SUPREME COURT OF THE UNITED STATES

Nos. 99–1687 and 99–1728

GLORIA BARTNICKI AND ANTHONY F. KANE, JR., PETITIONERS
99–1687 *v.*
FREDERICK W. VOPPER, AKA FRED WILLIAMS, ET AL.

UNITED STATES, PETITIONER
99–1728 *v.*
FREDERICK W. VOPPER, AKA FRED WILLIAMS, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[May 21, 2001]

CHIEF JUSTICE REHNQUIST, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

Technology now permits millions of important and confidential conversations to occur through a vast system of electronic networks. These advances, however, raise significant privacy concerns. 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.[1] The Court holds that all of

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[1] See 18 U. S. C. §2511(1) (1994 ed. and Supp. V); Ala. Code §13A–11–30 *et seq.* (1994); Alaska Stat. Ann. §42.20.300(d) (2000); Ark. Code Ann. §5–60–120 (1997); Cal. Penal Code Ann. §631 (West 1999); Colo.

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.

Over 30 years ago, with Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Congress recognized that the

> "[t]remendous scientific and technological developments that have taken place in the last century have made possible today the widespread use and abuse of electronic surveillance techniques. As a result of these developments, privacy of communication is seriously jeopardized by these techniques of surveil-

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Rev. Stat. §18–9–303 (2000); Del. Code Ann., Tit. 11, §1336(b)(1) (1995); D. C. Code Ann. §23–542 (1996); Fla. Stat. §934.03(1) (Supp. 2001); Ga. Code Ann. §16–11–66.1 (1996); Haw. Rev. Stat. §803–42 (1993); Idaho Code §18–6702 (1997); Ill. Comp. Stat., ch. 720, §5/14–2(b) (1999 Supp.); Iowa Code §808B.2 (1994); Kan. Stat. Ann. §21–4002 (1995); Ky. Rev. Stat. Ann. §526.060 (Michie 1999); La. Rev. Stat. Ann. §15:1303 (1992); Me. Rev. Stat. Ann., Tit. 15, §710(3) (Supp. 2000); Md. Cts. & Jud. Proc. Code Ann. §10–402 (Supp. 2000); Mass. Gen. Laws §272:99(C)(3) (1997); Mich. Comp. Laws Ann. §750.539e (West 1991); Minn. Stat. §626A.02 (2000); Mo. Rev. Stat. §542.402 (2000); Neb. Rev. Stat. §86–702 (1999); Nev. Rev. Stat. §200.630 (1995); N. H. Rev. Stat. Ann. §570–A:2 (Supp. 2000); N. J. Stat. Ann. §2A:156A–3 (West Supp. 2000); N. M. Stat. Ann. §30–12–1 (1994); N. C. Gen. Stat. §15A–287 (1999); N. D. Cent. Code §12.1–15–02 (1997); Ohio Rev. Code Ann. §2933.52(A)(3) (1997); Okla. Stat., Tit. 13, §176.3 (2000 Supp.); Ore. Rev. Stat. §165.540 (1997); 18 Pa. Cons. Stat. §5703 (2000); R. I. Gen. Laws §11–35–21 (2000); Tenn. Code Ann. §39–13–601 (1997); Tex. Penal Code Ann. §16.02 (Supp. 2001); Utah Code Ann. §77–23a–4 (1982); Va. Code Ann. §19.2–62 (1995); W. Va. Code §62–1D–3 (2000); Wis. Stat. §968.31(1) (1994); Wyo. Stat. Ann. §7–3–602 (1995).

> lance. . . . No longer is it possible, in short, for each man to retreat into his home and be left alone. Every spoken word relating to each man's personal, marital, religious, political, or commercial concerns can be intercepted by an unseen auditor and turned against the speaker to the auditor's advantage." S. Rep. No. 1097, 90th Cong., 2d Sess., 67 (1968) (hereinafter S. Rep. No. 1097).

This 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 on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 202 (1967).

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.[2] See, *e.g.*, 18 U. S. C. §2511(1)(c) (placing restrictions upon "any person who . . . intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to

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[2] "Electronic communication" is defined as "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system." 18 U. S. C. §2510(12) (1994 ed., Supp. V).

know that the information was obtained through the interception of a wire, oral, or electronic communication").

The Court correctly observes that these are "content-neutral law[s] of general applicability" which serve recognized interests of the "highest order": "the interest in individual privacy and . . . in fostering private speech." *Ante*, at 10, 2. It nonetheless subjects these laws to the strict scrutiny normally reserved for governmental attempts to censor different viewpoints or ideas. See *ante*, at 16 (holding that petitioners have not established the requisite "'need of the highest order'") (quoting *Smith* v. *Daily Mail Publishing Co.,* 443 U. S. 97, 103 (1979)). 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, Inc.* v. *FCC,* 512 U. S. 622, 662 (1994) (quoting *United States* v. *O'Brien,* 391 U. S. 367, 377 (1968)).

Here, Congress and the Pennsylvania Legislature have acted "'without reference to the content of the regulated speech.'" *Renton* v. *Playtime Theatres, Inc.,* 475 U. S. 41, 48 (1986). 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, supra,* at 641, 643. The antidisclosure 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. Cf. *Seattle Times Co.* v. *Rhinehart,* 467 U. S. 20, 34 (1984) (upholding under intermediate scrutiny a protective order on information acquired during discovery in part because "the party may disseminate the identical information . . . as long as the information is gained through means independent of the court's processes"). 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, *Florida Star* v. *B. J. F.,* 491 U. S. 524 (1989); *Cox Broadcasting Corp.* v. *Cohn,* 420 U. S. 469 (1975), the confidential proceedings before a state judicial review commission, *Landmark Communications, Inc.* v. *Virginia,* 435 U. S. 829 (1978), and the name of a juvenile defendant, *Daily Mail, supra*; *Oklahoma Publishing Co.* v. *District Court, Oklahoma Cty.,* 430 U. S. 308 (1977) *(per curiam)*— 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, supra,* at 103. Neither this *Daily Mail* principle nor any other aspect of these cases, however, justifies the Court's imposition of strict scrutiny here.

Each of the laws at issue in the *Daily Mail* cases regulated the content or subject matter of speech. This fact alone was enough to trigger strict scrutiny, see *United States* v. *Playboy Entertainment Group, Inc.,* 529 U. S. 803, 813 (2000) ("[A] content-based speech restriction . . . can stand only if it satisfies strict scrutiny"), and suffices to distinguish these antidisclosure provisions. But, as our

synthesis of these cases in *Florida Star* made clear, three other unique factors also informed the scope of the *Daily Mail* principle.

First, the information published by the newspapers had been lawfully obtained from the government itself.[3] "Where information is entrusted to the government, a less drastic means than punishing truthful publication almost always exists for guarding against the dissemination of private facts." *Florida Star, supra,* at 534. See, *e.g., Landmark Communications, supra,* at 841, and n. 12 (noting that the State could have taken steps to protect the confidentiality of its proceedings, such as holding in contempt commission members who breached their duty of confidentiality). Indeed, the State's ability to control the information undermined the claim that the restriction was necessary, for "[b]y placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served." *Cox Broadcasting, supra,* at 495. This factor has no relevance in the present cases, where we deal with private conversations that have been intentionally kept out of the public domain.

Second, the information in each case was already "publicly available," and punishing further dissemination would not have advanced the purported government interests of confidentiality. *Florida Star, supra,* at 535. Such is not the case here. These statutes only prohibit "disclos[ure]," 18 U. S. C. §2511(1)(c); 18 Pa. Cons. Stat. §5703(2) (2000), and one cannot "disclose" what is already

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[3] The one exception was *Daily Mail,* where reporters obtained the juvenile defendant's name from witnesses to the crime. See 443 U. S., at 99. However, the statute at issue there imposed a blanket prohibition on the publication of the information. See *id.*, at 98–99. In contrast, these antidisclosure provisions do not prohibit publication so long as the information comes from a legal source.

in the public domain. See Black's Law Dictionary 477 (7th ed. 1999) (defining "disclosure" as "[t]he act or process of making known something that was previously unknown; a revelation of facts"); S. Rep. No. 1097, at 93 ("The disclosure of the contents of an intercepted communication that had already become 'public information' or 'common knowledge' would not be prohibited"). These laws thus do not fall under the axiom that "the interests in privacy fade when the information involved already appears on the public record." *Cox Broadcasting, supra,* at 494–495.

Third, these cases were concerned with "the 'timidity and self-censorship' which may result from allowing the media to be punished for publishing certain truthful information." *Florida Star*, 491 U. S., at 535. But fear of "timidity and self-censorship" is a basis for upholding, not striking down, these antidisclosure provisions: They allow private conversations to transpire without inhibition. And unlike the statute at issue in *Florida Star*, which had no scienter requirement, see *id.,* at 539, these statutes only address those who *knowingly* disclose an illegally intercepted conversation.[4] They do not impose a duty to inquire into the source of the information and one could negligently disclose the contents of an illegally intercepted communication without liability.

In sum, it is obvious that the *Daily Mail* cases upon which the Court relies do not address the question presented here. Our decisions themselves made this clear: "The *Daily Mail* principle does not settle the issue whether,

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[4] In 1986, to ensure that only the most culpable could face liability for disclosure, Congress increased the scienter requirement from "willful" to "intentional." 18 U. S. C. §2511(1)(c); see also S. Rep. No. 99–541, p. 6 (1986) ("In order to underscore that the inadvertent reception of a protected communication is not a crime, the subcommittee changed the state of mind requirement under [Title III] from 'willful' to 'intentional'")

in cases where information has been acquired *unlawfully* by a newspaper or by a source, the government may ever punish not only the unlawful acquisition, but the ensuing publication as well." *Florida Star, supra,* at 535, n. 8; see also *Daily Mail,* 443 U. S., at 105 ("Our holding in this case is narrow. There is no issue before us of unlawful press [conduct]"); *Landmark Communications,* 435 U. S., at 837 ("We are not here concerned with the possible applicability of the statute to one who secures the information by illegal means and thereafter divulges it").[5]

Undaunted, the Court places an inordinate amount of weight upon the fact that the receipt of an illegally intercepted communication has not been criminalized. See *ante*, at 13–17. But this hardly renders those who knowingly receive and disclose such communications "law-abiding," *ante*, at 14, 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;

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[5] Tellingly, we noted in *Florida Star* that "[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." 491 U. S., at 534; see also *id.,* at 535 ("[I]t is highly anomalous to sanction persons other than the source of [the] release").

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, see Thompson, Cell Phone Snooping: Why Electronic Eavesdropping Goes Unpunished, 35 Am. Crim. L. Rev. 137, 149 (1997), notwithstanding the fact that Congress prohibited the marketing of such devices eight years ago, see 47 U. S. C. §302a(d).[6] As Congress recognized, "[a]ll too often the invasion of privacy itself will go unknown. Only by striking at all aspects of the problem can privacy be adequately protected." S. Rep. No. 1097, at 69. See also Hearings on H. R. 3378 before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 99th Cong., 1st Sess. and 2d Sess., 290 (1986) ("Congress should be under no illusion . . . that the Department [of Justice], because of the

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[6] The problem is pervasive because legal "radio scanners [may be] modified to intercept cellular calls." S. Rep. No. 99–541, at 9. For example, the scanner at issue in *Boehner* v. *McDermott*, 191 F. 3d 463 (CADC 1999), had been recently purchased at Radio Shack. See Thompson, 35 Am. Crim. L. Rev., at 152 (citing Stratton, Scanner Wasn't Supposed to Pick up Call, But it Did, Orlando Sentinel, Jan. 18, 1997, p. A15).

difficulty of such investigations, would be able to bring a substantial number of successful prosecutions").

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," *ante*, at 15–16, 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," *ante,* at 16. 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,* 528 U. S. 377, 391 (2000). "[C]ourts must accord substantial deference to the predictive judgments of Congress." *Turner Broadcasting*, 512 U. S., at 665 (citing *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U. S. 94, 103 (1973)). 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 and that "[s]ound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable." *Turner Broadcasting,* 512 U. S., at 665. Although we must nonetheless independently evaluate such congressional findings in performing our constitutional review, this "is not a license to reweigh the evidence *de novo*, or to replace Congress' factual predictions with our own." *Id.*, at 666.

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. See 2 W. LaFave & A. Scott, Substantive Criminal Law §8.10(a), p. 422 (1986) ("Without such receivers, theft ceases to be profitable. It is obvious that the receiver must be a principal target of any society anxious to stamp out theft in its various forms"). We ourselves adopted the exclusionary rule based upon similar reasoning, believing that it would "deter unreasonable searches," *Oregon* v. *Elstad,* 470 U. S. 298, 306 (1985), by removing an officer's "incentive to disregard [the Fourth Amendment]," *Elkins* v. *United States,* 364 U. S. 206, 217 (1960).[7]

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 antidisclosure provisions.

For a similar reason, we upheld against First Amendment challenge a law prohibiting the distribution of child

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[7] In crafting the exclusionary rule, we did not first require empirical evidence. See *Elkins,* 364 U. S., at 218 ("Empirical statistics are not available to show that the inhabitants of states which follow the exclusionary rule suffer less from lawless searches and seizures than do those of states which admit evidence unlawfully obtained"). When it comes to this Court's awesome power to strike down an Act of Congress as unconstitutional, it should not be "do as we say, not as we do."

pornography. See *New York* v. *Ferber,* 458 U. S. 747 (1982). Just as with unlawfully intercepted electronic communications, we there noted the difficulty of policing the "low-profile, clandestine industry" of child pornography production and concurred with 36 legislatures that "[t]he most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product." *Id.,* at 760. In so doing, we did not demand, nor did Congress provide, any empirical evidence to buttress this basic syllogism. Indeed, we reaffirmed the theory's vitality in *Osborne* v. *Ohio,* 495 U. S. 103, 109–110 (1990), finding it "surely reasonable for the State to conclude that it will decrease the production of child pornography if it penalizes those who possess and view the product, thereby decreasing demand."[8]

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.[9] The Court does not explain how or from

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[8] The Court attempts to distinguish *Ferber* and *Osborne* on the ground that they involved low-value speech, but this has nothing to do with the reasonableness of the "dry up the market" theory. The Court also posits that Congress here could simply have increased the penalty for intercepting cellular communications. See *ante,* at 14. But the Court's back-seat legislative advice does nothing to undermine the reasonableness of Congress' belief that prohibiting only the initial interception would not effectively protect the privacy interests of cellular telephone users.

[9] The Court observes that in many of the cases litigated under §2511(1), "the person or persons intercepting the communication ha[ve] been known." *Ante,* at 15. Of the 206 cases cited in the appendices, 143 solely involved §2511(1)(a) claims of wrongful interception– *disclosure* was not at issue. It is of course unremarkable that intentional *interception* cases have not been pursued where the identity of the eavesdropper was unknown. Of the 61 disclosure and use cases with published facts brought under §§2511(1)(c) and (d), 9 involved an unknown or

where Congress should obtain statistical evidence about the effectiveness of these laws, and "[s]ince as a practical matter it is never easy to prove a negative, it is hardly likely that conclusive factual data could ever be assembled." *Elkins, supra,* at 218. Reliance upon the "dry up the market" theory is both logical and eminently reasonable, and our precedents make plain that it is "far stronger than mere speculation." *United States* v. *Treasury Employees,* 513 U. S. 454, 475 (1995).

These statutes also protect the important interests of deterring clandestine invasions of privacy and preventing the involuntary broadcast of private communications. Over a century ago, Samuel Warren and Louis Brandeis recognized that "[t]he intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual." The Right to Privacy, 4 Harv. L. Rev. 193, 196 (1890). "There is necessarily, and within suitably defined areas, a . . . freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect." *Harper & Row, Publishers, Inc.* v. *Nation Enterprises,* 471 U. S. 539, 559 (1985) (internal quotation marks and citation omitted). One who speaks into a phone "is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world." *Katz* v. *United States,* 389 U. S. 347, 352

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unproved eavesdropper, 1 involved a lawful pen register, and 5 involved recordings that were not surreptitious. Thus, as relevant, 46 disclosure cases involved known eavesdroppers. Whatever might be gleaned from this figure, the Court is practicing voodoo statistics when it states that it undermines the "dry up the market" theory. See *ante,* at 16, n. 17. These cases say absolutely nothing about the interceptions and disclosures that have been *deterred.*

(1967); cf. *Gelbard* v. *United States,* 408 U. S. 41, 52 (1972) (compelling testimony about matters obtained from an illegal interception at a grand jury proceeding "compounds the statutorily proscribed invasion of . . . privacy by adding to the injury of the interception the insult of . . . disclosure").

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*, 512 U. S., at 641. By "protecting the privacy of individual thought and expression," *United States* v. *United States Dist. Court for Eastern Dist. of Mich.,* 407 U. S. 297, 302 (1972), these statutes further the "uninhibited, robust, and wide-open" speech of the private parties, *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 270 (1964). 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. See Hao, Nokia Profits from Surge in Cell Phones, Fla. Today, July 18, 1999, p. E1.

Although the Court recognizes and even extols the virtues of this right to privacy, see *ante*, at 17–18, these are "mere words," W. Shakespeare, Troilus and Cressida, act v, sc. 3, overridden by the Court's newfound right to publish unlawfully acquired information of "public concern," *ante*, at 10. The Court concludes that the private conversation between Gloria Bartnicki and Anthony Kane is somehow a "debate . . . . worthy of constitutional protection." *Ante*, at 20. Perhaps the Court is correct that "[i]f the statements about the labor negotiations had been

made in a public arena— during a bargaining session, for example— they would have been newsworthy." *Ante*, at 10. 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." Cf. *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 573 (1995) ("[O]ne 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.

The Court's decision to hold inviolable our right to broadcast conversations of "public importance" enjoys little support in our precedents. As discussed above, given the qualified nature of their holdings, the *Daily Mail* cases cannot bear the weight the Court places upon them. More mystifying still is the Court's reliance upon the "Pentagon Papers" case, *New York Times Co.* v. *United States,* 403 U. S. 713 (1971) *(per curiam),* which involved the United States' attempt to prevent the publication of Defense Department documents relating to the Vietnam 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.'" *Id.*, at 714. Indeed, it was this presumption that caused Justices Stewart and White

to join the 6-to-3 *per curiam* decision. See *id.*, at 730–731 (White, J., joined by Stewart, J., concurring) ("I concur in today's judgments, but only because of the concededly extraordinary protection against prior restraints enjoyed by the press under our constitutional system"). By no stretch of the imagination can the statutes at issue here be dubbed "prior restraints." And the Court's "parallel reasoning" from other inapposite cases fails to persuade. *Ante*, at 20.

Surely "the interest in individual privacy," *ante*, at 2, at its narrowest must embrace the right to be free from surreptitious eavesdropping on, and involuntary broadcast of, our cellular telephone conversations. The Court subordinates that right, not to the claims of those who themselves wish to speak, but to the claims of those who wish to publish the intercepted conversations of others. Congress' effort to balance the above claim to privacy against a marginal claim to speak freely is thereby set at naught.