# 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]

JUSTICE BREYER, with whom JUSTICE O'CONNOR joins, concurring.

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

As the Court recognizes, the question before us– a question of immunity from statutorily imposed civil liability– implicates competing constitutional concerns. *Ante*, at 17–18. The statutes directly interfere with free expression in that they prevent the media from publishing information. At the same time, they help to protect personal privacy– an interest here that includes not only the "right

to be let alone," *Olmstead* v. *United States,* 277 U. S. 438, 478 (1928) (Brandeis, J., dissenting), but also "the interest . . . in fostering private speech," *ante,* at 2. Given these competing interests "on both sides of the equation, the key question becomes one of proper fit." *Turner Broadcasting System, Inc.* v. *FCC,* 520 U. S. 180, 227 (1997) (BREYER, J., concurring in part). See also *Nixon* v. *Shrink Missouri Government PAC,* 528 U. S. 377, 402 (2000) (BREYER, J., concurring).

I would ask whether the statutes strike a reasonable balance between their speech-restricting and speech-enhancing consequences. Or do they instead impose restrictions on speech that are disproportionate when measured against their corresponding privacy and speech-related benefits, taking into account the kind, the importance, and the extent of these benefits, as well as the need for the restrictions in order to secure those benefits? What this Court has called "strict scrutiny"– with its strong presumption against constitutionality– is normally out of place where, as here, important competing constitutional interests are implicated. See *ante,* at 2 (recognizing "conflict between interests of the highest order"); *ante,* at 18 ("important interests to be considered on *both* sides of the constitutional calculus"); *ibid.* ("balanc[ing]" the interest in privacy "against the interest in publishing matters of public importance"); *ante,* at 18–19 (privacy interest outweighed in these cases).

The statutory restrictions before us directly enhance private speech. See *Harper & Row, Publishers, Inc.* v. *Nation Enterprises,* 471 U. S. 539, 559 (1985) (describing "'freedom *not* to speak publicly'" (quoting *Estate of Hemingway* v. *Random House, Inc.*, 23 N. Y.2d 341, 348, 244 N. E.2d 250, 255 (1968))). The statutes ensure the privacy of telephone conversations much as a trespass statute ensures privacy within the home. That assurance of privacy helps to overcome our natural reluctance to discuss

private matters when we fear that our private conversations may become public. And the statutory restrictions consequently encourage conversations that otherwise might not take place.

At the same time, these statutes restrict public speech directly, deliberately, and of necessity. They include media publication within their scope not simply as a means, say, to deter interception, but also as an end. Media dissemination of an intimate conversation to an entire community will often cause the speakers serious harm over and above the harm caused by an initial disclosure to the person who intercepted the phone call. See *Gelbard* v. *United States,* 408 U. S. 41, 51–52 (1972). And the threat of that widespread dissemination can create a far more powerful disincentive to speak privately than the comparatively minor threat of disclosure to an interceptor and perhaps to a handful of others. Insofar as these statutes protect private communications against that widespread dissemination, they resemble laws that would award damages caused through publication of information obtained by theft from a private bedroom. See generally Warren & Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890) (hereinafter Warren & Brandeis). See also Restatement (Second) of Torts §652D (1977).

As a general matter, despite the statutes' direct restrictions on speech, the Federal Constitution must tolerate laws of this kind because of the importance of these privacy and speech-related objectives. See Warren & Brandeis 196 (arguing for state law protection of the right to privacy). Cf. *Katz* v. *United States,* 389 U. S. 347, 350–351 (1967) ("[T]he protection of a person's *general* right to privacy– his right to be let alone by other people– is, like the protection of his property and of his very life, left largely to the law of the individual States"); *ante,* at 2 (protecting privacy and promoting speech are "interests of the highest order"). Rather than broadly forbid this kind of legislative

enactment, the Constitution demands legislative efforts to tailor the laws in order reasonably to reconcile media freedom with personal, speech-related privacy.

Nonetheless, looked at more specifically, the statutes, as applied in these circumstances, do not reasonably reconcile the competing constitutional objectives. Rather, they disproportionately interfere with media freedom. For one thing, the broadcasters here engaged in no unlawful activity other than the ultimate publication of the information another had previously obtained. They "neither encouraged nor participated directly or indirectly in the interception." App. to Pet. for Cert. 33a. See also *ante*, at 9–10. No one claims that they ordered, counseled, encouraged, or otherwise aided or abetted the interception, the later delivery of the tape by the interceptor to an intermediary, or the tape's still later delivery by the intermediary to the media. Cf. 18 U. S. C. §2 (criminalizing aiding and abetting any federal offense); 2 W. LaFave & A. Scott, Substantive Criminal Law §§6.6(b)–(c), pp. 128–129 (1986) (describing criminal liability for aiding and abetting). And, as the Court points out, the statutes do not forbid the receipt of the tape itself. *Ante*, at 9. The Court adds that its holding "does not apply to punishing parties for obtaining the relevant information *unlawfully*." *Ante*, at 17, n. 19 (emphasis added).

For another thing, the speakers had little or no *legitimate* interest in maintaining the privacy of the particular conversation. That conversation involved a suggestion about "blow[ing] off . . . front porches" and "do[ing] some work on some of these guys," App. 46, thereby raising a significant concern for the safety of others. Where publication of private information constitutes a wrongful act, the law recognizes a privilege allowing the reporting of threats to public safety. See Restatement (Second) of Torts §595, Comment *g* (1977) (general privilege to report that "another intends to kill or rob or commit some other

serious crime against a third person"); *id.*, §652G (privilege applies to invasion of privacy tort). Cf. Restatement (Third) of Unfair Competition §40, Comment *c* (1995) (trade secret law permits disclosures relevant to public health or safety, commission of crime or tort, or other matters of substantial public concern); *Lachman* v. *Sperry-Sun Well Surveying Co.*, 457 F. 2d 850, 853 (CA10 1972) (nondisclosure agreement not binding in respect to criminal activity); *Tarasoff* v. *Regents of Univ. of Cal.*, 17 Cal. 3d 425, 436, 551 P. 2d 334, 343–344 (1976) (psychiatric privilege not binding in presence of danger to self or others). Even where the danger may have passed by the time of publication, that fact cannot legitimize the speaker's earlier privacy expectation. Nor should editors, who must make a publication decision quickly, have to determine present or continued danger before publishing this kind of threat.

Further, the speakers themselves, the president of a teacher's union and the union's chief negotiator, were "limited public figures," for they voluntarily engaged in a public controversy. They thereby subjected themselves to somewhat greater public scrutiny and had a lesser interest in privacy than an individual engaged in purely private affairs. See, *e.g.*, *ante*, at 19 (respondents were engaged in matter of public concern); *Wolston* v. *Reader's Digest Assn., Inc.*, 443 U. S. 157, 164 (1979); *Hutchinson* v. *Proxmire*, 443 U. S. 111, 134 (1979); *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 351 (1974). See also Warren & Brandeis 215.

This is not to say that the Constitution requires anyone, including public figures, to give up entirely the right to private communication, *i.e.*, communication free from telephone taps or interceptions. But the subject matter of the conversation at issue here is far removed from that in situations where the media publicizes truly private matters. See *Michaels* v. *Internet Entertainment Group, Inc.*,

5 F. Supp. 2d 823, 841–842 (C.D. Cal. 1998) (broadcast of videotape recording of sexual relations between famous actress and rock star not a matter of legitimate public concern); W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser & Keeton on Law of Torts §117, p. 857 (5th ed. 1984) (stating that there is little expectation of privacy in mundane facts about a person's life, but that "portrayal of . . . intimate private characteristics or conduct" is "quite a different matter"); Warren & Brandeis 214 (recognizing that in certain matters "the community has no legitimate concern"). Cf. *Time, Inc.* v. *Firestone,* 424 U. S. 448, 454–455 (1976) (despite interest of public, divorce of wealthy person not a "public controversy"). Cf. also *ante*, at 18 ("[S]ome intrusions on privacy are more offensive than others").

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

I emphasize the particular circumstances before us because, in my view, the Constitution permits legislatures to respond flexibly to the challenges future technology may pose to the individual's interest in basic personal privacy. Clandestine and pervasive invasions of privacy, unlike the simple theft of documents from a bedroom, are genuine possibilities as a result of continuously advancing technologies. Eavesdropping on ordinary cellular phone conversations in the street (which many callers seem to

tolerate) is a very different matter from eavesdropping on encrypted cellular phone conversations or those carried on in the bedroom. But the technologies that allow the former may come to permit the latter. And statutes that may seem less important in the former context may turn out to have greater importance in the latter. Legislatures also may decide to revisit statutes such as those before us, creating better tailored provisions designed to encourage, for example, more effective privacy-protecting technologies.

For these reasons, we should avoid adopting overly broad or rigid constitutional rules, which would unnecessarily restrict legislative flexibility. I consequently agree with the Court's holding that the statutes as applied here violate the Constitution, but I would not extend that holding beyond these present circumstances.