOND) OF TORTS § 652D cmt. d (1977).

235. RESTATEMENT (SECOND) OF TORTS § 652D cmt. j (1977).

236. Gilbert v. Medical Econs. Co., 665 F.2d 305, 308 (10th Cir. 1981) (quoting RESTATEMENT (SECOND) OF TORTS § 652D cmt. g (1977)) (emphasis added).

237. *See id.*

As noted in *Gilbert v. Medical Economics Co.*, this broad definition of public significance or newsworthiness "properly restricts liability for public disclosure of private facts to the extreme case."[238] Therefore, it "provid[es] the breathing space needed by the press to properly exercise effective editorial judgment."[239] "This standard provides a privilege for truthful publications that cease to operate only when an editor abuses his broad discretion to publish matters that are of legitimate public interest."[240] Therefore, it is consistent with the Supreme Court's conclusion in *Florida Star* that where 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."[241]

Accordingly, Judge Hogan's application of the *Florida Star* test in *Boehner* is in accordance with long-standing First Amendment and privacy common law precedent. It strikes a proper balance between the government's interest in protecting privacy, and the overriding constitutional interest in fostering the free flow of information concerning matters of public significance.

Consistent with the *Cox / Florida Star* line of cases, and with the privacy precedent, therefore, the first step in any evaluation of the application of a law such as the wiretap statute must be whether the communication in question concerns a "matter of public significance."[242] Once a communication is determined to pertain to such a newsworthy matter, then consistent with long-standing law, the *Florida Star* strict scrutiny test must be met by the party seeking to punish the disclosure. In light of the importance of First Amendment principles, the "public significance" prong would be viewed broadly. Thus, even if the particular communication was not particularly newsworthy in and of itself, its disclosure would still be protected under *Florida Star* if the communication bore a substantial relationship to a newsworthy subject.

This broad rule necessarily incorporates strong deference to journalists and avoids the likelihood of any unconstitutional interference with the freedom to report truthfully on matters of legitimate public interest. Given the breathing space accorded the rule, it lessens the temptation for judges to parse out particular topics that they do or do not deem to be matters of public significance. While a communication

238. *Id.*
239. *Id.*
240. *Id.*
241. *Florida Star*, 491 U.S. at 533.
242. *Id.*

concerning governmental activity or political affairs, as in *Boehner*, would indisputably be a matter of public significance, there might be more debate concerning a communication regarding, for example, a business transaction between Microsoft and America Online or an upcoming Hollywood film. However, the broad test for public significance would ensure that most of the newsworthy decisions be made by reporters and editors, reserving only the most extreme intrusions into private spheres to judicial scrutiny.[243]

Once a communication is deemed to concern a matter of public significance, then the party seeking to punish the disclosure would be required to meet strict scrutiny analysis. Essentially it would balance the need for repressing speech against the First Amendment right to disclose, with a heavy thumb on the side of protecting the rights of free speech.

The first facet of the familiar strict scrutiny test would analyze the government's interest in suppressing the disclosure. In other words, whether it is so compelling as to override the First Amendment's protection of speech. Thus, in the *Boehner* context, the government's interest in punishing disclosure would be particularly unconvincing, as evidenced by the meager punishment of the primary wrongdoing (i.e., the actual interception of the communication). Moreover, any argument here would be further undercut by the lesser expectation of privacy with regard to cellular transmissions. And, as with the inquiry into whether the communication concerned a matter of public significance, the inquiry would be extremely deferential to free speech. For example, in *Florida Star*, the statute in question, barring the publication of a rape victim's name, did not meet strict scrutiny because the information in question was related to a topic clearly within the core of free speech: governmental processes. In this way, the compelling interest prong would echo the standard for determining whether a topic was of public significance by considering not just the communication itself but how it related to other issues.

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243. In a sense, the true problem with 18 U.S.C. section 2511(1)(c) and (d) is one of overbreadth because they subject individuals to punishment for the disclosure of both privately and publicly significant information in all cases. Thus, the statute is not unlike the law struck down in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982). In *Globe Newspaper*, the Supreme Court invalidated a Massachusetts law providing for the mandatory exclusion of the general public from *all* trials concerning specified sexual offenses committed against minors. *Id.* The Court noted that in certain cases, courts could exclude the public from the courtroom, but that an across the board law precluding case-by-case application could not stand constitutional muster. *Id.* at 607–08. Similarly here, a more narrowly focused law—punishing the disclosure of private, non-newsworthy communications—would be much more likely to satisfy the dictates of the First Amendment.

The second prong of the strict scrutiny test would constitute an inquiry into whether there are alternative means of meeting the government's goals in punishing disclosure and whether banning speech is the least restrictive alternative. Thus, in *Boehner*, the statute would fail this test because lesser restrictive alternatives are clearly available. In short, the government could more severely punish or inhibit the primary wrongdoing, namely, the actual interception of the call. For example, as obvious alternatives, penalties for the interception of cellular transmissions could be increased, or scanning devices could be banned or severely regulated. Given this, the wiretap statute cannot meet this prong of the strict scrutiny test. Ultimately, a repression of speech of public significance cannot be justified simply as just one alternative among many. It must be the only alternative. That is clearly not so with regard to the wiretap statute and it is therefore unconstitutional as applied in *Boehner*.

V. CONCLUSION

As the above discussion demonstrates, the federal wiretap statutes and analogous state statutes cannot withstand constitutional scrutiny in circumstances like those in *Boehner*. Therefore, Judge Hogan's opinion in *Boehner* is correct and should be upheld by the District of Columbia Circuit on appeal and, if necessary, by the United States Supreme Court. In short, the wiretap statute unconstitutionally permits the government to punish those who disclose newsworthy information that they have lawfully obtained. Even under a conservative reading of the Supreme Court's *Cox / Florida Star* line of cases, and decades of common law precedent, the First Amendment does not permit Congress to do so. Moreover, even aside from the question of whether the information was lawfully obtained, the statute unconstitutionally muzzles the media's ability to impart truthful information of public significance. This contradicts decades of reasoned jurisprudence drawing a fine compromise between interests in privacy on the one hand, and the constitutional guarantee of free speech and a free press on the other.