

Washington Law Review

Volume 96 | Number 1

3-1-2021

Hacks, Leaks, and Data Dumps: The Right to Publish Illegally Acquired Information Twenty Years After *Bartnicki V. Vopper*

Erik Ugland

Christina Mazzeo

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wlr>



Part of the [Constitutional Law Commons](#), [First Amendment Commons](#), and the [Privacy Law Commons](#)

Recommended Citation

Erik Ugland & Christina Mazzeo, Hacks, Leaks, and Data Dumps: The Right to Publish Illegally Acquired Information Twenty Years After *Bartnicki V. Vopper*, 96 Wash. L. Rev. 139 (2021).

This Article is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact lawref@uw.edu.

HACKS, LEAKS, AND DATA DUMPS: THE RIGHT TO PUBLISH ILLEGALLY ACQUIRED INFORMATION TWENTY YEARS AFTER *BARTNICKI V. VOPPER*

Erik Ugland* & Christina Mazzeo**

Abstract: This Article addresses a fluid and increasingly salient category of cases involving the First Amendment right to publish information that was hacked, stolen, or illegally leaked by someone else. Twenty years ago, in *Bartnicki v. Vopper*, the Supreme Court appeared to give broad constitutional cover to journalists and other publishers in these situations, but Justice Stevens’s inexact opinion for the Court and Justice Breyer’s muddling concurrence left the boundaries unclear. The *Bartnicki* framework is now implicated in dozens of new cases—from the extradition and prosecution of Julian Assange, to Donald Trump’s threatened suit of *The New York Times* over his tax records, to the civil suits spawned by the hack of DNC servers—so there is a pressing need for clarity.

The empirical part of this Article presents the results of a comprehensive analysis of every case applying *Bartnicki* over the past two decades to determine if lower courts have answered the questions *Bartnicki* left open and to identify points of confluence and conflict. The analysis shows courts are divided about nearly every aspect of *Bartnicki*. There is a circuit split regarding the amount of separation a publisher must have from a source in order to be protected, division about the relevance of statutory prohibitions on receiving or possessing certain information, and confusion about how to assess whether publications, particularly those involving large caches of data, address matters of public concern.

The normative part of this Article proposes a reorientation of courts’ approaches to these issues by (1) untethering liability for the procurement, receipt, and publication of information, treating each as a legally discrete act; (2) denying *Bartnicki* protection *only* to those who directly participate or assist in the illegal procurement of information; (3) treating as a First Amendment violation any law punishing those who merely receive or possess newsworthy information; and (4) engaging in more contextual analyses of “public concern.” All of these changes will help stabilize the law, strike a better balance between newsgathering and secrecy, and vitalize press and citizen communication at a time of decreasing government and private-sector transparency.

INTRODUCTION	140
I. THE RIGHT TO GATHER NEWS	146
A. The Supreme Court’s Conceptualization of the Right to Gather News	147
B. The Supreme Court’s Treatment of Newsgathering-Expression Interconnections	150

* J.D., Ph.D. Associate Professor, Diederich College of Communication, Marquette University.

** M.A., Diederich College of Communication, Marquette University. The authors would like to thank Torreon Edwards for his research assistance on this article, and the Greater Milwaukee Foundation for its funding support.

II.	THE MEANING AND INFLUENCE OF <i>BARTNICKI</i>	
	V. <i>VOPPER</i>	151
	A. The Supreme Court’s Ruling in <i>Bartnicki</i>	152
	B. Interpretations of <i>Bartnicki</i>	154
	C. Emerging Cases and the Enduring Confusion About <i>Bartnicki</i>	157
III.	ANALYSIS OF CASES	160
	A. <i>Bartnicki</i> Prong One: Publisher-Source Interaction	162
	B. <i>Bartnicki</i> Prong Two: Unlawful Acquisition	174
	C. <i>Bartnicki</i> Prong Three: Public Concern	185
IV.	REPAIRING <i>BARTNICKI</i> : THE PATH FORWARD.....	193
	A. Reverse and Replace	194
	B. Aiding and Abetting as a New Prong One Standard	196
	C. Narrow Prong Two: No Liability for Possessing Newsworthy Information	202
	D. Affirming the Contextual View of Public Concern Under Prong Three	204
	CONCLUSION	207

INTRODUCTION

The First Amendment is still not ready for Julian Assange. Eleven years after publishing a trove of classified diplomatic cables obtained through an illegal leak,¹ the WikiLeaks founder,² hacker,³ self-described

1. In 2010, Assange obtained and published on WikiLeaks thousands of classified diplomatic cables and war logs that were leaked to him by U.S. Army Intelligence Analyst Chelsea (then Bradley) Manning. Those materials contradicted official military accounts of U.S. operations in Iraq and Afghanistan. The most notable was the so-called “Collateral Murder” video showing a 2007 U.S. airstrike in Iraq that killed at least a dozen civilians, including two Reuters journalists. See Elisabeth Bumiller, *Video Shows U.S. Killing of Reuters Employees*, N.Y. TIMES (Apr. 5, 2010), <https://www.nytimes.com/2010/04/06/world/middleeast/06baghdad.html> [https://perma.cc/MBZ8-PNZQ]; *Collateral Murder*, WIKILEAKS (Apr. 5, 2010), <https://collateralmurder.wikileaks.org/> [https://perma.cc/H7WM-KNDS].

2. Assange, an Australian citizen, is the principal founder of WikiLeaks, which was launched in 2006 to provide a vehicle for disseminating information from leakers and whistleblowers while also producing original reporting. Raffi Khatchadourian, *No Secrets*, NEW YORKER (May 31, 2010), <https://www.newyorker.com/magazine/2010/06/07/no-secrets> [https://perma.cc/GJS6-HAU6]. Assange served as its editor-in-chief from 2006 until September 26, 2018, when WikiLeaks announced that Kristinn Hrafnsson would take over as editor, but that Assange would remain as publisher. WikiLeaks (@wikileaks), TWITTER (Sept. 26, 2018, 12:35 PM), https://twitter.com/wikileaks/status/1045034219939016704?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwtterm%5E1045034219939016704%7Ctwgr%5E%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fmashable.com%2Farticle%2Fjulian-assange-no-longer-editor-wikileaks%2F (last visited Jan. 17, 2021).

3. Assange was an active hacker for much of his youth and into adulthood. When he was twenty, he pleaded guilty to twenty-five counts of computer fraud but was ultimately given a light sentence. Khatchadourian, *supra* note 2.

journalist,⁴ and ruthless transparency advocate⁵ remains in a British jail awaiting possible extradition to the United States to face an eighteen-charge indictment over his alleged role in soliciting, receiving and publishing secret information affecting national defense.⁶ Even if Assange is extradited,⁷ the outcome of his trial would be impossible to predict, because much of the relevant law remains inchoate. Nearly ninety years after the United States Supreme Court first struck down a government action limiting press freedom,⁸ U.S. courts have not fully answered some foundational questions about the boundaries of the First Amendment’s Press Clause⁹ and the institutions, individuals, and activities to which it should be applied. They are also years behind in grappling with emergent technology and the atomized ways in which news and information are now gathered and shared.

An Assange prosecution could serve as a crucible for all of this, but that case is not singularly important; it is one of dozens that pose the same

4. Scott Shane & Steven Erlanger, *Assange: A Self-Proclaimed Foe of Secrecy Who Inspires Both Admiration and Fury*, N.Y. TIMES (Apr. 11, 2019), <https://www.nytimes.com/2019/04/11/us/politics/wikileaks-assange.html> [<https://perma.cc/M3D2-R5K7>] (“[Assange] has always described himself as a journalist . . .”).

5. See, e.g., Raffi Khatchadourian, *Julian Assange, A Man Without a Country*, NEW YORKER (Aug. 14, 2017), <https://www.newyorker.com/magazine/2017/08/21/julian-assange-a-man-without-a-country> [<https://perma.cc/33RF-TW7P>] (“‘If it’s true information, we don’t care where it comes from,’ [Assange] said. ‘Let people fight with the truth, and when the bodies are cleared there will be bullets of truth everywhere.’”).

6. Superseding Indictment at 1, *United States v. Assange*, No. 1:18-cr-111 (E.D. Va. May 23, 2019) [hereinafter *Assange Superseding Indictment*]. A second superseding indictment was issued in June 2020. Second Superseding Indictment, *United States v. Assange*, No. 1:18-cr-111 (E.D. Va. June 24, 2020) [hereinafter *Assange Second Superseding Indictment*]. It adds additional information and broadens the scope of the inquiry but does not add any additional charges. *Id.* References in this Article to the “Assange indictment” refer to the first superseding indictment unless otherwise specified. Assange is in jail for violating his bail conditions following his arrest for allegedly sexually assaulting two women in Sweden. *Julian Assange: A Timeline of Wikileaks Founder’s Case*, BBC (Nov. 19, 2019), <https://www.bbc.com/news/world-europe-11949341> [<https://perma.cc/6VJU-6UDK>]. Those charges have been dropped but he remains in jail while a British court considers the U.S. Justice Department’s request to extradite Assange to the United States. *Id.*

7. On Jan. 4, 2021, a British judge ruled that Assange could not be extradited because of his unstable mental state and the likelihood that he would be held in isolation in a United States prison. Ben Quinn, *Julian Assange Cannot Be Extradited to US, British Judge Rules*, THE GUARDIAN (Jan. 4, 2021), <https://www.theguardian.com/media/2021/jan/04/julian-assange-cannot-be-extradited-to-us-british-judge-rules> [<https://perma.cc/53DJ-QZJJ>]. United States prosecutors are appealing that ruling. *Id.* Importantly, in her ruling, Judge Vanessa Baraitser did not reject the merits of the United States indictment, conceding that Assange could be prosecuted without violating his rights if United States prosecutors proved their case at trial. *Id.*

8. *Near v. Minnesota*, 283 U.S. 697, 701 (1931) (striking down, under the First and Fourteenth Amendments, a state law allowing judges to enjoin “malicious, scandalous and defamatory” publications).

9. U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom . . . of the press . . .”).

vital question: Can people be held civilly or criminally liable for publishing information that was illegally acquired by someone else? The United States Supreme Court has already addressed this question in two of its most important First Amendment cases, *New York Times Co. v. United States (Pentagon Papers)*¹⁰ and *Bartnicki v. Vopper*.¹¹ But neither of those cases, nor the two together, provides a complete answer. Because *Pentagon Papers* involved an injunction halting publication, which is exceedingly rare, it is distinguishable from Assange's case and most others like it. *Bartnicki* is more on point. It addressed the broadcast of an illegally intercepted and recorded phone conversation between people involved in a labor dispute between a school district and teacher's union. The Court upheld the right of a radio host who obtained the recording to broadcast it, and concluded that people may disseminate illegally acquired information provided (1) they played no part in the illegal interception; (2) they lawfully acquired the information; and (3) the information relates to a matter of public concern.¹²

The *Bartnicki* ruling was a leap forward but it left unanswered questions: When do journalists become so closely involved with their sources that they forfeit *Bartnicki* protection? In what circumstances do journalists obtain information *unlawfully*? What constitutes a matter of "public concern"? Finally, who is a journalist, or more precisely, what types of defendants are eligible for First Amendment protections in these situations? Despite these uncertainties, journalists and commentators often overstate the clarity and scope of *Bartnicki* when discussing it in the context of new hacking and leaking cases, presenting it as essentially a grant of absolute immunity for journalists and publishers who use illegally acquired information.¹³ Those accounts typically overlook the "public concern" prong of the Court's test, which limits *Bartnicki*'s relevance in cases like *Bollea v. Gawker*¹⁴ involving the publication of a celebrity sex tape.¹⁵ They also tend to focus on Justice Stevens's opinion of the Court

10. 403 U.S. 713 (1971).

11. 532 U.S. 514 (2001).

12. *Id.* at 525. The Court did not explicitly present this as a test, but these were the conditions it highlighted as justification for its ruling for the defendants. *Id.*

13. See discussion *infra* section II.C.

14. 170 So. 3d 125 (Fla. Dist. Ct. App. 2015).

15. *Id.*; see also *Bollea v. Gawker Media, LLC*, No. 12012447 CI-01, 2016 Fla. Cir. LEXIS 4710 (Fla. Cir. Ct. June 8, 2016). Terry Bollea, a professional wrestler known by the name Hulk Hogan, sued Gawker media for invasion of privacy after Gawker published a link to an explicit video of Bollea engaged in a sexual encounter. *Bollea*, 170 So. 3d at 127. The video was recorded without Bollea's knowledge or consent. *Id.* After rejecting Gawker's claim that the video was newsworthy because Bollea is both a celebrity and someone who has publicly discussed his past sexual

in *Bartnicki* without recognizing the ways in which it was both narrowed and obfuscated by the concurring opinion of Justice Breyer.¹⁶ These inexact media reports mask the fact that *Bartnicki* is not the robust, anchoring precedent that people assume but a cautious, narrow and ambiguous first step, and a precedent whose persuasiveness and durability are even more uncertain in light of new technologies and changes in the makeup of the Court.

Resolving these issues is especially urgent in light of broader social trends—authoritarian drift,¹⁷ declining government transparency,¹⁸ withering press freedom¹⁹—but also because new cases and controversies are regularly arising that expose the post-*Bartnicki* instability:

In a March 2017 tweet that he later deleted, *New York Times* columnist Nicholas Kristof urged employees of the IRS to leak President Donald Trump’s tax returns to him.²⁰ Would Kristof be protected by *Bartnicki* against a felony charge of soliciting a crime, or would his actions be treated as “participation” under prong one of the *Bartnicki* test?

In January 2019, the *National Enquirer* began publishing private text messages sent by Amazon CEO Jeff Bezos to his mistress, Lauren

experiences, the court awarded Bollea \$115 million in compensatory damages and \$25 million in punitive damages. Nick Madigan, *Jury Tacks on \$25 Million to Gawker’s Bill in Hulk Hogan Case*, N.Y. TIMES (Mar. 21, 2016), <https://www.nytimes.com/2016/03/22/business/media/hulk-hogan-damages-25-million-gawker-case.html#:~:text=A%20Florida%20jury%20assessed%20Gawker,in%20compensatory%20damages%20last%20week> [<https://perma.cc/LE86-6L38>]. Gawker and its founder, Nick Denton, subsequently filed for bankruptcy. Lukas I. Alpert, *Gawker Files for Bankruptcy, Will Be Put Up for Auction*, WALL ST. J. (June 10, 2016), <https://www.wsj.com/articles/gawker-declaring-bankruptcy-will-be-put-up-for-auction-1465578030> [<https://perma.cc/9QD5-RQM9>].

16. See discussion *infra* section II.B.

17. See generally STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* (2018); Gideon Rose, *Autocracy Now*, FOREIGN AFFS., Sept.–Oct. 2019, at 8.

18. See generally *U.S. Hits New Low in Global Corruption Index*, TRANSPARENCY INT’L (Jan. 23, 2020), <https://www.transparency.org/en/press/2019-cpi-us-hits-new-low> [<https://perma.cc/PM77-RBM3>] (citing *Corruption Perceptions Index*, TRANSPARENCY INT’L (2019), <https://www.transparency.org/en/cpi/2019> [<https://perma.cc/9HSF-HZWV>]); Micah Lee, *The Metadata Trap*, THE INTERCEPT (Aug. 4, 2019, 4:00 AM), <https://theintercept.com/2019/08/04/whistleblowers-surveillance-fbi-trump/> [<https://perma.cc/7HGY-3XZ5>] (describing Trump Administration use of data surveillance to track and prosecute government leakers).

19. See generally *Global Expression Report 2018-19: Global Freedom of Expression at a Ten-Year Low*, ARTICLE19 (Dec. 2, 2019), <https://www.article19.org/resources/global-expression-report-2018-19-global-freedom-of-expression-at-a-ten-year-low/> [<https://perma.cc/SX7G-ED32>].

20. Nicholas Kristof (@NickKristof), TWITTER (Mar. 5, 2017, 5:00 PM), https://twitter.com/NickKristof/status/838554838329872384?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E838554838329872384%7Ctwgr%5E%7Ctwcon%5E%5E1_&ref_url=https%3A%2F%2Fthehill.com%2Fhomenews%2Fmedia%2F322477-nyt-columnist-urges-irs-employees-to-unlawfully-leak-trumps-tax-returns (last visited Jan. 17, 2021) (“But if you’re in IRS and have a certain president’s tax return that you’d like to leak, my address is: NYT, 620 Eighth Ave, NY NY 10018.”).

Sanchez, which the *Enquirer* obtained by paying \$200,000 to Sanchez's brother.²¹ Is the *Enquirer* covered by *Bartnicki*, or did the payment make this an "unlawful acquisition" under prong two?

In July 2015, ESPN reporter Adam Schefter tweeted a leaked image of NFL player Jason Pierre-Paul's private medical record indicating that Pierre-Paul's finger had been amputated following a fireworks accident.²² Does *Bartnicki* shield ESPN and Schefter, or does this material lie outside of the "public concern" condition of prong three?

Similar cases are emerging in other jurisdictions and in cases involving citizen-journalists, activists, and ordinary social media users who want to share newsworthy information that was illegally acquired or leaked by someone else.²³ These cases highlight enduring uncertainties about journalistic identity and its constitutional significance, something that is also implicated by the case against Assange, whom prosecutors have taken pains to present as a hacker and saboteur, not a journalist.²⁴

Another question that has emerged since *Bartnicki* is whether publishers lose First Amendment protection if they fail to exercise

21. Michael Rothfeld, Joe Palazzolo & Alexandra Berzon, *How the National Enquirer Got Bezos' Texts: It Paid \$200,000 to His Lover's Brother*, WALL ST. J. (Mar. 18, 2019, 8:06 PM), <https://www.wsj.com/articles/how-the-national-enquirer-got-bezos-texts-it-paid-200-000-to-his-lovers-brother-11552953981> [<https://perma.cc/KH3N-ENGA>].

22. Adam Schefter (@AdamSchefter), TWITTER (July 8, 2015, 4:04 p.m.), <https://twitter.com/AdamSchefter/status/618918579770146816> (last visited Jan. 17, 2021) ("ESPN obtained medical charts that show Giants DE Jason Pierre-Paul had right index finger amputated today.").

23. In July 2019, the *Daily Mail* in London published leaked diplomatic cables from Britain's ambassador to the United States, Kim Darroch, in which Darroch privately lambasted President Trump. British police warned journalists that publishing the cables "may also be a criminal matter." Henry Martin, *Terror Cops Probe Leak of Darroch Emails About Trump: Scotland Yard Is Accused of 'Police State' Tactics with Threat to Prosecute Publishers Who Print More Secrets*, DAILY MAIL (July 13, 2019, 4:34 AM), <https://www.dailymail.co.uk/news/article-7242257/UK-police-launch-investigation-leak-ambassador-Sir-Kim-Darrochs-diplomatic-emails.html> [<https://perma.cc/8QZ5-NPLU>]. That same month, Brazilian President Jair Bolsonaro threatened criminal charges against Brazil-based *Guardian* reporter Glenn Greenwald after he published material hacked from a cellphone conversation between a judge and prosecutors. *Brazilians Show Support for American Journalist Greenwald*, AP NEWS (July 30, 2019), <https://www.apnews.com/cd8c55f4a9ec49cc83724cda81d32be7> [<https://perma.cc/E5MG-9E8C>]. The criminal charges were later dropped by the government in appealing that ruling. *Brazilian Prosecutors Appeal Judge's Order, Refuse to Drop Criminal Charges Against Journalist Glenn Greenwald*, FREEDOM OF THE PRESS FOUND. (Mar. 3, 2020), <https://freedom.press/news/brazilian-prosecutors-appeal-judges-order-refuse-to-drop-criminal-charges-against-journalist-glenn-greenwald/> [<https://perma.cc/W2W5-7WMA>].

24. See Press Release, Dept. of Just., Remarks from the Briefing Announcing the Superseding Indictment of Julian Assange (May 23, 2019), <https://www.justice.gov/opa/press-release/file/1165636/download> [<https://perma.cc/2MYD-KP9H>] ("Julian Assange is no journalist. This made plain by the totality of his conduct as alleged in the indictment—i.e., his conspiring with and assisting a security clearance holder to acquire classified information, and his publishing the names of human sources.").

editorial scrutiny over the information they disclose. Do “data dumpers” who indiscriminately post leaked files online qualify for protection? The dissenters in *Bartnicki* anticipated this problem and argued that the majority’s approach would allow people to “anonymously launder” illegally acquired records by simply handing them off to third parties.²⁵ This is essentially what happened in 2016 when WikiLeaks published thousands of private emails that were hacked from Democratic National Committee (DNC) staff members and from Hillary Clinton’s campaign chair, John Podesta, apparently by Russian operatives. The DNC hack has already spawned two civil cases, yielding diametric rulings from two federal district courts.²⁶ These cases also highlight the editorial scrutiny question because WikiLeaks likely did not review each of the more than 70,000 email messages and attachments that it published.²⁷

This Article provides a comprehensive review of all lower court cases applying *Bartnicki* to understand how the case has been interpreted over the past twenty years and how lower courts have answered the questions left open by the Supreme Court in 2001. The Article also critically evaluates the courts’ analyses and offers normative suggestions for unifying this area of law, both through a reversal and reimagining of *Bartnicki* and, alternatively, through a set of interpretive adjustments to each prong of the *Bartnicki* test.

Part I traces the evolution of the right to gather news and describes the Supreme Court’s mixed guidance on these issues, both with regard to the general right to seek information and with regard to the scope of protections in situations like *Bartnicki* where newsgathering and expression are closely intertwined.

Part II summarizes the review of cases applying *Bartnicki*, showing significant divisions among the courts over the meaning and scope of each prong of the *Bartnicki* test, including splits between several circuit courts.

25. *Bartnicki v. Vopper*, 532 U.S. 514, 551 (2001) (Rehnquist, C.J., dissenting).

26. In one case, Democratic National Committee (DNC) donors and staffers sued the Trump Campaign for allegedly collaborating with Russian hackers who accessed the plaintiffs’ private email communications, which were later published by WikiLeaks. That claim was dismissed by a federal district court in March 2019 after the court found no evidence of collaboration between the defendants and the suspected hackers. *Cockrum v. Donald J. Trump for President, Inc.*, 365 F. Supp. 3d 652 (E.D. Va. 2019). In the second case, decided July 30, 2019, a federal district court dismissed a DNC lawsuit against Assange and WikiLeaks (among other defendants) for its role in publishing the hacked emails because the defendants did not actually participate in the hack. *Democratic Nat’l Comm. (DNC) v. Russian Fed’n*, 392 F. Supp. 3d 410 (S.D.N.Y. 2019).

27. WikiLeaks published 20,000 DNC emails just four days after receiving them from the Russian hackers. 1 SPECIAL COUNSEL ROBERT S. MUELLER, III, U.S. DEP’T OF JUST., REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 46 (2019), <https://www.justice.gov/storage/report.pdf> [<https://perma.cc/JUQ3-276H>]. The organization later published, over the course of a month, 50,000 of Podesta’s e-mails and related documents. *Id.* at 48.

With regard to prong one, courts disagree about the amount of involvement a publisher must have with a source before becoming a “participant” in an illegal acquisition of information. Some courts have drawn support from Justice Stevens’s concurring opinion to deny *Bartnicki* protection to those who knew the information they received was illegally acquired and to those who encouraged illegal leaks. On prong two, at least one circuit court has held that reporters lose *Bartnicki* protection when requesting certain non-public records—even when those records are newsworthy and are supplied by the government—creating an extraordinary loophole to the *Bartnicki* framework. As for prong three, courts continue to disagree about both the definition of “public concern” and about whether to assess it—particularly in hacking and data-dump cases—by examining individual revelations or the impact of the totality of the disclosures.

Part III outlines proposals for reorienting the law by, at the broadest level, completely severing the connection between the right to publish information and the legality of its procurement. More specifically, it suggests applying a modified aiding and abetting standard under prong one, denying *Bartnicki* protection *only* to those who are actively involved in the illegal procurement of information. With regard to prong two, it proposes the elimination of any liability for those who merely receive or possess illegally acquired but newsworthy information. It also endorses a contextually driven concept of public concern that considers the newsworthiness of the totality of what is published for determining the applicability of *Bartnicki* while still holding publishers accountable for harms caused by the content of what they publish.

I. THE RIGHT TO GATHER NEWS

This Article focuses on a small but increasingly vital category of First Amendment cases involving the intersection of free expression rights and rights to gather news and information. In these cases, the government or a civil litigant seeks to suppress or subsequently punish the dissemination of information, at least in part because of some alleged problem with the means by which it was acquired. The Supreme Court did not begin to address this confluence of newsgathering and expression until the 1970s. In fact, the Court did not even begin to develop its free press jurisprudence until 1931 in *Near v. Minnesota*²⁸—the first case in which the Court struck down a government restriction on speech in a traditional mass medium.²⁹

28. 283 U.S. 697 (1931).

29. *Id.* at 722–23. The Court had decided a handful of free speech cases prior to *Near*, but all of

Throughout the next several decades, most of the Court's First Amendment decisions involved obscenity, defamation, or other cases focused on harms associated with the speech itself. In many of these cases, the Court made reference to the press or to media defendants but never clarified whether the Speech Clause³⁰ and Press Clause³¹ should be treated as discrete sources of protection or as a collective statement about free expression, and it never explained whether and to what extent the First Amendment protects pre-publication activities. Four decades after *Near*, the Court started to confront these questions, but despite tectonic shifts in communications practices over the past twenty years, the rise of citizen-journalists and the proliferation of new surveillance tools and distributions platforms, the Court has not offered any significant insights on these issues since *Bartnicki* in 2001.

A. *The Supreme Court's Conceptualization of the Right to Gather News*

The Supreme Court has only addressed the right to gather news³² in a handful of cases. The first was *Branzburg v. Hayes*,³³ in which the Court acknowledged that newsgathering “is not without its First Amendment protections”³⁴ and that “without some protection for seeking out the news, freedom of the press could be eviscerated.”³⁵ Despite those affirmations, *Branzburg* was a step backward in that the Court refused to recognize a First Amendment-based reporter's privilege—the right of journalists to quash subpoenas seeking their work products or testimony, particularly where confidential sources might be exposed. The Court in *Branzburg* was deeply divided, however, and because the fifth vote was supplied by

them involved speakers and pamphleteers. *See, e.g.*, *Schenck v. United States*, 249 U.S. 47 (1919) (involving the distribution of leaflets opposing the military draft); *Abrams v. United States*, 250 U.S. 616 (1919) (involving the distribution of leaflets opposing the United States' involvement in World War I); *Gitlow v. New York*, 268 U.S. 652 (1925) (involving the distribution of a printed manifesto urging worker strikes and revolts to help institute a socialist government).

30. U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . .”).

31. *Id.* (“Congress shall make no law . . . abridging the freedom . . . of the press . . .”).

32. It is important to distinguish the right to *gather* information from the right to *receive* information. The Court has recognized the latter right in several cases, but none of these involved the pursuit of new information; they involved government attempts to interrupt the flow of information from one party to another. *See, e.g.*, *Stanley v. Georgia*, 394 U.S. 557 (1969) (upholding right of citizen to receive and possess obscene material in his home); *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965) (striking down law blocking mail distribution of communist literature).

33. 408 U.S. 665 (1972).

34. *Id.* at 707.

35. *Id.* at 681.

Justice Powell, who urged a case-by-case approach,³⁶ the decision left the door open for lower courts to recognize some protections in contexts dissimilar from those in *Branzburg*.³⁷ This is precisely what happened in the subsequent decades. Most of the federal circuit courts now recognize some form of the reporter's privilege,³⁸ and forty state legislatures have passed shield laws providing reporters with statutory protections against certain subpoenas,³⁹ although Congress has still not passed a federal shield law.

In the years following *Branzburg*, the Supreme Court continued to emphasize the *absence* of constitutional protections for newsgathering. In a series of cases in the 1970s, the Court rejected journalists' claims of a First Amendment right of access to prisons and prisoners.⁴⁰ In 1978, the Court refused to recognize a First Amendment shield against newsroom searches,⁴¹ and the following year it held that journalists and news organizations are not immune from inquiries into their editorial decision-making processes by libel litigants.⁴² More than a decade later, the Court reiterated in *Cohen v. Cowles Media Co.*⁴³ that journalists and the press have no First Amendment defense against the application of generally applicable laws.⁴⁴ The Court ruled in *Cohen* that journalists could be sued for breaking their promises of confidentiality with sources.⁴⁵ The Court has also repeatedly rejected attempts by journalists to gain access to places where the public generally is not permitted.⁴⁶

36. *Id.* at 710 (Powell, J., concurring).

37. *Branzburg* and the associated cases decided concurrently—*In re Pappas*, 408 U.S. 665 (1972) and *United States v. Caldwell*, 408 U.S. 665 (1972)—involved grand jury subpoenas seeking confidential source information.

38. See *Reporter's Privilege Compendium*, REPS. COMM. FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/reporters-privilege/> [<https://perma.cc/H7LP-EP5H>].

39. *Id.*

40. *Pell v. Procunier*, 417 U.S. 817 (1974) (upholding California regulations effectively preventing journalists from interviewing prisoners); *Saxbe v. Wash. Post Co.*, 417 U.S. 843 (1974) (upholding federal regulations denying press access to prisoners); *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978) (denying right of broadcast journalists to observe and record conditions in county jail).

41. *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978) (upholding constitutional validity of police execution of a search warrant on the premises of a university newspaper). In response to *Zurcher*, the U.S. Congress provided a statutory fix by passing a law explicitly prohibiting searches of newsrooms except under certain conditions. See Privacy Protection Act of 1980, 42 U.S.C. § 2000aa.

42. *Herbert v. Lando*, 441 U.S. 153 (1979).

43. 501 U.S. 663 (1991).

44. *Id.* at 669 (“[G]enerally 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.”).

45. *Id.* at 671–72.

46. See *Reporter's Privilege Compendium*, *supra* note 38. Lower courts have followed suit. See, e.g., *Flynt v. Rumsfeld*, 245 F. Supp. 2d 94 (D.D.C. 2003), *aff'd on other grounds*, 355 F.3d 697

Although the Court has recognized a First Amendment-based right of access to attend some judicial proceedings and to access associated judicial records,⁴⁷ it has made clear that those rights belong to the “public and press”⁴⁸ and are less about enabling news coverage than honoring traditions and ensuring fair processes. Despite acknowledging in *Richmond Newspapers, Inc. v. Virginia*⁴⁹ that “it is difficult for [citizens] to accept what they are prohibited from observing,”⁵⁰ the Court has explicitly rejected the notion that the First Amendment compels the government to provide access to government-controlled records⁵¹ or places.⁵²

Although the Supreme Court has not directly addressed the right to capture images, video, or data in public places, several federal courts have begun to recognize a right to record police officers⁵³ or other government officials⁵⁴ while they are on duty. Some courts have framed this as part of a broader right to photograph and record “matters of public interest”⁵⁵—sometimes even on private property⁵⁶—and have emphasized the

(D.C. Cir. 2004) (rejecting First Amendment right of journalists to accompany troops during military operations); *City of Oak Creek v. King*, 436 N.W.2d 285 (Wis. 1989) (finding no First Amendment problem with disorderly conduct charge against reporter who refused to leave scene of a plane crash).

47. *Press-Enter. Co. v. Superior Ct. of Cal.*, 478 U.S. 1 (1986); *Press-Enter. Co. v. Superior Ct. of Cal.*, 464 U.S. 501 (1984); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

48. *Richmond Newspapers*, 448 U.S. at 558.

49. 448 U.S. 555 (1980).

50. *Id.* at 572.

51. *McBurney v. Young*, 569 U.S. 221 (2013).

52. *See, e.g., Pell v. Procunier*, 417 U.S. 817, 834 (1974) (“The Constitution does not . . . require government to access the press special access to information not shared by members of the public generally.”); *Houchins v. KQED, Inc.*, 438 U.S. 1, 12 (1978) (“Whether government should open penal institutions . . . is a question of policy which a legislative body might appropriately resolve . . .”). Congress and all fifty state legislatures have substantially filled that void, however, by passing freedom of information laws that establish at least a presumption of access to most government records and meetings. *See Open Government Guide*, REPS. COMM. FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/open-government-guide/> [<https://perma.cc/DY9Y-8T9H>].

53. *See, e.g., ACLU of Ill. v. Alvarez*, 679 F.3d 583 (7th Cir. 2012) (issuing a preliminary injunction against enforcement of Illinois eavesdropping law making it a felony to record audio of police officers); *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011) (rejecting police officers’ claim of qualified immunity because their arrest of citizen who recorded them in public was a violation of the citizen’s clearly established First Amendment rights); *Fordyce v. City of Seattle*, 55 F.3d 436 (9th Cir. 1995) (reversing a lower court’s summary judgment dismissal of an assault claim against police officers who allegedly sought to intimidate citizen who had been recording protesters).

54. *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (recognizing “the right to gather information about what public officials do on public property”).

55. *Id.*

56. *See Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018) (striking down state “Ag-Gag” law limiting ability of activists and journalists to document animal abuse on large farms and ranches).

indivisibility of newsgathering and news dissemination.⁵⁷ This domain of cases is still evolving but shows that lower courts are at least starting to give shape to the Supreme Court's vague recognition in *Branzburg* of a right to gather news, even though the Court itself has done little to elaborate.

B. *The Supreme Court's Treatment of Newsgathering-Expression Interconnections*

The Supreme Court and lower courts have been clearer and more solicitous in cases where newsgathering is closely linked with expression. In *Pentagon Papers*, the fact that the key information was supplied via an illegal leak was not enough to stop the Court from striking down an order prohibiting publication.⁵⁸ And lower courts have held that even though journalists are not immune from liability for laws they break⁵⁹ or torts they commit⁶⁰ while gathering news, those claims must be disentangled from claims targeting what they publish or broadcast.⁶¹

The Supreme Court's most thorough statements on the intersection of newsgathering and dissemination have come in a line of cases involving attempts to suppress or punish the publication of information that was not meant to be public. In *Smith v. Daily Mail Publishing Co.*,⁶² the Court vacated the criminal prosecution of reporters who violated a state law by publishing the name of a juvenile crime suspect. In doing so, the Court established a formidable standard: when someone "lawfully obtains truthful information about a matter of public significance," the state may not punish its publication "absent a need to further a state interest of the highest order."⁶³ The Court did not elaborate about what might constitute *unlawful* acquisition, nor whether this fact is always dispositive.

In the other cases in this line, however, the Court found criminal or civil penalties to be unconstitutional when targeting the publication of

57. *Alvarez*, 679 F.3d at 595; see also *Wasden*, 878 F.3d at 1203 ("[C]laim[ing] that the act of creating an audiovisual recording is not speech protected by the First Amendment . . . is akin to saying that even though a book is protected by the First Amendment, the process of writing the book is not.").

58. See *N.Y. Times Co. v. United States (Pentagon Papers)*, 403 U.S. 713 (1971).

59. See, e.g., *United States v. Matthews*, 209 F.3d 338 (4th Cir. 2000) (rejecting First Amendment defense of journalist who downloaded child pornography, ostensibly as research for a story on the subject).

60. *Food Lion, Inc. v. Cap. Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999).

61. *Id.* (affirming judgment against defendant news organization for tort violations—trespass, breach of the duty of loyalty—committed by employees as part of an undercover investigation but reversing the awarding of publication-related damages); see *infra* text accompanying notes 277–280.

62. 443 U.S. 97 (1979).

63. *Id.* at 103.

private information that: was disclosed in open court (*Cox Broadcasting Corp. v. Cohn*⁶⁴), was revealed in a proceeding closed to the public but open to journalists (*Oklahoma Publishing Co. v. District Court*⁶⁵), was the subject of a closed proceeding but was independently discovered by journalists (*Landmark Communications, Inc. v. Virginia*⁶⁶), or was provided to journalists by mistake (*Florida Star v. B.J.F.*⁶⁷).

This was the general state of the law leading up to the Court's decision in *Bartnicki* in 2001. The Court had acknowledged, as a sort of abstract principle, that the First Amendment implicitly protects a right to gather news, but the Court had repeatedly rejected the pleas of journalists to provide specific layers of privileges not enjoyed by the public generally. Where the Court had been solicitous of press litigants, however, was in cases in which expressive rights were more tightly intertwined with newsgathering—a situation presented again by the facts of *Bartnicki*.

II. THE MEANING AND INFLUENCE OF *BARTNICKI V. VOPPER*

Bartnicki reached the Supreme Court at the dawn of the Digital Age—a period in which legislatures were still trying to protect internet users from salacious content⁶⁸ while at the same time a generation of internet utopians were declaring cyberspace to be a wholly differentiated sphere of human existence beyond the reach of traditional law or national boundaries.⁶⁹ The Court has always been reluctant to make wide-ranging pronouncements, especially where dynamic spheres of society are involved, and indeed the justices in *Bartnicki* expressed some hesitation about trying to map legal boundaries during a period of unusual technological tumult.⁷⁰ Nevertheless, twenty years later, courts are still struggling to understand and apply *Bartnicki* and are now faced with a range of new speech-privacy conflicts and tech-enabled newsgathering

64. 420 U.S. 469 (1975).

65. 430 U.S. 308 (1977).

66. 435 U.S. 829 (1978).

67. 491 U.S. 524 (1989).

68. Communications Decency Act of 1996, 47 U.S.C. § 609; S. 652, 104th Cong. § 501, 110 Stat. 133 (1996) (enacted).

69. See John Perry Barlow, *A Declaration of the Independence of Cyberspace*, ELEC. FRONTIER FOUND. (Feb. 8, 1996), <https://www.eff.org/cyberspace-independence> [<https://perma.cc/M2W9-NH4W>].

70. *Bartnicki v. Vopper*, 532 U.S. 514, 541 (2001) (Breyer, J., concurring) (“[I]n 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 . . . are genuine possibilities as a result of continuously advancing technologies.”).

and surveillance practices, so there is an urgent need to find clarity and for the Court to reengage with these issues.

A. *The Supreme Court's Ruling in Bartnicki*

The *Bartnicki* case arose in the unremarkable context of a labor negotiation between a teacher's union and a school board. When the head of the union, Gloria Bartnicki, and its chief negotiator, Anthony Kane, were on a private cell phone conversation discussing the matter, someone (whose identity was never discovered) intercepted and recorded their exchange. The conversation was mostly about strategy but included a sensational declaration by Kane that if the school board did not agree to a 3% pay raise, "we're gonna have to go to their, their homes To blow off their front porches, we'll have to do some work on some of those guys."⁷¹ The recording was given to a local political operative, Jack Yocum,⁷² who eventually gave it to Fredrick Vopper—a radio host who, on multiple occasions, put salient parts of the recording on the air. Bartnicki and Kane sued Yocum and Vopper for violating federal and state wiretap laws,⁷³ which prohibit the intentional interception of private electronic communications. Those laws also criminalize the disclosure of the contents of illegal interceptions by anyone who knew, or had reason to know, that the material been illegally intercepted.⁷⁴

Four decades earlier, in *Pentagon Papers*, the Court made clear that the illegal actions of a source in acquiring and disclosing information are not *automatically* imputed to a journalist who receives that information.⁷⁵ But the justices did not foreclose the possibility that in other contexts a source's illegal actions could be relevant in deciding an action against a journalist. The justices also did not address the extent to which actions by the journalists themselves could undo their freedom to publish. The Court revisited these issues in *Florida Star*, posing but not reaching the following question: "[W]hether, in cases where information has been acquired unlawfully . . . government may ever punish not only the

71. *Id.* at 518–19 (majority opinion).

72. Yocum testified that someone had left a tape recording of the phone call in his mailbox. *Id.* at 519.

73. *Id.* at 520 (first citing 18 U.S.C. § 2511(1)(a); and then citing 18 PA. CONS. STAT. § 5725(a) (2000)).

74. The Court indicated that both Yocum and Vopper had reason to know the recording was illegally captured, even if they did not know the identity of the interceptor. *Id.* at 517–18, 525.

75. As the Court in *Bartnicki* noted, none of the justices in *Pentagon Papers* placed any weight on the fact that the information the defendant intended to publish had been stolen by its source. *Id.* at 528.

unlawful acquisition, but the ensuing publication as well.”⁷⁶ In *Bartnicki*, Justice Stevens, writing for the Court, framed the question more narrowly: “Where the punished publisher of information has obtained the information in question in a manner lawful in itself but from a source who has obtained it unlawfully, may the government punish the ensuing publication of that information based on the defect in a chain?”⁷⁷

The Court in *Bartnicki* held that the wiretap statutes’ prohibitions on capturing and using private communications were content-neutral, but it construed the “naked prohibition against *disclosures* . . . as a regulation of pure speech.”⁷⁸ Such communications, the Court held, are subject to the more exacting standard outlined in *Daily Mail* barring punishment for publication “absent a need to further a state interest of the highest order.”⁷⁹ The Court concluded that neither the government’s interest in eliminating the incentive to intercept private communications⁸⁰ nor the need to protect communicators’ privacy was sufficiently weighty to justify the burden on speech. The Court acknowledged that the privacy of communications is an especially important interest that is threatened by the possibility of public disclosure but noted that this must be balanced against the First Amendment interests implicated by punishing the dissemination of newsworthy information. The conversation between Kane and Bartnicki, the Court concluded, “unquestionably”⁸¹ involved matters of public concern⁸² and therefore “implicate[d] the core purposes of the First Amendment.”⁸³

The concurring opinion of Justice Breyer, joined by Justice O’Connor, was principally directed to this last point. Breyer argued that the majority gave too little weight to the government’s interests in protecting communicative privacy—an interest that Breyer said is, like speech itself, one “of the highest order.”⁸⁴ He framed the wiretap laws as simultaneously

76. *Fla. Star v. B.J.F.*, 491 U.S. 524, 535 n.8 (1989) (emphasis omitted). Because the defendant in *Florida Star* had lawfully obtained the records at issue, the Court did not have a reason to address this question directly, so the Court reserved the question for future consideration. *Id.*

77. *Bartnicki*, 532 U.S. at 528 (quoting *Boehner v. McDermott (Boehner I)*, 191 F.3d 463, 484–85 (D.C. Cir. 1999) (Sentelle, J., dissenting)).

78. *Id.* at 526 (emphasis added).

79. *Id.* at 103; *see also supra* text accompanying notes 62–63.

80. The Court was skeptical that punishing disclosures would actually inhibit illegal interceptions and noted that the plaintiffs had provided no evidence to justify that claim. In any case, the Court held, the more efficient way to create such a deterrence is to punish more strictly the act of illegal interception itself. *Bartnicki*, 532 U.S. at 530–31.

81. *Id.* at 535.

82. *Id.*

83. *Id.* at 533–34.

84. *Id.* at 538 (Breyer, J., concurring).

speech-restricting and speech-enhancing and suggested that a more careful balancing of interests was therefore required.⁸⁵ Breyer wrote that because the majority's approach undervalued the plaintiffs' interests in expressive privacy, it effectively applied a strict scrutiny analysis, which is "normally out of place where, as here, important competing constitutional interests are implicated."⁸⁶ In the end, however, Breyer agreed that the defendants should prevail but only because the plaintiffs' "privacy expectations [were] unusually low,"⁸⁷ and "the public interest in defeating those expectations [was] unusually high."⁸⁸ Breyer also noted at the end of his concurrence that he worried that the majority opinion might tie the hands of legislators who will struggle in future years to protect citizens' privacy interests in a world of new and increasingly invasive technologies.⁸⁹

The dissenters echoed Breyer's concerns about privacy. Chief Justice Rehnquist, joined by Justices Scalia and Thomas, emphasized the "widespread use and abuse of electronic surveillance techniques"⁹⁰ and argued that because the risk of intrusions into people's private communications could actually chill speech, robust statutory protections were warranted.⁹¹ By limiting the enforcement of those types of protections, the majority, Rehnquist wrote, "diminishes, rather than enhances, the purposes of the First Amendment."⁹²

B. *Interpretations of Bartnicki*

What most people glean from the Court's decision in *Bartnicki* is that journalists and others can publish illegally acquired information, provided (1) they played no part in the illegal interception; (2) they obtained access to the information lawfully; and (3) the information relates to a matter of

85. *Id.* at 536 (asking whether the statutes "strike a reasonable balance between their speech-restricting and speech-enhancing consequences . . . [o]r do they instead impose restrictions on speech that are disproportionate when measured against their corresponding privacy and speech-related benefits").

86. *Id.* at 536–37.

87. *Id.* at 540. Breyer noted that the plaintiffs were both "limited public figures" who "voluntarily engaged in a public controversy." *Id.* at 539.

88. *Id.* at 540. Breyer explained that there was no unlawful activity by the defendants and no coordination between them and the interceptor, *id.* at 538, and that the phone conversation involved a matter of "unusual public concern" because it included a threat of "physical harm to others," *id.* at 536.

89. *Id.* at 541.

90. *Id.* at 542–43 (Rehnquist, C.J., dissenting) (quoting S. REP. NO. 90-1097, at 67 (1968)).

91. *Id.* at 543.

92. *Id.* at 542.

public concern.⁹³ This is a reasonable takeaway and a paraphrase of what Justice Stevens wrote in his opinion for the Court. But this unqualified phrasing of the *Bartnicki* test blunts the definitional difficulties that remain, the fact-dependency of the ruling, and its attenuated standing as precedent in light of the caveats and qualifications in Justice Breyer's concurring opinion, which was joined by Justice O'Connor.

Justice Breyer did not specifically object to any of the three components of the test laid out by Stevens, but he presented a laundry list of conditions and possible exceptions, which will be referred to here as the "Breyer contingencies." With regard to prong one, Breyer noted the fact that "the broadcasters here engaged in no unlawful activity"⁹⁴ but added that the defendants "neither encouraged nor participated directly or indirectly in the interception"⁹⁵ and no one "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"⁹⁶ implying that each of these could be material and distinguishing facts in other cases. With regard to prong two, Breyer pointed out that the federal and Pennsylvania wiretap laws did not make it illegal to receive illegally intercepted communications,⁹⁷ something the majority acknowledged as well,⁹⁸ leaving open the possibility that such a proscription might have changed the analysis.⁹⁹ And with regard to prong three, Breyer focused on the fact that Kane and Bartnicki were "limited public figures"¹⁰⁰ and that the "front porches" comment by Kane was a bona fide threat of violence.¹⁰¹ This is quite different than Stevens's opinion for the Court, which treated the entire subject of the conversation as "unquestionably a matter of

93. *Id.* at 525.

94. *Id.* at 538 (Breyer, J., concurring).

95. *Id.* (quoting Petition for Writ of Certiorari at 33a, *Bartnicki*, 532 U.S. 514 (No. 99-1687)).

96. *Id.*

97. *Id.*

98. *Id.* at 525 (majority opinion).

99. The majority is clear, however, that mere knowledge or suspicion that that material was illegally acquired by someone else is not, by itself, enough to make receipt of the information unlawful. *Id.* at 532 n.19.

100. *Id.* at 539 (Breyer, J., concurring). Breyer borrows this phrase from the context of defamation law. *See, e.g.,* *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974) (defining limited public figures as those who are perhaps not widely known or influential like traditional public figures but who nevertheless invite "attention and comment" because they "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved").

101. *Bartnicki*, 532 U.S. at 539 (Breyer, J., concurring).

public concern.”¹⁰²

Setting aside the complications presented by Breyer’s concurrence, Stevens’s opinion is indefinite in some respects. With regard to prong one, Stevens emphasized that reporters who disseminate information of public interest do not lose their protection because of a “*stranger’s* illegal conduct,”¹⁰³ which suggests that a different result could occur in situations in which the parties know each other or are engaged in more active collaboration.¹⁰⁴ Clearly, a reporter who personally engages in an illegal wiretap would lose protection,¹⁰⁵ but beyond that, it is not clear where the line is to be drawn. With regard to prong two, it is still not certain what constitutes unlawful acquisition of information, nor whether this *always* and *fully* forecloses First Amendment protection.¹⁰⁶ Finally, it is not clear what the Court means by “public concern.” The dissenters, Justices Rehnquist, Scalia and Thomas, mocked the Court’s reliance on this “amorphous concept,” which they said Justice Stevens did “not even attempt to define.”¹⁰⁷ Their concern was validated by Stevens’s and Breyer’s disparate conceptualizations of public concern¹⁰⁸ and by the Court’s terminological inconsistency, using, without distinguishing: “public interest,”¹⁰⁹ “public significance,”¹¹⁰ “public issue[,]”¹¹¹ “public

102. *Id.* at 535 (majority opinion). Breyer tried to clarify that the Court “does not create a ‘public interest’ exception that swallows up the . . . rule” but rather “finds constitutional protection for publication of intercepted information of a special kind.” *Id.* at 540 (Breyer, J., concurring). This is correct insofar as it is clearly insufficient to simply claim the presence of an issue of public concern, but it is incorrect insofar as it suggests that Breyer and Stevens are aligned on the meaning of the term “public concern.” Stevens took a contextual and categorical approach while Breyer focused on the public safety threat and the public status of the participants.

103. *Id.* at 535 (majority opinion) (emphasis added).

104. At several other points in the opinion, the Court uses the phrase “third party” rather than emphasizing “stranger.” *Id.* at 525, 528, 530.

105. That is what occurred in *Peavy v. WFAA-TV, Inc.*, 221 F.3d 158 (5th Cir. 2000), one of the cases that triggered the Court’s grant of certiorari in *Bartnicki*, and a case the Court distinguishes at the outset of its opinion. *Bartnicki*, 532 U.S. at 522 & n.5.

106. This is a question the Court posed in *Pentagon Papers* and *Florida Star*, which the Court has repeatedly reserved and which it did not fully answer in *Bartnicki*: “whether, in cases where information has been acquired *unlawfully* by a newspaper or by a source, government may ever punish not only the unlawful acquisition, but the ensuing publication as well.” *Fla. Star v. B.J.F.*, 491 U.S. 524, 535 n.8 (1989) (emphasis in original).

107. *Bartnicki*, 532 U.S. at 542 (Rehnquist, C.J., dissenting).

108. *See supra* text accompanying notes 304–311.

109. *Bartnicki*, 532 U.S. at 540 (Breyer, J., concurring).

110. *Id.* at 527–28 (majority opinion) (quoting *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 103 (1979)).

111. *Id.* at 518.

concern,”¹¹² and “newsworthy.”¹¹³ The justices likely understood these to be synonymous (indeed, those terms are used interchangeably by other courts and by the authors of this Article), but the Court left unnecessary confusion by not saying so.¹¹⁴

Bartnicki was clearly an important ruling in that it extended the right to publish illegally acquired information beyond the prior restraint context of *Pentagon Papers*, and Stevens’s opinion for the Court is a strong defense of the right to publish. But its force is limited by its own imprecision and by its dependency on the votes of Breyer and O’Connor, whose separate concurring opinion introduced a series of conditions that opened the door for less protective applications in the future. The only things that a majority of justices agreed about were that the right to publish illegally acquired information must be balanced against competing social interests (in *Bartnicki*, the protection of privacy) and that the more connected a publisher is to illegal activity, or the less connected the material is to public issues, the more the balance must tilt against the publisher. Much like with the Court’s divided ruling on the reporter’s privilege in *Branzburg v. Hayes*¹¹⁵—in which the decisive fifth vote was provided by a justice whose concurrence narrowed the reach of the majority opinion¹¹⁶—the full meaning and impact of *Bartnicki* has become a project for the lower courts.

C. *Emerging Cases and the Enduring Confusion About Bartnicki*

The initial reaction to *Bartnicki* by many journalists and lawyers was jubilant. The effect of the decision was to affirm the rights of journalists and extend the reach of *Pentagon Papers*, and because most people naturally focused on the immediate outcome and on Stevens’s opinion for the Court, speech and press supporters were thrilled.¹¹⁷ Legal scholars realized quickly, however, that the decision was replete with uncertainties and moderating conditions. A number of articles have explored these idiosyncrasies over the past two decades, both in assessments of the case

112. *Id.* at 525.

113. *Id.*

114. The Court has offered at least some additional guidance on the meaning of these terms in subsequent cases. *See supra* text accompanying notes 304–311.

115. *See supra* text accompanying notes 33–37.

116. *See supra* text accompanying note 36.

117. *See, e.g.*, William R. Self & Minabere Ibelema, *Bartnicki v. Vopper: Landmark or Question Mark*, 40 FREE SPEECH Y.B. 13, 13 (2002) (describing some of the excited responses to the ruling).

itself¹¹⁸ and in studies of related problems.¹¹⁹

Despite these more careful analyses, however, *Bartnicki* is often mischaracterized or oversimplified in media analyses of contemporary controversies. After hackers breached the user data of Ashley Madison—a dating service marketed to people in pre-existing relationships¹²⁰—one analyst suggested that while the hackers clearly broke the law, the press “can basically run with any information given to them innocently, even if the person giving it to them obtained it illegally.”¹²¹ Likewise, when Terry Bollea (professional wrestler Hulk Hogan) sued Gawker magazine for publishing Boella’s illicitly-filmed sex tape, commentators made similarly sweeping claims. “[T]he law is on *Gawker*’s side,” a Reuters legal analyst noted, because the Supreme Court held in *Bartnicki* that “in matters of public importance, the First Amendment trumps privacy.”¹²² These characterizations ignored Justice Breyer’s concurrence, which treated speech and privacy as comparably important rights,¹²³ and they presupposed the legitimacy of the public interest in the sex tape. A more recent *Wired* analysis of the case against Julian Assange and WikiLeaks

118. See, e.g., *id.* at 31 (characterizing *Bartnicki* as “fundamentally flawed and problematic”); see also Eric B. Easton, *Ten Years After: Bartnicki v. Vopper as a Laboratory for First Amendment Advocacy and Analysis*, 50 U. LOUISVILLE L. REV. 287 (2011) (using the *Bartnicki* ruling as a kind of heuristic for understanding the different frameworks courts might apply to the same constitutional problem); Howard M. Wasserman, *Bartnicki as Lochner: Some Thoughts on First Amendment Lochnerism*, 33 N. KY. L. REV. 421 (2006) (rejecting the notion that *Bartnicki* is an example of the First Amendment being used to defeat legitimate consumer protection laws); Richard D. Shoop, *Bartnicki v. Vopper*, 17 BERKELEY TECH. L.J. 449, 449 (2002) (predicting *Bartnicki* will have less long-term impact because of the “ambiguity and fragility of the holding”).

119. See, e.g., Jon L. Mills & Kelsey Harclerode, *Privacy, Mass Intrusion, and the Modern Data Breach*, 69 FLA. L. REV. 771 (2017) (examining, in part, *Bartnicki*’s impact on business and personal privacy); William E. Lee, *Probing Secrets: The Press and Inchoate Liability for Newsgathering Crimes*, 36 AM. J. CRIM. L. 129 (2009) (addressing *Bartnicki*’s limitations in shielding journalists from criminal liability for seeking classified material); Rodney A. Smolla, *Information as Contraband: The First Amendment and Liability for Trafficking in Speech*, 96 NW. U. L. REV. 1099 (2002) (exploring *Bartnicki*’s possible application and misapplication in a variety of contexts in which publishers disseminate illegally acquired information).

120. Ashley Madison is a website and dating app that matches people in relationships with others who are interested in having affairs. See ASHLEY MADISON, <https://www.ashleymadison.com/en-us/> [<https://perma.cc/C89D-P3GP>]. Its assurances of anonymity are naturally an important selling point of the service.

121. Kate Cox, *Why the Stolen Ashley Madison Data Is (Legally) Fair Game for the Internet*, CONSUMERIST (Aug. 25, 2015, 10:23 AM), <https://consumerist.com/2015/08/25/why-the-stolen-ashley-madison-data-is-legally-fair-game-for-the-internet/> [<https://perma.cc/4E67-EQH5>].

122. Alison Frankel, *Why Does Hulk Hogan Even Have a Case Against Gawker?*, REUTERS (Mar. 14, 2016), <http://blogs.reuters.com/alison-frankel/2016/03/14/why-does-hulk-hogan-even-have-a-case-against-gawker/> [<https://perma.cc/ZP6A-6SBQ>].

123. See *supra* text accompanying note 84.

shows a similar tendency to erase all nuance.¹²⁴ Even when the most knowledgeable sources are consulted, they tend to offer misleadingly abridged interpretations for lay audiences. Immediately after the *Bartnicki* ruling, Yocum’s lawyer, Tom Goldstein, said a key takeaway from the case was that “if you’re the press, you don’t have to worry about reporting truthful information of public concern.”¹²⁵ And one can find many other examples of thumbnail assessments from media law experts that go too far in flattening these issues for the public.¹²⁶

One cannot expect experts, in quotes or soundbites, to convey all of the complexities of a decision like *Bartnicki*. Nevertheless, the popular, received wisdom about *Bartnicki*, and certainly *Pentagon Papers*, often comes in the form of terse absolutes. There is a palpable press-protective mythos surrounding both of these rulings, which is perhaps the result of media accounts that tend to wash away the uncertainties. Journalists and others who share information online have perhaps become unduly emboldened by this. That was likely true of *Gawker* editor Nick Denton whose unrepentant publication of a celebrity sex tape ultimately killed his whole enterprise.¹²⁷ Others should heed the *Gawker* lesson, but also recognize that even in *Pentagon Papers*, some justices explicitly left open the possibility of post-publication charges against *The New York Times* for publishing classified material.¹²⁸ And *Bartnicki* itself was not a home run for the press, and perhaps not even a “win.” Indeed, as First

124. Tor Ekeland, *The Law Being Used to Prosecute Julian Assange Is Broken*, WIRED (May 7, 2019, 9:00 AM), <https://www.wired.com/story/julian-assange-computer-fraud-and-abuse-act/> [<https://perma.cc/G35T-5X7Q>] (asserting that “Assange and WikiLeaks are publishers just like *The New York Times* . . . [a]nd if it was legal for *The New York Times* to publish the classified Pentagon Papers detailing the US’ lies when it came to Vietnam, it’s legal for WikiLeaks to do the same”).

125. Charles Lane, *Supreme Court Ruling Supports Media Rights over Privacy Law*, WASH. POST (May 22, 2001), <https://www.washingtonpost.com/archive/politics/2001/05/22/supreme-court-ruling-supports-media-rights-over-privacy-law/d5e2c04b-f190-4f12-a708-aae1fb69043f/> [<https://perma.cc/8P9U-EJ32>].

126. One typical example is a story analyzing Jason Pierre-Paul’s lawsuit against Adam Schefter for publishing part of Pierre-Paul’s medical record that appeared to have been illegally released or acquired by someone else. The story quotes a media law expert who said, “[a]s long as ESPN did nothing to procure the documents or aid and abet in their procurement . . . ESPN is in the free and clear.” Erik Wemple, *Twitter Stupidly Freaks Out About ESPN, Jason Pierre-Paul and HIPAA*, WASH. POST (July 9, 2015, 6:17 AM), <https://www.washingtonpost.com/blogs/erik-wemple/wp/2015/07/09/twitter-stupidly-freaks-out-about-espn-jason-pierre-paul-and-hipaa/> [<https://perma.cc/HS5P-X626>].

127. Les Neuhaus, *Nick Denton, on Stand, Justifies Posting of Hulk Hogan Sex Video*, N.Y. TIMES (Mar. 15, 2016), <https://www.nytimes.com/2016/03/16/business/media/nick-denton-on-stand-justifies-posting-of-hulk-hogan-sex-video.html/> [<https://perma.cc/9AKW-SX8J>].

128. *N.Y. Times Co. v. United States (Pentagon Papers)*, 403 U.S. 713, 735–37 (1971) (White, J., concurring) (noting various criminal laws that explicitly prohibit publishing classified and other sensitive information relating to national security and saying he would have “no difficulty in sustaining convictions under these [laws]”).

Amendment scholar Amy Gajda points out, it could actually be viewed as a 5-4 ruling *against* the press in the sense that the majority of justices acknowledged that there are times when speech must yield to privacy.¹²⁹

All of this points to the need for clarity, partly from news organizations covering these issues, but more importantly from courts applying these precedents and shaping new outcomes. The analysis in Part III looks in more detail at how courts have interpreted and applied *Bartnicki* over the past two decades to see if they offer insights for courts confronting a new wave of cases like the espionage prosecution of Julian Assange, the criminal hacking prosecutions of Glenn Greenwald¹³⁰ and Barrett Brown,¹³¹ the DNC data-dumping lawsuits,¹³² the leak cases like those involving Donald Trump (tax records),¹³³ Jason Pierre-Paul (medical records)¹³⁴ and Jeff Bezos (communication records),¹³⁵ and some other emerging cases and scenarios, including the risks faced by average web users who might seek to share or re-post information online.

III. ANALYSIS OF CASES

The ambiguities of *Bartnicki* have forced lower courts over the past two decades to try to clarify and extrapolate from it, much like they did after *Branzburg*. A focal point of this Article was to examine all of the federal and state cases applying *Bartnicki* to see how lower courts have answered the questions the Supreme Court left open in 2001, to identify clear or budding points of consensus, and to see if any new dilemmas have arisen.

The analysis here reveals that courts are deeply divided about the meaning of every element of the *Bartnicki* test. There is a circuit split over the extent to which a publisher can interact with a source before effectively becoming a primary participant in the illegal acquisition of information. Courts are also divided about the relevance of legal prohibitions on receiving or possessing certain information, with some courts effectively treating certain types of information as contraband and

129. AMY GAJDA, *THE FIRST AMENDMENT BUBBLE: HOW PRIVACY AND PAPARAZZI THREATEN A FREE PRESS* 48–49 (2015).

130. *See supra* note 23.

131. Brown, who had previously been involved with the hacker group Anonymous, spent four years in jail after posting a link to a trove of files hacked from the cyber-security firm Stratfor, which turned out to contain some credit card numbers. Russell Brandom, *Barrett Brown Has Been Sentenced to 63 Months in Prison*, *THE VERGE* (Jan. 22, 2015, 2:32 PM), <https://www.theverge.com/2015/1/22/7871317/barrett-brown-sentencing-anonymous-stratfor> [https://perma.cc/8W99-LDKF].

132. *See supra* note 26 and accompanying text.

133. *See infra* text accompanying note 229.

134. *See supra* text accompanying note 22.

135. *See supra* text accompanying note 21.

creating legal risks for journalists for merely requesting non-public records, even when those records are newsworthy and ultimately furnished by the government. There is also some lingering confusion about how to assess the newsworthiness of a publication and whether courts should focus on the newsworthiness of particular facts or the newsworthiness of the broader context. This is critical in cases involving large caches of data, like in the DNC hacking cases where courts have taken diametric approaches to the public concern criterion, with one saying publishers must demonstrate the newsworthiness of *every* disclosed fact, and the other focusing on the macro-level impact of the whole.

The primary sources for this analysis were the opinions of federal and state courts that analyzed, discussed, or cited *Bartnicki* when determining the case outcome. The time frame used was 2001, the year *Bartnicki* was decided, through the end of 2019. The examined cases were gathered using LexisNexis and Shepard's Citation Service. The initial search yielded 229 cases across all jurisdictions, which were then categorized using Shepard's depth of discussion indicator ("analyzed," "discussed," "mentioned," and "cited"). All cases were examined, but many of them, particularly those that merely cited or mentioned *Bartnicki*, did not contain enough relevant analysis or contextual clues to warrant deeper review. A total of seventeen cases "analyzed" *Bartnicki* and another twenty-five "discussed" it.¹³⁶ The analysis of cases was oriented around the following questions:

Prong one—What actions have courts treated as "illegal" in applying prong one? How have lower courts treated the relationship between the source and publisher and the legal significance of their interactions with each other? Relatedly, have courts used the Breyer contingencies¹³⁷ as bases for withholding First Amendment protection?

Prong two—What do the lower courts regard as unlawful acquisition? Have courts fully denied First Amendment protection to those who acquired information unlawfully?

Prong three—What types of information have the courts identified as being of public concern or not of public concern, and how have they balanced information of public interest against privacy or other social interests?

These and other questions are addressed in the subsections below, along with some discussion of their implications for present as well as

136. There were also a few cases that were examined but that did not have a depth of discussion label.

137. See *supra* text accompanying notes 94–96.

future cases and controversies.

It is important to be clear about the distinctions between prong one and prong two. The first is about procurement; the second is about receipt and possession. Lower courts have not always carefully distinguished the two. In addition, there are two varieties of activity under prong one. For purposes of this analysis, defendants lose prong one protection when they directly engage in illegal behavior in order to acquire information in the first place. This will be referred to here as primary participation. In addition, some courts have pointed to the narrow facts of *Bartnicki* and to some of the language in Stevens's and Breyer's opinions to conclude that a defendant might also fail prong one by indirectly—but too closely—participating in illegally securing the information by, for example, collaborating, inducing, encouraging, or supporting that activity. This will be referred to here as secondary participation.¹³⁸ Prong two, by contrast, is less commonly implicated and only involves situations in which, like in *Bartnicki*, the defendant was not involved in the initial procuring of the information but where, unlike in *Bartnicki*, their *receipt* or *possession* of the information was specifically proscribed by law.¹³⁹

A. *Bartnicki* Prong One: Publisher-Source Interaction

Although the Supreme Court in *Bartnicki* upheld the rights of both Yocum as the intermediary and Vopper as the publisher, it clearly had no sympathy for whoever initially broke the law by intercepting the Kane-Bartnicki phone conversation. That person engaged in a clear violation of the wiretap statutes, and the privacy-protection justifications for punishing those actions were substantial and self-evident. This aspect of the Court's opinion is supported by a long line of cases denying legal immunity to journalists or others whose newsgathering activities violate generally applicable laws.¹⁴⁰ Many of the post-*Bartnicki* cases have turned on this aspect of prong one. The application of *Bartnicki* in those cases has been relatively straightforward because they involved defendants who acted illegally in procuring the information and were the first link in the chain.

138. A key question for this analysis is whether a secondary participant is eligible for *Bartnicki* protection, and what types of secondary participation fall within the ambit of *Bartnicki*.

139. Because both prong one and two involve unlawful activity—under prong one, unlawfulness in securing the information in the first place, and under prong two, unlawfulness in receiving or possessing the information—the courts sometimes blur the two. *See, e.g.,* *Lowe v. Hearst Commc'ns, Inc.*, 403 F. Supp. 2d 568, 576 (W.D. Tex. 2005) (noting that in one case a defendant participated in an illegal interception and therefore “did *not lawfully* receive the contents” (emphasis in original)), *superseded*, 414 F. Supp. 2d 669 (W.D. Tex. 2006).

140. *See supra* text accompanying notes 40–44.

In *In re Zyprexa Injunction*,¹⁴¹ for example, a federal district court in New York rejected the invocation of *Bartnicki* by lawyers seeking to resist a court order compelling them to return, and cease distributing, court documents that were under a protective order.¹⁴² In *Council on American-Islamic Relations Action Network, Inc. v. Gaubatz*,¹⁴³ a different federal district court held that a defendant who lied to get an internship at a private organization could not rely on *Bartnicki* to shield him from liability for accessing and publishing the organization's private records.¹⁴⁴ In *State v. Baron*,¹⁴⁵ the Wisconsin Supreme Court denied *Bartnicki* protection to a defendant who distributed his supervisor's private emails after gaining unauthorized access to the supervisor's computer and email account.¹⁴⁶ And in *Bowens v. Ary, Inc.*,¹⁴⁷ the Michigan Court of Appeals denied *Bartnicki* protection to defendants who had illegally recorded, and later distributed, video and audio of a backstage dispute between musicians and police.¹⁴⁸ In all of these cases, the defendants directly participated in the illegal acquisition of information and were not merely recipients of information captured by others.

Some courts, like the First Circuit,¹⁴⁹ have framed *Bartnicki* in simple terms: people are free to disclose illegally intercepted information provided they have not "participated in the interception."¹⁵⁰ But decisions by other courts, including two circuit courts,¹⁵¹ show there is no bright

141. 474 F. Supp. 2d 385 (E.D.N.Y. 2007).

142. *Id.* at 420–22. The documents were part of a class-action lawsuit against Eli Lilly & Co., maker of the drug Zyprexa. The lawyers, who were participants in the case, leaked the documents to journalists and others, and parts were shared on websites and in news reports. The only surviving injunction in this case was aimed at the lawyers, not the journalists or subsequent publishers. *Id.* at 427.

143. 793 F. Supp. 2d 311 (D.D.C. 2011).

144. *Id.* at 331–32. In that case, the defendant's actions also violated the confidentiality agreement he signed as a condition of his employment. *Id.* at 342–44.

145. 2009 WI 58, 318 Wis. 2d 60, 769 N.W.2d 34.

146. *Id.* ¶¶ 55–56, 318 Wis. 2d at 87–88, 769 N.W.2d at 48.

147. No. 282711, 2009 Mich. App. LEXIS 2000 (Mich. Ct. App. Sept. 24, 2009).

148. *Id.* at *20–22. After musicians had been preparing to show sexually explicit material during a concert performance, police intervened and, during a backstage discussion, were recorded by defendants while conversing with performers and managers. The recordings, which violated the wiretap laws, were later included on a DVD that was subsequently distributed by the band. *Id.* at *1–2.

149. *See, e.g., IMS Health Inc. v. Ayotte*, 550 F.3d 42 (1st Cir. 2008) (holding that a New Hampshire statute prohibiting certain transfers of physician's prescribing history did not violate First Amendment rights of data miners).

150. *Id.* at 51.

151. *Boehner v. McDermott (Boehner II)*, 441 F.3d 1010 (D.C. Cir. 2006) (holding that that a

line here. A determinative feature of *Bartnicki* was certainly the disconnection between Vopper and the person who illegally intercepted the Kane-Bartnicki phone call. Similarly, in *Pentagon Papers*, the separation between the source (Daniel Ellsberg) and the newspapers made the case a simpler one for the justices.¹⁵² In *Bartnicki*, Justice Stevens's opinion highlighted the fact that the illegal interception was committed by a stranger and someone who was further separated from Vopper by an intermediary, Yocum.¹⁵³ Stevens did not limit his opinion to cases in which the interceptor and publisher were so far removed, but by not drawing a clear line, he left a crack in the door that Breyer pushed open by flagging a set of alternative conditions that, if present, might warrant different outcomes.¹⁵⁴ Justice Breyer implied that a stronger link of liability might be forged between source and publisher in situations in which the publisher ordered, counseled, encouraged, or aided and abetted the illegal acquisition or the subsequent transfer of records from one node to another.¹⁵⁵ If lower courts have indeed seized on Breyer's contingencies, it could have significant implications for many defendants, including Julian Assange, who had many direct interactions with his source, Chelsea Manning.¹⁵⁶

The first federal circuit case applying *Bartnicki* was by the Tenth Circuit in *Quigley v. Rosenthal*.¹⁵⁷ That case involved a fierce dispute between neighbors in which a Jewish couple, the Aronsons, claimed their neighbors, the Quigleys, were trying to run them out of the neighborhood. The Aronsons repeatedly intercepted and recorded the Quigleys' home phone calls, capturing the Quigleys making what the Aronsons believed were anti-Semitic and threatening comments.¹⁵⁸ The Aronsons consulted lawyers for the Anti-Defamation League who eventually filed civil claims on behalf of the Aronsons against the Quigleys, incorporating excerpts from the illegally intercepted phone conversations.¹⁵⁹ The Quigleys

Congressman who knowingly disclosed unlawfully intercepted communications in violation of federal statute was not entitled to First Amendment protections); *Quigley v. Rosenthal*, 327 F.3d 1044 (10th Cir. 2003) (finding that the application of a federal wiretap act did not violate defendants' First Amendment rights).

152. *N.Y. Times Co. v. United States (Pentagon Papers)*, 403 U.S. 713 (1971).

153. *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001).

154. See *supra* text accompanying notes 94–96. Breyer also notes that the wiretap laws did not forbid the receipt of intercepted communications, *supra* text accompanying note 97, an issue that is more relevant to prong two and discussed in the next section.

155. *Bartnicki*, 532 U.S. at 538 (Breyer, J., concurring); see *supra* text accompanying notes 94–96.

156. See *infra* text accompanying notes 230–232.

157. 327 F.3d 1044 (10th Cir. 2003).

158. *Id.* at 1052.

159. *Id.* at 1052–53.

subsequently filed their own claims against various defendants, including the ADL, which the Quigleys accused of violating the state and federal wiretap laws when its lawyers used the illegally intercepted calls in their court filings on behalf of the Aronsons.¹⁶⁰ The ADL invoked *Bartnicki*, but the Tenth Circuit concluded that it was distinguishable, in part because, unlike Yocum and Vopper, the ADL “knew that the Aronsons were the ones responsible for recording the Quigleys’ telephone conversations” and knew that “the Aronsons were continuing to record the Aronsons’ telephone conversations.”¹⁶¹

The Tenth Circuit’s conclusion is plainly inconsistent with Stevens’s *Bartnicki* opinion, which acknowledges that the defendants knew or had reason to know that the Kane-Bartnicki call had been illegally intercepted.¹⁶² The Tenth Circuit effectively splits this phrase, however, implying that those who merely have “reason to know” about the illegal interception can invoke the First Amendment while those who are more certain about it may not.¹⁶³ The Tenth Circuit was correct that the two cases are factually distinct—in one, the defendants had actual knowledge of illegal interception (*Quigley*), and in the other, they merely suspected it (*Bartnicki*)—but there is nothing in Stevens’s opinion, either by itself or read together with Breyer’s concurrence, to suggest that this distinction has constitutional relevance. In fact, it contradicts the fifth sentence of Stevens’s opinion for the Court in which he conjoins knowledge and suspicion by presenting them as gradations of the same condition.¹⁶⁴

Nevertheless, a few years later, another federal circuit, the D.C. Circuit, applied similar logic in perhaps the most high-profile post-*Bartnicki* ruling—*Boehner v. McDermott (Boehner II)*.¹⁶⁵ The *Boehner* litigation ran parallel to the *Bartnicki* litigation but was not ultimately resolved until 2007 after multiple rulings, appeals, and remands.¹⁶⁶ The case involved a civil claim filed under the federal wiretap law by Republican Representative John Boehner against Democratic Representative James

160. *Id.* at 1056.

161. *Id.* at 1067. The court further distinguished *Bartnicki* by suggesting that the Quigley phone calls did not involve matters of public concern. *Id.*

162. *Bartnicki v. Vopper*, 532 U.S. 514, 517–18 (2001) (“The persons who made the disclosures did not participate in the interception, but they did know—or at least had reason to know—that the interception was unlawful.”).

163. *Quigley*, 327 F.3d at 1078.

164. *Bartnicki*, 532 U.S. at 517–18.

165. *Boehner II*, 441 F.3d 1010 (D.C. Cir. 2006). The case was finally resolved later after an en banc review. *Boehner v. McDermott (Boehner III)*, 484 F.3d 573 (D.C. Cir. 2007) (en banc).

166. For a full account of this case’s journey through the courts, prior to the final en banc ruling of the D.C. Circuit, see William R. Self, *Boehner v. McDermott: Full Appeals Court Avoids Attempting to Solve the Riddle of Bartnicki v. Vopper*, 43 FREE SPEECH Y.B. 154 (2006).

McDermott.¹⁶⁷ A married couple, the Martins, used a radio scanner to illegally intercept and record a private conference call between Boehner and other members of Congress, including Republican Representative Newt Gingrich, in which they discussed the disposition of a House Ethics Committee punishment of Gingrich, and revealed that Gingrich might have violated his settlement agreement with the committee.¹⁶⁸ The couple gave a tape of the call to McDermott who subsequently contacted two reporters, played the tape for them, and allowed them to make their own recordings.¹⁶⁹

In its penultimate ruling on this case, *Boehner II*, a panel of the D.C. Circuit ruled in favor of Boehner and highlighted the fact that, unlike the defendants in *Bartnicki*, McDermott *knew* (rather than merely suspected) that the information given to him had been illegally intercepted.¹⁷⁰ “The difference between this case and *Bartnicki* is plain to see,” Judge Randolph wrote for the court. “It is the difference between someone who discovers a bag containing a diamond ring on the sidewalk and someone who accepts the same bag from a thief, knowing the ring inside to have been stolen.”¹⁷¹ This is a plainly specious argument because the wiretap law did not outlaw the mere possession of intercepted communications, and courts have also been reluctant to treat information as property.¹⁷² The D.C. Circuit, then, like the Tenth, treated the certainty of the defendants’ knowledge of the illegal acquisition as a constitutionally significant factor in applying and distinguishing *Bartnicki*.

In *Boehner II*, D.C. Circuit also highlighted a related factor: the anonymity of the interceptor. In *Bartnicki*, the defendants never knew who recorded the original phone call. The D.C. Circuit suggests that this was significant because “[t]he Court mentioned the anonymity of the interceptor several times” in its opinion.¹⁷³ Justice Stevens’s opinion does

167. *Boehner II*, 441 F.3d at 1011.

168. *Id.* at 1012.

169. *Id.* at 1012–13. The reporters later published news stories based on the recordings. *Id.*

170. *Id.* at 1016. The Martins had written an explanatory note on the outside of the envelope explaining its contents. *Id.* at 1012. McDermott denied having read it. *Id.* at 1015–16. Nevertheless, McDermott was later quoted in a newspaper story about the recording in which he indicated it had been captured using a radio scanner. *Id.* at 1016. He could only have known this, the court concluded, from either his direct contacts with the Martins or from the note on the envelope. *Id.* at 1016–17. Either way, the Court held that the evidence supported the conclusion that McDermott knew the recording he shared with reporters had been illegally acquired. *Id.*

171. *Id.* at 1017.

172. *See, e.g.*, *Pearson v. Dodd*, 410 F.2d 701, 708 (D.C. Cir. 1969) (concluding that information should not be treated as property except in situations in which it constitutes a literary work, scientific invention or the like).

173. *Boehner II*, 441 F. 3d at 1014 (citing *Bartnicki v. Vopper*, 532 U.S. 514, 525, 530, 530 n.15, 531, 535 (2001)).

refer to the interceptor as a stranger, and his opinion concludes by noting that “a stranger’s illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern.”¹⁷⁴ But Stevens never suggests or implies that an interceptor must be anonymous for a publisher to invoke the First Amendment. Indeed, he just as frequently uses terms such as “third party”¹⁷⁵ or “another.”¹⁷⁶

A year after *Boehner II*, the D.C. Circuit granted an appeal for a rehearing en banc and issued its final judgment in the case in *Boehner v. McDermott (Boehner III)*,¹⁷⁷ with four judges, led by Randolph, siding with Boehner, four judges, led by Sentelle, siding with McDermott, and one judge, Griffith, concurring.¹⁷⁸ This time Judge Randolph tethered his opinion to an entirely different rationale—the fact that McDermott had a special duty as a member of the ethics committee not to disclose confidential material.¹⁷⁹ “When Representative McDermott became a member of the Ethics Committee,” Judge Randolph wrote, “he voluntarily accepted a duty of confidentiality that covered his receipt and handling of the Martins’ illegal recording. He therefore had no First Amendment right to disclose the tape to the media.”¹⁸⁰ Because Judge Randolph oriented his argument around this point, he never revisited the issues of knowledge or direct contact he stressed in *Boehner II*.¹⁸¹ Judge Sentelle, however, not wanting to leave those specious assertions unchallenged, wrote a strong dissent in *Boehner III*, emphasizing that the panel’s rationale in *Boehner II* could not stand as a matter of law or logic. Sentelle argued that there is no constitutionally significant difference between the facts of

174. *Bartnicki*, 532 U.S. at 535.

175. *Id.* at 529–30 (“But it would be quite remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party.”).

176. *Id.* at 530.

177. 484 F.3d 573 (D.C. Cir. 2007) (en banc).

178. Judge Randolph’s opinion was joined by Chief Judge Ginsburg, Judge Henderson, and Judge Brown. *Id.* at 574–75. Judge Sentelle’s dissent was joined by Judges Rogers, Tatel and Garland. *Id.* at 581 (Sentelle, J., dissenting). Judge Griffith concurred, joining Part I of Judge Randolph’s opinion in which the court ruled in favor of Boehner. *Id.* at 575 (majority opinion); *id.* at 581 (Griffith, J., concurring in part).

179. *Id.* at 581 (majority opinion).

180. *Id.*; see also discussion *infra* section III.B.

181. *Boehner II*, 441 F.3d 1010, 1016 (2006). These issues were stressed again by the district court that heard the remand of the case, the appeal of which became *Boehner III*. *Boehner v. McDermott*, 332 F. Supp. 2d 149, 168–69 (D.D.C. 2004) (“In the instant case, however, McDermott actively accepted the tape from the people who had illegally recorded it” and in doing so “participated in an illegal transaction” and therefore “he is without First Amendment protection.”).

Bartnicki and *Boehner*.¹⁸²

In both cases, the defendant publisher knew or had reason to know that the information had been illegally intercepted, and there is nothing in the *Bartnicki* opinion to suggest that the outcome would be different had the defendants known the identity of the interceptor or been more certain about the illegality of the original interception.¹⁸³ In his decisive concurring opinion, Judge Griffith joined the majority in finding that the First Amendment was inapplicable because of McDermott's overriding duty of non-disclosure; however, he noted that but for that condition, he would have found McDermott's disclosure to be protected by the First Amendment.¹⁸⁴ In the final analysis, a slight majority of the judges of the D.C. Circuit rejected the notion that one surrenders *Bartnicki* protection by virtue of knowing the identity of the original interceptor or knowing with certainty that the material was illegally acquired.

That same year, the First Circuit mirrored the Sentelle interpretation in *Jean v. Massachusetts State Police*.¹⁸⁵ In *Jean*, a woman whose home was being searched by police, recorded the police without their knowledge using a nanny-cam.¹⁸⁶ The footage included audio of the officers' conversations with each other and with the homeowner, which made the recording illegal under the Massachusetts wiretap law.¹⁸⁷ The homeowner, who believed the search to be unjustified, sent the recording to Mary Jean, who operated a website monitoring police misconduct.¹⁸⁸ After the footage was posted online, the police sought to have it removed, but Jean was able to secure an injunction prohibiting any interference with the website.¹⁸⁹

Aside from the posture of the case (the merits of an injunction), the facts closely matched those in *Bartnicki*. The homeowner plainly violated the wiretap law, but Jean played no role in the illegal recording. The police, relying on Justice Breyer's *Bartnicki* concurrence and paralleling the arguments from *Quigley* and *Boehner II*, argued that Jean was differently situated than Vopper because she was aware of the identity of the illegal interceptor, had direct contact with her, and knew with certainty

182. *Boehner III*, 484 F.3d at 584 (Sentelle, J., dissenting) ("There is no distinction of legal, let alone constitutional, significance between our facts and those before the Court in *Bartnicki*.")

183. *Id.* at 581–87.

184. *Id.* at 581 (Griffith, J., concurring in part).

185. 492 F.3d 24 (1st Cir. 2007).

186. *Id.* at 25.

187. *Id.*

188. *Id.*

189. *Id.* at 24–25.

that the recording was made in violation of the law.¹⁹⁰ The court concluded that none of these was a material fact.¹⁹¹ It is true that in *Bartnicki*, Yocum received the recording blindly, which is different than Jean, who consulted directly with the homeowner,¹⁹² but, the First Circuit wrote, “the fact that Yocum received the tape ‘passively’ and Jean received the tape ‘actively’ is a distinction without a difference.”¹⁹³ The First Circuit further rejected the notion that simple logistical communications between Jean and the homeowner about publication somehow conjoined them for purposes of wiretap-law culpability. Finally, the court acknowledged Justice Breyer’s concurrence but declined to use it as the basis for a narrower reading of *Bartnicki*.¹⁹⁴

One federal district court applying *Bartnicki* aptly noted “that the more involvement journalists have in obtaining information by illegal means, the more likely their publication of that material will not receive First Amendment protection.”¹⁹⁵ But there is a circuit split about how to bridge the extremes—at one end, situations in which a publisher breaks the law to acquire information, and at the other end, situations like *Bartnicki* where the publisher is fully removed from the illegal acquisition. The Tenth Circuit in *Quigley* offered one approach, saying publishers lose *Bartnicki* protection if they *know* the information provided by a source was illegally obtained.¹⁹⁶ Four of the nine D.C. Circuit judges who sat en banc in *Boehner III* agreed, adding that the same would be true if the publisher had personal interactions with the sources who provided the illegally acquired information.¹⁹⁷ Judge Hogan’s district court decision

190. *Id.* at 31–32.

191. *Id.* at 32.

192. Indeed, the Third Circuit even acknowledged that Jean and the homeowner engaged in a “conspiracy” to disclose the recording, but the court concluded that it was of no constitutional relevance. *Id.* at 31–32.

193. *Id.* at 32.

194. *Id.* at 33 (concluding that “the precise scope of [that] language is uncertain” but that in any case Jean’s actions did not fit any of the possible exceptions noted by Breyer).

195. *Lowe v. Hearst Commc’ns, Inc.*, 403 F. Supp. 2d 568, 576 (W.D. Tex. 2005), *superseded*, 414 F. Supp. 2d 669 (W.D. Tex. 2006).

196. *Quigley v. Rosenthal*, 327 F.3d 1044, 1067 (10th Cir. 2003). Some lower courts applying *Bartnicki* have addressed the issue of knowledge, but only to consider whether the defendants even knew the information they were publishing had been illegally obtained or that its dissemination was prohibited. *See, e.g.*, *Wingrave v. Hebert*, 2006-1240 (La. App. 4 Cir. 5/9/07); 964 So. 2d 385 (finding no clear evidence that defendant knew information she distributed had been illegally intercepted); *DVD Copy Control Ass’n v. Bunner*, 75 P.3d 1 (Cal. 2003) (addressing issue of knowledge of illegal acquisition but only to establish basis for underlying tort claim of trade secret misappropriation).

197. *Boehner III*, 484 F.3d 573, 577–79 (D.C. Cir. 2007). The only path to reconcile *Quigley* with *Bartnicki* is to argue that the latter involved mere suspicion of illegality whereas in the former the defendants were certain, *and* that this is a legally significant distinction.

preceding *Boehner II* and *Boehner III* also supported this interpretation.¹⁹⁸ But five of the nine judges on the D.C. Circuit in *Boehner III*, and a unanimous panel of the First Circuit, said that neither of those conditions—knowledge of illegal acquisition nor personal contact between publisher and source—is sufficient to remove the *Bartnicki* shield, although it is not clear how much further they might be willing to extend protections.¹⁹⁹

There is one more federal circuit decision that offers some guidance—*Peavy v. WFAA-TV, Inc.*²⁰⁰—decided just prior to *Bartnicki*. In that case, a reporter had been in close consultation with a couple who had been illegally intercepting and recording their neighbor’s phone calls, believing that the neighbor (Carver Dan Peavy) was engaged in criminal activity. The reporter sought to expose Peavy, relying on information gleaned from the couple’s recordings.²⁰¹ The reporter spoke with the couple regularly for months, often meeting them at their house, occasionally listening to the recorded conversations with them, and providing some technical advice to them about recording techniques.²⁰² The Fifth Circuit denied the reporter’s First Amendment defense, and the Supreme Court subsequently denied certiorari following its decision in *Bartnicki*.²⁰³ Although the Court never addressed the merits of the Fifth Circuit’s decision, Justice Stevens’s opinion did note that in *Peavy*, unlike *Bartnicki*, the “media defendant in fact *participated* in the interceptions at issue.”²⁰⁴

Peavy provides an example of a situation in which a court might withhold First Amendment protection because of a too-close connection between reporters and sources, even where the reporter is one step removed from the actual procurement. It is perhaps the kind of situation Breyer had in mind when he implied that liability might attach to those who encourage illegal acquisition or participate in it, “directly or indirectly.”²⁰⁵ Other lower courts have not deeply explored the gradations of this kind of secondary participation, however, so while the loophole

198. *Boehner v. McDermott*, 332 F. Supp. 2d 149, 168 (D.D.C. 2004).

199. *Boehner III*, 484 F.3d at 581 (Griffith, J., concurring in the result) (noting that he agreed with the minority and would find the disclosure protected under *Bartnicki* if not for the House ethics rules violations); *Jean v. Mass. State Police*, 492 F.3d 24, 33 (1st Cir. 2007) (finding *Bartnicki* applied to the knowing publication of an illegally intercepted recording).

200. 221 F.3d 158 (5th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001).

201. *Id.* at 164–65.

202. *Id.* at 164–67.

203. *Id.* at 194; Order Denying Certiorari, *Peavy v. WFAA-TV, Inc.*, 532 U.S. 1051 (2001).

204. *Bartnicki v. Vopper*, 532 U.S. 514, 522 n.5 (2001) (emphasis added).

205. *Id.* at 538 (Breyer, J., concurring) (emphasis added).

Breyer created has not been exploited by plaintiffs,²⁰⁶ it has not been closed either.²⁰⁷

That lingering uncertainty is consequential because the issue of reporter-source (or interceptor-publisher) proximity is at the center of several emerging cases. It was explored in the 2019 federal district court rulings in both of the Democratic National Committee (DNC) hacking cases—one case brought by DNC donors and staffers against the Trump Campaign (*Cockrum v. Donald J. Trump for President, Inc.*²⁰⁸) and the other brought by the DNC itself against the Russian Federation and a number of secondary defendants, including the Trump Campaign, WikiLeaks, Roger Stone, Donald Trump, Jr., Julian Assange and Jared Kushner (*Democratic National Committee (DNC) v. Russian Federation*²⁰⁹). In *Cockrum*, which involved defendants' motion to dismiss, Judge Hudson found the evidence to be “more than ample” to at least establish a “plausible factual basis” for the plaintiff's claim that the defendants coordinated with the Russian hackers.²¹⁰ As a result, Hudson distinguished *Bartnicki* based on prong one, noting that “[h]ere, unlike *Bartnicki*, the Campaign is alleged to have conspired with the Kremlin and WikiLeaks.”²¹¹ Judge Hudson muddled the issue, however, by saying that this evidence demonstrates that the “Campaign was *aware* that the stolen information had been unlawfully obtained.”²¹² Hudson therefore

206. In *Quigley v. Rosenthal*, the Tenth Circuit noted that during a meeting between the Aronsons and their lawyers, “[t]he attendees . . . agreed that the Aronsons should continue recording the Quigleys' telephone conversations.” 327 F.3d 1044, 1052 (10th Cir. 2003). This appeared to be evidence that the lawyers *encouraged* the illegal interception of information by the Aronsons, which aligns with one of the Breyer contingencies, *Bartnicki*, 532 U.S. at 538 (Breyer, J., concurring), but the court never returned to this point, perhaps because it has already established that mere knowledge of illegal acquisition was sufficient to deny *Bartnicki* protection. In some other cases, it also appeared that there might have been some interaction and coordination between sources and publishers, but either the court did not elaborate, or the facts were unclear. *See, e.g.*, *Lowe v. Hearst Commc'ns, Inc.*, 403 F. Supp. 2d 568, 571 (S.D. Tex. 2005) (noting factual dispute about how defendant news organization obtained sealed court records), *superseded*, 414 F. Supp. 2d 669 (W.D. Tex. 2006).

207. Indeed, the Seventh Circuit case *Dahlstrom v. Sun-Times Media, LLC* puts considerable emphasis on the Breyer concurrence in denying First Amendment protection to reporters, but with a focus on the second prong of the *Bartnicki* test. 777 F.3d 937, 953 (7th Cir. 2015); *see also* discussion *infra* section III.B.

208. 365 F. Supp. 3d 652 (E.D. Va. 2019).

209. 392 F. Supp. 3d 410 (S.D.N.Y. 2019).

210. *Cockrum*, 365 F. Supp. 3d at 658. Judge Hudson granted the defendants' motion to dismiss all of the claims but without any further discussion of *Bartnicki*, because the claims were unsustainable for other reasons. *Id.* at 672.

211. *Id.* at 657.

212. *Id.* at 658 (emphasis added).

confused active collaboration with knowledge of illegal acquisition.²¹³ Ultimately, Hudson concluded that based on the available evidence, “the Campaign’s release of the hacked emails from the DNC do not warrant First Amendment protection.”²¹⁴

In the *DNC* case, however, Judge Koeltl interpreted *Bartnicki* in the broadest possible terms, framing the issue as a simple distinction between “stealing documents and disclosing documents that someone else had stolen previously.”²¹⁵ He acknowledged the plaintiffs’ claim that the various secondary defendants “actively supported and approved the Russian operation,”²¹⁶ but noted that all of this occurred after the emails had already been hacked. Because the DNC “failed to allege plausibly that any of the other defendants participated in the hack or theft,”²¹⁷ or that they conspired to do so before the incidents occurred,²¹⁸ they are entitled to First Amendment protection under *Bartnicki*. Judge Koeltl observed that the plaintiffs’ strongest claim was against WikiLeaks because it was the only one of the secondary defendants to have actually published the stolen emails and because WikiLeaks actually solicited the emails via direct communication with the Russians.²¹⁹ The plaintiffs argued that WikiLeaks could not claim *Bartnicki* protection because it knowingly published stolen information. But Judge Koeltl, citing *Boehner III* and *Jean*, concluded that it is “constitutionally insignificant that WikiLeaks knew the Russian Federation had stolen the documents when it published them.”²²⁰ It is also irrelevant, he added, that WikiLeaks solicited the emails from the Russians. Soliciting stolen documents is a common journalistic practice, Judge Koeltl asserted, and to hold WikiLeaks liable for doing so would “eviscerate *Bartnicki*.”²²¹ The solicitation by WikiLeaks occurred after the documents had already been stolen, and indeed after the Russians had already started to distribute them. “This was not a solicitation to steal documents but a request for material,” Judge Koeltl concluded, adding that “[j]ournalists are allowed to request

213. An alternative explanation is that Judge Hudson meant only that the collaboration served to *alert* the campaign about the illegal interception, not that the campaign coordinated more directly with the hackers.

214. *Cockrum*, 365 F. Supp. 3d at 659.

215. *Democratic Nat’l Comm. (DNC) v. Russian Fed’n*, 392 F. Supp. 3d 410, 431 (S.D.N.Y. 2019).

216. *Id.* at 421.

217. *Id.* at 434.

218. *Id.* at 435.

219. *Id.*

220. *Id.* at 434 (first citing *Boehner III*, 484 F.3d 573, 585 (D.C. Cir. 2017) (Sentelle, J., dissenting); and then citing *Jean v. Mass. State Police*, 492 F.3d 24, 31 (1st Cir. 2007)).

221. *Id.* at 435.

documents that have been stolen and to publish those documents.”²²²

In another 2019 case, *Allen v. Beirich*,²²³ a different federal district court judge cited *DNC* and mirrored its analysis, holding that defendants could not be liable for publishing illegally leaked documents despite knowing the documents were stolen, coordinating with the person who stole them, and paying that person \$5,000 as a reward.²²⁴ None of these facts was constitutionally significant, the court held, in part because the coordination and payment occurred *after* the source had already stolen the documents.²²⁵ For both Judge Koeltl, who decided *DNC*,²²⁶ and Judge Blake, who decided *Allen*, the key distinction is between before-the-fact participation, conspiracy or solicitation, on the one hand, and after-the-fact solicitation on the other. To Judge Hudson, however, who decided *Cockrum*, any of the above conditions could conceivably negate the protection.

This division and imprecision pervades the post-*Bartnicki* case law and creates uneven legal terrain for potential defendants like columnist Nicholas Kristof, who arguably engaged in before-the-fact solicitation by tweeting out a request in 2017 for leaks of Donald Trump’s tax records.²²⁷ Reporters for *The New York Times* could also be vulnerable. In May 2019, the *Times* published a story about Trump’s previous financial losses that was based on a leak of parts of ten years of Trump’s tax returns.²²⁸ And in October 2020, the *Times* published a series of stories exploring different aspects of Trump’s finances, again based on leaked tax records.²²⁹ The *Times*’s sources are not known, but if *Times*’s reporters asked those sources for the records, the reporters’ actions would fall outside of the zone of *Bartnicki* protection suggested by Judge Hogan.

The problems are more serious for Julian Assange, whom prosecutors

222. *Id.* at 436 (first citing *Jean v. Mass. State Police*, 492 F.3d 24, 31 (1st Cir. 2007); then citing *N.Y. Times Co. v. United States (Pentagon Papers)*, 403 U.S. 713, 714 (1971); and then citing *Nicholson v. McClatchy Newspapers*, 177 Cal. App. 3d 509, 521 (1986)).

223. No. CCB-18-3781, 2019 U.S. Dist. LEXIS 197183 (D. Md. Nov. 13, 2019).

224. *Id.* at *24.

225. *Id.* at *16–18.

226. *DNC*, 392 F. Supp. 3d at 451.

227. See Kristof, *supra* note 20; *supra* text accompanying note 20.

228. Russ Buettner & Susanne Craig, *Decade in the Red: Trump Tax Figures Show over \$1 Billion in Business Losses*, N.Y. TIMES (May 8, 2019), <https://www.nytimes.com/interactive/2019/05/07/us/politics/donald-trump-taxes.html> [https://perma.cc/PY9H-9HBF].

229. Russ Buettner, Susanne Craig & Mike McIntire, *Long-Concealed Records Show Trump’s Chronic Losses and Years of Tax Avoidance*, N.Y. TIMES (Sept. 27, 2020), <https://www.nytimes.com/interactive/2020/09/27/us/donald-trump-taxes.html?smid=tw-nytimes&smtype=cur> [https://perma.cc/RM5L-TBGV].

say had sustained and detailed contacts with Chelsea Manning before²³⁰ and during²³¹ the transfer of classified data to WikiLeaks. The Assange indictment repeatedly mentions the word “encourage,” suggesting that in the government’s view, before-the-fact encouragement of illegal leaks by sources is enough to warrant withholding First Amendment protection, but that, in any case, Assange went well beyond that by actively collaborating with Manning.²³² For Assange to succeed, then, he will first have to convince the court to apply an interpretation of *Bartnicki* that reserves liability for those who actively conspire with their sources. (This Article largely supports this approach,²³³ and it is not precluded by Stevens’s opinion for the Court, but is harder to square with Breyer’s concurrence and some subsequent precedent). Assange will then have to persuade that court that his interactions with Manning fell short of that line.²³⁴

B. *Bartnicki Prong Two: Unlawful Acquisition*

The second condition for claiming *Bartnicki* protection is that the publisher obtained the information “lawfully,”²³⁵ and like with prong one, courts have applied it inconsistently. Although some courts have blurred the distinction between prong one and two,²³⁶ prong two applies only to situations in which a publisher received information from a third party where the receipt or possession of that information was itself proscribed by law.

One of the most restrictive interpretations of prong two came from the

230. The indictment notes that Manning’s first involvement with WikiLeaks was to search for specific classified records (e.g., CIA detainee interrogation videos) sought by WikiLeaks via a “Most Wanted Leaks” appeal on its website. The website also solicited records in “bulk databases and military and intelligence categories,” which is what Manning ultimately provided to WikiLeaks—full databases of war-related activity reports from Iraq and Afghanistan, Guantanamo Bay detainee records, and about a quarter million State Department cables. *Assange Superseding Indictment*, *supra* note 6, at 5–6.

231. The government alleges that Assange and Manning engaged in regular correspondence, *id.* at 6, and that Assange continued to encourage the leak of additional records after receiving the first batches, *id.* at 6–7, which Assange knew were classified, *id.* at 9, and might put individuals at risk, *id.* at 26. The indictment also alleges Assange offered technical advice to Manning about how to circumvent password protections. *Id.* at 7.

232. The words “encourage” or “encouraged” appear ten different times in the first superseding indictment. *Assange Superseding Indictment*, *supra* note 6. The second superseding indictment focuses less on Manning but nevertheless charges Assange with conspiring with Manning. *See Assange Second Superseding Indictment*, *supra* note 6.

233. *See infra* section IV.B.

234. *See* discussion *infra* section IV.B.

235. *Bartnicki v. Vopper*, 532 U.S. 514, 525 (2001).

236. *See supra* note 139.

Seventh Circuit in *Dahlstrom v. Sun-Times Media, LLC*²³⁷ in 2015. That case was based on the actions of *Chicago Sun-Times* reporters who were covering a criminal investigation of the nephew of the mayor of Chicago. In order to prove that lookalike “fillers” were used in a police lineup to make the nephew difficult to identify, the reporters sought information about the men, in part by requesting their motor vehicle records from the office of the Secretary of State.²³⁸ Officials in that office then supplied the records without objection or qualification.²³⁹ After the reporters included some of this information in their subsequent reporting, several police officers, who were among the fillers, sued the *Sun-Times* based on the reporters’ alleged violation of the Driver’s Privacy Protection Act (DPPA).²⁴⁰ That law prohibits knowingly obtaining or disclosing personal information from motor vehicle records.²⁴¹ The Seventh Circuit panel concluded that the *Sun-Times* could be held liable because it was technically unlawful to acquire such records, so the paper did not qualify for *Bartnicki* protection. The Seventh Circuit focused solely on the reporters’ pursuit of protected records, ignoring the intervening actions of the records custodians and treating the case as one without an intermediary.

The *Dahlstrom* decision was mystifying, in part because the facts largely paralleled those of the Supreme Court’s decision in *Florida Star*, which the Seventh Circuit blithely tried to distinguish. In *Florida Star*, a woman had been raped, and an unredacted report of the incident, which contained her full name, was accidentally placed in a press room by an employee of the sheriff’s department.²⁴² A reporter then copied the report and subsequently published the victim’s name in the paper, which violated state law.²⁴³ The Supreme Court held that the reporter obtained the information lawfully, even though the record included information that was not meant to be public, and even though the government officials violated their own statutory obligations by releasing it. This is precisely what happened in *Dahlstrom*: information that was not meant to be public was mistakenly made available to the press by records custodians in

237. 777 F.3d 937 (7th Cir. 2015).

238. *Id.* at 940.

239. *Id.*

240. 18 U.S.C. § 2721.

241. *Id.* § 2722(a) (“It shall be unlawful for any person knowingly to obtain or disclose personal information, from a motor vehicle record”).

242. *Fla. Star v. B.J.F.*, 491 U.S. 524, 527 (1989).

243. *Id.* The statute in that case prohibited government officials from releasing the names of rape victims, and it also authorized penalties for anyone who published such information. *Id.* at 526 n.1. The latter provision was struck down by the Court as a violation of the right to publish lawfully obtained information about matters of public interest. *Id.* at 526.

violation of the statute. The Seventh Circuit glossed over these similarities by saying the paper in *Florida Star* obtained the private information from “a public police report.”²⁴⁴ But that report was no more public than the information provided to *Sun-Times* reporters in *Dahlstrom*. And, as the Court noted in *Florida Star*, “the fact that state officials are not required to disclose such reports does not make it unlawful for a newspaper to receive them when furnished by the government.”²⁴⁵ Nor does the violation of the law by the records custodians make “the newspaper’s ensuing receipt of this information unlawful.”²⁴⁶

The Seventh Circuit suggests that a material difference in *Dahlstrom* is that “the acquirer and publisher are one and the same.”²⁴⁷ The court seems to assume that the Supreme Court would have decided *Florida Star* differently if the reporter in that case had first asked for the non-public information, and *then* the government employee mistakenly provided it. That seems implausible, and it would require the same kind of logic that other courts have rejected²⁴⁸ in their analyses of prong one: that in order to invoke *Bartnicki*, reporters must be oblivious about the provenance of the material they acquired.

In any case, such a rule would present another problem that the Supreme Court highlighted in *Florida Star*: it would shift the burden of determining what is private under the statute from records custodians to records requesters and would subject the requesters to civil and criminal penalties if they guess wrong.²⁴⁹ The Seventh Circuit’s *Dahlstrom* analysis also flies in the face of Judge Koeltl’s observation in *DNC* that seeking information, asking questions, and soliciting records are fundamental aspects of journalism and their curtailment certainly implicates First Amendment interests.²⁵⁰

The final way in which the Seventh Circuit sought to distinguish

244. *Dahlstrom*, 777 F.3d at 951.

245. *Fla. Star*, 491 U.S. at 536.

246. *Id.* The Court in *Florida Star* noted that the first step should be for the government to secure the privacy of records, not to punish those who happen to obtain them. “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.” *Id.* at 534. It made a similar point in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 841 & n.12 (1978) (noting that the State could have done more to protect the confidentiality of its proceedings).

247. *Dahlstrom*, 777 F.3d at 952.

248. See *Jean v. Mass. State Police*, 492 F.3d 24 (1st Cir. 2007); *Boehner III*, 484 F.3d 573 (D.C. Cir. 2007); *Democratic Nat’l Comm. (DNC) v. Russian Fed’n*, 392 F. Supp. 3d 410 (S.D.N.Y. 2019).

249. *Fla. Star*, 491 U.S. at 536 (“[D]epriving protection to those who rely on the government’s implied representations of the lawfulness of dissemination, would force upon the media the onerous obligation of sifting through government press releases, reports, and pronouncements to prune out material arguably unlawful for publication.”).

250. *DNC*, 392 F. Supp. 3d at 436.

Dahlstrom from *Florida Star* was by emphasizing the differences in the underlying statute. The DPPA specifically authorizes penalties for both “obtaining” and “disclosing” private information from motor vehicle records.²⁵¹ The statute in *Florida Star*, however, focused solely on disclosures of personal information. Similarly, the wiretap laws in *Bartnicki* only prohibited disclosures and uses of illegally intercepted communications. After ruling for the defendant in *Florida Star*, the Supreme Court reserved the question of whether a different outcome might have been warranted had the statute specifically proscribed the obtaining of the name of the rape victim. “Even assuming the Constitution permitted a State to proscribe receipt of information,” the Court noted, “Florida has not taken this step.”²⁵² The Court acknowledged this issue in *Bartnicki* but did not have a reason to answer it, so the Court left the matter open once again.²⁵³

The Seventh Circuit responded by not only assuming that a statutory prohibition on possession necessarily precluded *Bartnicki* protection under prong two but by using the most narrow and literal approach possible. The *Sun-Times* reporters argued that their pursuit of truthful, newsworthy information held by a government agency is a routine journalistic practice, and probably not what the legislature had in mind when it drafted the law. Nevertheless, the Seventh Circuit wrote, the *Sun-Times* “cannot escape the fact that it acquired that truthful information unlawfully.”²⁵⁴ It went still further, adding that the statute’s prohibition on obtaining information did not implicate any First Amendment interests and so was only subject to rational-basis scrutiny.²⁵⁵

After the Seventh Circuit remanded *Dahlstrom*, the District Court explored more fully the role of the records custodians in the Secretary of

251. 18 U.S.C. § 2722(a) (“It shall be unlawful for any person knowingly to obtain or disclose personal information, from a motor vehicle record . . .”).

252. *Fla. Star*, 491 U.S. at 536 (emphasis in original); see also *Boehner III*, 484 F.3d at 585 (Sentelle, J., dissenting) (“[T]he otherwise-lawful receipt of unlawfully obtained information remains in itself lawful, even where the receiver knows or has reason to know that the source has obtained the information unlawfully.”).

253. In effect the Court in *Bartnicki* added prong two as an acknowledgement of this open question rather than as an attempt to answer it. The Court essentially said that *at least* where the information was lawfully obtained—like it was in *Bartnicki*, because there was no statutory prohibition on receiving the stolen communications—then publishers can disclose that information when it addresses matters of public concern. It did not hold that unlawful receipt of information would necessarily preclude protection. In that sense, prong two is not a mandatory condition that lower courts must follow, but simply an acknowledgement of the facts in front of the Court and the *possibility* that its analysis might be different in other circumstances.

254. *Dahlstrom v. Sun-Times Media, LLC*, 777 F.3d 937, 951 (7th Cir. 2015) (emphasis in original).

255. *Id.* at 949.

State's office, acknowledging what the Seventh Circuit ignored: that those officials violated the DPPA and that the journalists only obtained the records as a result of that violation. Nevertheless, the district court held—without any reference to *Florida Star* or *Bartnicki*—that the violation by the Secretary of State officials “does not immunize the *Sun-Times* from liability” because “an initial violation by one party does not negate subsequent violations by another.”²⁵⁶ But this is precisely the opposite of what the Supreme Court held in *Florida Star* when it made clear that where the government itself provides information, it is fair to assume that it “had, but failed to utilize, far more limited means of guarding against dissemination” than imposing liability on a publisher of that information.²⁵⁷

The only difference between *Dahlstrom* and *Florida Star* was the inclusion of the word “obtain” in the DPPA.²⁵⁸ And if *Florida Star* and *Bartnicki* protection can be defeated by simply including statutory language prohibiting receipt of information, and that language is only subject to rational-basis scrutiny, it is an extraordinary loophole. Legislatures could easily exploit *Dahlstrom* by making any unauthorized receipt of government information a crime, which would gut *Bartnicki* while giving no sanctuary to journalists who receive leaked information from whistleblowers and others. The Seventh Circuit's approach essentially treats information as contraband, allowing the government to criminalize its mere possession, and inviting legislatures to skirt *Bartnicki* by adding “obtain” and “possess” prohibitions to every government records law.

This has major implications for people like Julian Assange, and for journalists covering national security issues, because some laws like the Espionage Act arguably prohibit the possession of classified or other sensitive information.²⁵⁹ As a circuit court decision, *Dahlstrom* is

256. *Dahlstrom v. Sun-Times Media, LLC*, 346 F. Supp. 3d 1162, 1168 (N.D. Ill. 2018).

257. *Fla. Star*, 491 U. S. at 538. The Court added that once the government releases information “reliance must rest upon the judgment of those who decide what to publish or broadcast.” *Id.* This principle was also followed in one case applying *Bartnicki*, *Palm Beach Newspapers, LLC v. State*, 183 So. 3d 480 (Fla. Dist. Ct. App. 2016) (holding that a newspaper did not receive information unlawfully when it was supplied by the government).

258. *See* 18 U.S.C. § 2722(a).

259. 18 U.S.C. § 793(e). This section prohibits unauthorized possessors of classified national security information—which arguably could include journalists to whom such information has been leaked—from *communicating* or *retaining* that information. *Id.* For a thorough analysis of how this provision could apply against the press, see Stephen I. Vladeck, *Inchoate Liability and the Espionage Act: The Statutory Framework and the Freedom of the Press*, 1 HARV. L. & POL'Y REV. 219 (2007). Vladeck notes that in *United States v. Rosen*, 445 F. Supp. 2d 602 (E.D. Va. 2006), the court upheld the conviction of third parties (albeit non-journalists) for conspiring to violate § 793(e). Vladeck,

especially important, even though among the post-*Bartnicki* cases it largely stands alone. No other cases have turned on the presence or absence of this kind of statutory language. Nevertheless, because the Supreme Court reserved the question in several cases, and because a circuit court has now supplied an answer, it could have a malignant effect.

It does not help that the only other circuit court cases touching on the prong two notion of unlawful acquisition—*Boehner II* and *Boehner III*—introduced their own complications. In *Boehner II*, the D.C. Circuit largely conflated prong one and prong two by treating McDermott’s receipt of the intercepted phone call as unlawful *because* he knew the information was illegally intercepted and had personal interaction with the Martins.²⁶⁰ In *Boehner III*, the full D.C. Circuit, by the narrowest margin, abandoned that rationale and instead focused on Rep. McDermott’s special obligation under House rules not to reveal confidential communications received in his capacity as a member of the Ethics Committee.²⁶¹ Four of the nine *Boehner III* judges would have maintained that McDermott’s receipt of the information was unlawful,²⁶² but that issue was left open because the court shifted its focus to McDermott’s disclosure. In the end, the D.C. Circuit essentially treated McDermott as a records custodian, akin to other government employees who are prohibited from revealing private or sensitive government records to which they have been entrusted. There are two problems with this. One is that McDermott’s obligations were ethical, not legal.²⁶³ The other is that, to the extent that McDermott had surrendered some of his freedom to communicate by virtue of his responsibilities as a member of the committee, the analysis of his rights under *Bartnicki* was misplaced.

With regard to the first point, McDermott did not violate a criminal law, his actions were not tortious, and he did not break an enforceable

supra, at 224. The court concluded that “the government can punish those outside of the government for the *unauthorized receipt* and deliberate retransmission of information relating to the national defense.” *Rosen*, 445 F. Supp. 2d at 637 (emphasis added).

260. *Boehner II*, 441 F.3d 1010, 1016 (D.C. Cir. 2006).

261. *Boehner III*, 484 F.3d 573, 581 (D.C. Cir. 2007) (“When Representative McDermott became a member of the Ethics Committee, he voluntarily accepted a duty of confidentiality that covered his receipt and handling of the Martins’ illegal recording. He therefore had no First Amendment right to disclose the tape to the media.”). This theory was first addressed in the immediately previous district court opinion, but that court reached a different conclusion. *Boehner v. McDermott*, 332 F. Supp. 2d 149, 163 (D.D.C. 2004) (“[W]hile it is clear that McDermott received the information from the Martins in his official political capacity, the Court does not find that he was under an independent preexisting duty greater than that required of any citizen.”).

262. *Boehner III*, 484 F.3d at 577 n.1.

263. It is not even clear, as Judge Sentelle pointed out in his dissent, that McDermott violated House rules. The House report on the matter found only that McDermott’s actions were “inconsistent with the spirit of the applicable rules.” *Id.* at 590 (Sentelle, J., dissenting) (emphasis omitted).

contract. The penalties he was subject to were institutional sanctions like peer censure and the like. He was not subject to any court-imposed or other external sanction. By framing McDermott's ethical duty as a legal obligation and identifying no limiting conditions, the D.C. Circuit endorsed a boundary-less exception to *Bartnicki*. Of course, there are situations in which people voluntarily relinquish some of their First Amendment rights and are bound by a superseding obligation of non-disclosure.²⁶⁴ But if that exception is triggered by ethical duties rather than statutory or contractual requirements, it is an arbitrary standard.

None of this would have mattered if not for the second problem, which is that the court's opinion initially presents the case as lying entirely outside of the *Bartnicki* framework ("we shall assume *arguendo*," the court wrote, "that Representative McDermott lawfully obtained the tape from the Martins"²⁶⁵) but never fully untethered it because it continued to tie McDermott's liability back to the illegal actions of the Martins. Judge Griffith's concurring opinion reflected the same error. He noted, correctly, that the "the Court . . . need not reach the *Bartnicki* issue to resolve the matter before us,"²⁶⁶ but concluded that because McDermott's *disclosures* were not protected by the First Amendment, he had no defense against the wiretap claims stemming from the illegal *acquisition*.

The court noted that there are many situations in which people are prohibited by law, or as a condition of their employment, from disclosing sensitive information, and that punishments in those situations do not necessarily violate the First Amendment.²⁶⁷ This is true and would have been the case if McDermott had been punished by the House of Representatives; he might not have had a First Amendment defense

264. Indeed, this was true in at least one other case applying *Bartnicki*. See *Council on Am.-Islamic Rels. Action Network, Inc. v. Gaubatz*, 793 F. Supp. 2d 311 (D.D.C. 2011) (holding intern at a private organization did not have First Amendment right to disclose organization's private but newsworthy records where doing so violated the parties' confidentiality agreement); see also *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) (holding that former CIA agent whose employment contract prohibited disclosure of classified information, even post-employment, did not have a First Amendment right to disclose that information).

265. *Boehner III*, 484 F.3d at 577.

266. *Id.* at 581 (Griffith, J., concurring).

267. The court lists examples of laws that impose limits on disclosure by custodians or possessors of certain information, including the Espionage Act, the Privacy Act and the Intelligence Identities Protection Act. *Id.* at 578 (majority opinion). And it notes that certain government employees—those working for the Internal Revenue Service or the Social Security Administration—are obligated to maintain the confidentiality of certain records. *Id.* None of those examples are on point, however, because none involve holding the discloser of those records liable for the antecedent illegal acts of third parties. *Id.*

against institutionally imposed sanctions.²⁶⁸ But the fact that he had voluntarily surrendered some of his First Amendment rights to *disclose* information placed in his custody is not a reason to tie his culpability back to the illegal interception by the Martins. By the D.C. Circuit's own admission, McDermott met all of the conditions of *Bartnicki*, yet the court still found him liable. Whether it intended to or not, then, and despite Judge Griffith's assertions to the contrary, the court carved out a vague exception *within* the *Bartnicki* framework rather than a clear exception *to* it.

Unfortunately, other lower court rulings have not offered much additional guidance about what constitutes illegal acquisition in the prong two sense, although one court held that the receipt of documents that a defendant knew were under judicial seal constituted unlawful acquisition.²⁶⁹ Prong two scenarios do not arise very often because it is rare for statutes to explicitly prohibit the receipt or possession of information. Still, courts ought to consider abandoning this criterion altogether and strike down as inconsistent with the First Amendment any proscription on the mere possession of information, at least where that information relates to a matter of public significance, and the possessor believed this to be the case prior to taking possession. This would still leave open the possibility of liability for those who actively participate in the illegal procurement of the information and those who knowingly receive illegally acquired information without any expectation that it contained information of public concern.²⁷⁰ It would also resolve the paradoxical situation where someone is free to publish what they are prohibited from possessing, as if the former is possible without the latter.

There is one final question related to prong two that the courts have not resolved and that the Supreme Court has repeatedly left open, including in *Bartnicki*: “[W]hether, in cases where information has been acquired *unlawfully* by a newspaper or by a source, government may ever punish

268. Compare *id.*, with *Baumann v. District of Columbia*, 987 F. Supp. 2d 68 (2013) (denying *Bartnicki* protection to government employee disciplined for misconduct after disclosing confidential radio communications between emergency response personnel).

269. *Lowe v. Hearst Commc'ns., Inc.*, 403 F. Supp. 2d 568, 576 (W.D. Tex. 2005) (“If . . . Hearst obtained the sealed documents in contravention of the sealing order and published them, it has done so ‘illegally’ in the sense that it violated a lawful court order of which it had notice.”), *superseded*, 414 F. Supp. 2d 669 (W.D. Tex. 2006).

270. So, someone offered stolen credit card information or an illegally recorded sex tape would not be able to claim the protection, but those with a good faith and well-founded belief that the offered information contained material of public significance would be immune from liability for merely possessing it.

not only the unlawful acquisition, but the ensuing publication as well.”²⁷¹ Aside from noting the strong presumption against the constitutionality of restraints on publishing newsworthy information,²⁷² the Court offered little insight. The question also needs some parsing because a court might answer the question differently depending on whether they interpret the phrase “unlawful acquisition” to mean primary participation under prong one, secondary participation under prong one, or merely the unsolicited but illegal receipt or possession of information under prong two.

The Seventh Circuit purported to enter this “uncharted territory”²⁷³ in *Dahlstrom*, noting that the question raised by the Court about restrictions on publishing information “acquired unlawfully by a newspaper” was “still open.”²⁷⁴ The Seventh Circuit’s answer was incomplete, however, because it found that the DPPA was a reasonable limitation on the right to publish where there is no “intervening illegal actor” and the “acquirer and the publisher are one and the same.”²⁷⁵ The court acknowledged that the outcome might have been different if a third party had acquired the information illegally and transmitted it to the *Sun-Times*, but the court concluded that was not the case, and so the situation was not analogous to *Bartnicki*.²⁷⁶ In reaching this conclusion, however, the court completely ignored the actions of the records custodians at the office of the Secretary of State, whose disclosure of the information violated the DPPA. Other courts should take note of this factual oversight when interpreting and applying *Dahlstrom*; the Seventh Circuit’s conclusion is delegitimized by its own mischaracterization of the facts and by its inconsistency with the rulings in both *Florida Star* and *Bartnicki*. Nevertheless, the Seventh Circuit is at least one influential court that has concluded that there is no constitutional problem with imposing limits on the *publication* of newsworthy information, at least where the defendant was a primary participant in illegally procuring the information. It remains to be seen if other courts will concur or whether they will distinguish situations in which the defendant was a secondary participant or where they merely

271. *Bartnicki v. Vopper*, 532 U.S. 514, 528 (2001) (emphasis in original) (quoting *Fla. Star v. B.J.F.*, 491 U.S. 524, 535 n.8 (1989)) (noting that the same question was also reserved by the court in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 837 (1978), after being initially raised by the Court in *N.Y. Times Co. v. United States (Pentagon Papers)*, 403 U.S. 713 (1971)).

272. *Bartnicki*, 532 U.S. at 527 (emphasis in original) (quoting *Smith v. Daily Mail Pub’g Co.*, 443 U.S. 97, 102 (1979)).

273. *Dahlstrom v. Sun-Times Media, LLC*, 777 F.3d 937, 951–52 (7th Cir. 2015).

274. *Id.* (emphasis omitted) (quoting *Bartnicki*, 532 U.S. at 528).

275. *Id.* at 952. In those situations, the court noted, punishing disclosure is more likely to deter illegal acquisition, unlike in situations like *Bartnicki* where the publisher of the information was not the party who illegally intercepted it. *Id.*

276. *Id.*

received the illegally acquired information from a third party.

There is another approach that courts should consider, which is to sever illegal acquisition from publication to more precisely target the harms caused by each while not unduly restraining the flow of newsworthy information. Courts could simply treat procurement and publication as discrete acts redressable through discrete remedies. This is essentially what the Fourth Circuit did in a pre-*Bartnicki* case, *Food Lion, Inc. v. Capital Cities/ABC, Inc.*²⁷⁷ In that case, reporters lied to get hired at Food Lion grocery stores where they documented unsanitary food handling practices while on the job using hidden cameras and microphones.²⁷⁸ The resulting broadcast report caused Food Lion stock to plummet, and the company sued under a number of tort theories.²⁷⁹ The Fourth Circuit held that while the reporters and their parent organization could be held liable for torts they committed in their pursuit of the story (e.g., trespass, breach of the duty of loyalty), any damages awarded had to be tied directly to the harms caused by those breaches, not those resulting from the subsequent broadcast.²⁸⁰

Although the Supreme Court has not addressed this issue directly, its rulings in *Cohen* and *Hustler Magazine, Inc. v. Falwell*²⁸¹ provided the doctrinal foundation for *Food Lion*.²⁸² In addition, the *Food Lion* principle (disentangling newsgathering-related damages from publication-related damages²⁸³) has been widely embraced by other courts, including by the First and Sixth Circuits,²⁸⁴ and it is consistent with other Supreme Court

277. 194 F.3d 505 (4th Cir. 1999).

278. *Id.* at 510–11.

279. *Id.*

280. *Id.* at 523–24. Food Lion was still free to sue for defamation for any harms caused by the broadcast—a claim they never pursued, perhaps because they would not have been able to prove that the report was materially false.

281. 485 U.S. 46 (1988).

282. In *Cohen v. Cowles Media Co.*, the Supreme Court held that the First Amendment does not immunize journalists from liability for torts they commit in their pursuit of news. 501 U.S. 663 (1991). Nevertheless, the Court previously made clear in *Hustler Magazine, Inc. v. Falwell* that plaintiffs cannot skirt First Amendment requirements by seeking reputation-based damages for non-reputation-based torts. 485 U.S. 46 (1988).

283. *Food Lion*, 194 F.3d at 522 (“What Food Lion sought to do, then, was to recover defamation-type damages under non-reputational tort claims, without satisfying the stricter (First Amendment) standards of a defamation claim. We believe that such an end-run around First Amendment strictures is foreclosed by *Hustler*.”).

284. Both courts concluded that journalist-defendants were not protected by the First Amendment against pecuniary harms caused by their misrepresentations to sources but that damages could not be based on the journalists’ subsequent reporting. *Veilleux v. Nat’l Broad. Co.*, 206 F.3d 92 (1st Cir. 2000); *W.D.I.A. Corp. v. McGraw-Hill, Inc.*, 34 F. Supp. 2d 612 (S.D. Ohio 1998), *aff’d*, 202 F.3d 271 (6th Cir. 2000) (per curiam). Not all courts have followed the *Food Lion* model, however. In two

cases decoupling harmful acts from depictions of those acts.²⁸⁵ This approach is also compatible with Supreme Court precedent (given that the Court has repeatedly reserved the question) and with *Bartnicki* itself, which is often misread as foreclosing First Amendment protection for those who unlawfully acquire information when in fact the Court approached it from the opposite direction, acknowledging the unchanged presence of First Amendment protection when information is “obtained lawfully.”²⁸⁶ The *Bartnicki* Court explicitly refused to identify a ceiling of protection, mindful of its longstanding reluctance to offer a final answer about “whether truthful publication may ever be punished consistent with the First Amendment.”²⁸⁷

In the Julian Assange case, untying acquisition and publication would mean that the government could still pursue charges under the Espionage Act by seeking to prove that Assange conspired with Manning to access classified records. They could also pursue separate charges or seek injunctions, focusing on the publication of the records. But courts should reject the government’s attempts to criminalize the mere possession of records that are of public significance or attempts to vitiate First Amendment protection for publication by pointing to the technical illegality of the defendants’ prior possession or receipt of that information. Those approaches, endorsed in one form or another by the courts in *Quigley*, *Boehner II* and *Dahlstrom*, and by the plaintiffs in the *Cockrum* and *DNC* cases, suppose an inextricable connection between illegal actors and third-party publishers and turn prong two into a technical exception that can too easily be exploited to suppress the circulation of newsworthy information. On the latter point, Donald Trump’s threatened tax-records lawsuit against *The New York Times* provides an illustration. The *Times* is clearly protected by *Bartnicki* because it obtained the records from a third party, and the records are clearly newsworthy.²⁸⁸ But a simple amendment by Congress outlawing the obtaining of tax records by

California cases, *Turnbull v. American Broadcasting Co.*, No. CV 03-3554 SJO, 2004 WL 2924590 (C.D. Cal. Aug. 19, 2004) and *Sanders v. American Broadcasting Co.*, No. B094245, 1999 WL 1458129 (Cal. App. Dec. 15, 1999), the courts held that damages for harms caused by non-consensual video recordings could be based on both the recording itself *and* the subsequent broadcast of the video.

285. See, e.g., *United States v. Stevens*, 559 U.S. 460 (2010) (recognizing the legitimacy of laws against animal cruelty but striking down application of law that punished *depictions* of such cruelty). For a similar example from a different court and context, see *Anderson v. Blake*, No. Civ-05-0729-HE, 2005 U.S. Dist. LEXIS 25654 (W.D. Okla. Oct. 21, 2005) (news organization could not be liable for intrusion for broadcasting part of a recording of a rape where organization was not involved in making the recording).

286. *Bartnicki v. Vopper*, 532 U.S. 514, 525 (2001).

287. *Id.* at 529.

288. See Buettner et al., *supra* note 229.

non-custodians would be constitutional under *Dahlstrom* and would subject the *Times* to criminal liability for publishing information of clear public concern. That obstacle also looms large for Assange because the Espionage Act proscribes possession of classified documents relating to national security.²⁸⁹

A cleaner and less hazardous approach would be for courts to more clearly disentangle procurement, receipt, and publication. They should close the *Dahlstrom* loophole that allows governments to criminalize the mere receipt of newsworthy information, particularly when that information is supplied by the government itself.²⁹⁰ And courts should abandon the *Boehner III* exception that treats defendants' duties of non-disclosure (even some duties that are not legally enforceable) as relevant in assessing liability for illegal *procurement*.

C. Bartnicki Prong Three: Public Concern

The third prerequisite for invoking *Bartnicki* protection is that information addresses a matter of “public concern.”²⁹¹ This is a familiar but malleable term used by the courts in a number of contexts and sometimes expressed as “public interest,” “public issue,” “public significance,” or “newsworthiness.” The Supreme Court has long recognized²⁹² the distinction between private people and issues, on one hand, and public people and issues on the other, giving more expansive protection to speech about the latter in the adjudication of defamation claims,²⁹³ in assessing the constitutionality of restrictions on public-employee speech,²⁹⁴ and in the pre-*Bartnicki* line of cases involving the disclosure of non-public information.²⁹⁵

289. See *supra* note 259.

290. As Justice Stewart noted in *Pentagon Papers*, “[t]he responsibility must be where the power is.” *N.Y. Times Co. v. United States (Pentagon Papers)*, 403 U.S. 713, 729–30 (1971) (Stewart, J., concurring).

291. *Bartnicki*, 532 U.S. at 525.

292. The First Amendment “embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment.” *Thornhill v. Alabama*, 310 U.S. 88, 101–02 (1940).

293. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348 (1974) (permitting states to establish less onerous standards of proof in libel cases brought by private people than those applying to public people); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 44 (1971) (extending protection “to all discussion and communication involving matters of public or general concern”); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270–71 (1964) (recognizing the “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open”).

294. See *Connick v. Myers*, 461 U.S. 138, 146 (1983) (holding that public employee could be fired without violating the First Amendment where the triggering speech involved private, internal workplace issues, not “a matter of public concern”).

295. See *supra* text accompanying notes 64–67.

Prior to *Bartnicki*, lower courts had not given much shape to the concept of public concern but had embraced expansive conceptions of “newsworthiness,” finding that it encompassed just about everything short of “morbid and sensational prying into private lives.”²⁹⁶ The Supreme Court, which has not defined newsworthiness, offered a seemingly narrower definition of public concern in *Connick v. Myers*,²⁹⁷ saying that whether speech addresses matters of public concern must be determined by its “content, form, and context”²⁹⁸ but that it generally encompasses material “relating to any matter of political, social, or other concern to the community.”²⁹⁹ A few years after *Bartnicki*, the Court added in *City of San Diego v. Roe*³⁰⁰ that “public concern is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.”³⁰¹ In 2011, the Court broached the definitional question again in *Snyder v. Phelps*³⁰² but largely reiterated the language from *Connick* and *Roe*.³⁰³

The Supreme Court did not address these definitional questions in *Bartnicki*, but it is clear that Justice Stevens had in mind an expansive notion of public concern. His opinion only mentioned disclosures of “trade secrets, domestic gossip or other information of purely private concern”³⁰⁴ as being *potentially*³⁰⁵ unprotected. He also at one point used the term “newsworthy” in conjunction with “public concern,” stating that the content of the Kane-Bartnicki call involved matters of public concern, and if the conversation had occurred in public, it would have been considered newsworthy.³⁰⁶ Perhaps most important was Stevens’s characterization of the salient facts in *Bartnicki*. Stevens focused on the newsworthiness of the broader context of the call—the battle between the

296. *Virgil v. Time, Inc.*, 527 F.2d 1122, 1129 (9th Cir. 1975) (quoting RESTATEMENT (SECOND) OF TORTS § 652F (AM. L. INST., Tentative Draft No. 13, 1967)). Newsworthiness is a defense to civil claims for public disclosure of private facts and has been defined so broadly in that context that one media law scholar suggested that the defense had “swallow[ed]” the tort. Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 336 (1966).

297. 461 U.S. 138 (1983).

298. *Id.* at 147.

299. *Id.* at 146.

300. 543 U.S. 77 (2004).

301. *Id.* at 83–84.

302. 562 U.S. 443 (2011).

303. *Id.* at 453.

304. *Bartnicki v. Vopper*, 532 U.S. 514, 533 (2001).

305. Stevens did not rule out protection for speech on those subjects but merely reserved the question. *Id.* Some courts have acknowledged this uncertainty, e.g., *Quigley v. Rosenthal*, 327 F.3d 1044, 1067–68 (10th Cir. 2003), but none has recognized protection for private information in *Bartnicki* situations.

306. *Bartnicki*, 532 U.S. at 525.

union and the school district—which he described in the final paragraph of his opinion as “unquestionably a matter of public concern,” adding that “respondents were clearly engaged in debate about that concern.”³⁰⁷ Stevens put no emphasis on Kane’s “blow off their front porches” comment.³⁰⁸

Breyer, on the other hand, began his opinion by highlighting the porches comment, which he clearly viewed as more than rhetorical hyperbole, writing that the “threat of potential physical harm to others” made the recording a matter of “unusual public concern.”³⁰⁹ Because Breyer’s concurrence emphasized the threat rather than the broader subject-matter of the conversation,³¹⁰ and because he and Justice O’Connor provided the crucial votes for the defendants,³¹¹ lower courts were left with some uncertainty about where to place the emphasis under prong three.

In terms of terminology, lower courts applying *Bartnicki* have mirrored the Court’s treatment of “public concern,” “public interest,” and “newsworthiness” as synonymous or parallel concepts and often use them interchangeably within the same opinion. Some courts have explored the definitional issues in more detail,³¹² some have avoided the issue altogether,³¹³ and others have treated either the public³¹⁴ or private³¹⁵ nature of the information as self-evident. The types of material that courts applying *Bartnicki* have found to be of public concern include video of police executing a search warrant at a private residence,³¹⁶ details of an

307. *Id.* at 535.

308. Stevens mentions Kane’s comment, but as part of the facts of the case, not as a determinative factor in assessing the newsworthiness of the call. *Id.* at 518–19.

309. *Id.* at 536 (Breyer, J., concurring).

310. Breyer also highlighted the public-figure status of the participants. *Id.* at 539.

311. Justice O’Connor joined the Breyer concurrence, creating a six-vote majority in favor of the defendants.

312. See *Cockrum v. Donald J. Trump for President, Inc.*, 365 F. Supp. 3d 652, 658–59 (E.D. Va. 2019); *Lowe v. Hearst Commc’ns, Inc.*, 403 F. Supp. 2d 568, 572–73 (W.D. Tex. 2005), *superseded*, 414 F. Supp. 2d 669 (W.D. Tex. 2006).

313. Neither the district court in *Boehner v. McDermott*, 332 F. Supp. 2d 149 (D.D.C. 2004) nor the D.C. Circuit in *Boehner II* or *Boehner III* addressed the issue of public concern. Indeed, in *Boehner II* the court only acknowledged prong three of *Bartnicki* in a footnote and then noted that the Supreme Court had previously warned about the difficulty of judges determining what issues are of public concern. *Boehner II*, 441 F.3d 1010, 1014 n.1 (D.C. Cir. 2006) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346 (1974)).

314. See, e.g., *Palm Beach Newspapers, LLC v. State*, 183 So. 3d 480, 482–83 (2016) (declaring that information about prosecutors’ collaboration with a jailhouse “snitch” was “clearly one of public concern”).

315. See, e.g., *Trans Union Corp. v. FTC*, 267 F.3d 1138 (D.C. Cir. 2001) (rejecting applicability of *Bartnicki* to disclosure of private credit report information).

316. *Jean v. Mass. State Police*, 492 F.3d 24 (1st Cir. 2007).

illegal blackmail scheme,³¹⁷ information about evidence in an upcoming murder trial,³¹⁸ and information relating to the validity of a police lineup.³¹⁹ Information that courts have found to *not* be of public concern include false speech,³²⁰ defamatory speech,³²¹ non-consensual sexual images (“revenge porn”),³²² information about the paternity of a child accessed from a private cell phone,³²³ and cell phone conversations in which a participant made a threat of violence that the court ultimately viewed as not credible.³²⁴

A few courts added their own peculiar conditions. In *Quigley*, the Tenth Circuit distinguished *Bartnicki* in part because the Aronsons’ lawyers “did not *accurately portray* the contents of the Quigleys’ recorded telephone conversations.”³²⁵ False information is not newsworthy, of course, but the court did not offer any insight about the point at which these reporting errors might destroy *Bartnicki* protection.

Similarly, the Michigan Supreme Court held that the defendants could not rely on *Bartnicki* because they were not “members of the press” and because they distributed illegally recorded video as an extra feature on a commercially distributed DVD.³²⁶ The court in *Bowens* made no effort to

317. *Lowe v. Hearst Commc’ns, Inc.*, 403 F. Supp. 2d 568 (W.D. Tex. 2005), *superseded*, 414 F. Supp. 2d 669 (W.D. Tex. 2006).

318. *Palm Beach*, 183 So. 3d 480.

319. *Dahlstrom v. Sun-Times Media, LLC*, 777 F.3d 937 (7th Cir. 2015).

320. *Quigley v. Rosenthal*, 327 F.3d 1044 (10th Cir. 2003).

321. *State v. Baron*, 2009 WI 58, 318 Wis. 2d 60, 769 N.W.2d 34.

322. *State v. VanBuren*, 2018 VT 95, 210 Vt. 293, 214 A.3d 791.

323. *In re Marriage of Evilsizor & Sweeney*, 189 Cal. Rptr. 3d 1 (Cal. 2015). The defendant husband discovered text messages on the phone of his plaintiff wife indicating that she had received fertility treatments, leading the husband to suspect he might not be the father of their child. The court noted that the defendant had “not identified any public concern in [his wife’s] text messages and other information that he surreptitiously took from her phones,” and that the information was of “purely private concern” and therefore outside the scope of *Bartnicki*. *Id.* at 1428 (quoting *Bartnicki v. Vopper*, 532 U.S. 514, 533 (2001)).

324. *Wingrave v. Hebert*, 2006-1240 (La. App. 4 Cir. 5/9/07); 964 So. 2d 385. Although the court expressed doubt about the credibility of the threat made by an intoxicated participant in a private phone conversation, it treated this as a material question of fact to be assessed by the lower court on remand. *Id.* at 11–13, 964 So. 2d at 392–93.

325. *Quigley v. Rosenthal*, 327 F.3d 1044, 1067 (10th Cir. 2003) (emphasis added). In *Bartnicki*, the court noted:

[T]he defendants broadcast the recorded conversation and printed a transcript of the conversation. Here, in contrast, the defendants merely used snippets of the Quigleys’ conversations in preparing the Aronsons’ civil complaint, and inaccurately portrayed those comments as demonstrating the existence of an anti-Semitic campaign on the part of the Quigleys against the Aronsons.

Id.

326. *Bowens v. Ary, Inc.*, No. 282711, 2009 Mich. App. LEXIS 2000, at *21 (Mich. Ct. App.

explain whom it considered to be “members of the press,”³²⁷ what works fit within its exclusion of material distributed “for profit,”³²⁸ or how either of these things affected the public’s interest in the material.³²⁹ It proved to be an aberrational case, however. No other court has conditioned protection on the defendants’ journalistic credentials³³⁰ or on their commercial interests in disclosure.

Another anomalous case was *DVD Copy Control Ass’n v. Bunner*,³³¹ in which the California Supreme Court held that the online distribution of DVD decryption software did not relate to matters of public concern. This type of functional speech does not contribute to the examination of public issues, the court held, and furthermore it fit within the *Bartnicki* Court’s implicit prong-three exception for trade secrets.³³² This issue reemerged more recently in *DNC*. The DNC alleged that the defendants violated the DNC’s trade secrets by publishing its donor lists and fundraising strategies.³³³ Judge Koeltl concluded that *Bartnicki* protection could not be vanquished by simply labeling something a trade secret, and that the

Sept. 24, 2009), *rev’d in part*, 489 Mich. 851 (2011). The Michigan Supreme Court ultimately dismissed the wiretap claim, finding that the plaintiffs did not have reasonable expectations of privacy in the bustling backstage area of an arena. It did not address the *Bartnicki* criteria because it found no basis for the claim in the first place. *Id.*

327. *Id.*

328. *Id.* One court suggested that media *attention* is an indicator of public concern. *Wingrave*, 2006-1240 at 11–13, 964 So. 2d at 391–92 (“However, we find *Bartnicki* distinguishable [because] the record reflects that [the] telephone conversation was not regarding information reported in the media.”).

329. Indeed, this case is inconsistent with the Supreme Court’s notation in *Bartnicki* that the Court drew “no distinction between the media respondents and Yocum.” *Bartnicki v. Vopper*, 532 U.S. 514, 525 n.8 (2001).

330. For the most part, courts did not address the status or credentials of the defendants and treated their baseline eligibility for *Bartnicki* protection as obvious or just addressed it in passing. *See, e.g.*, *Democratic Nat’l Comm. (DNC) v. Russian Fed’n*, 392 F. Supp. 3d 410, 418 (S.D.N.Y. 2019) (“[T]he First Amendment prevents such liability in the same way it would preclude liability for *press outlets* that publish materials of public interest . . .” (emphasis added)). Judge Sentelle emphasized the inconsequence of journalistic identity in *Boehner II*, 441 F.3d 1010, 1022 (D.C. Cir. 2006) (Sentelle, J., dissenting) (“Lest someone draw a distinction between the First Amendment rights of the press and the First Amendment speech rights of nonprofessional communicators, I would note that one of the communicators in *Bartnicki* was himself a news commentator, and the Supreme Court placed no reliance on that fact.”).

331. 75 P.3d 1 (Cal. 2003).

332. *Id.* at 86 (noting that the Court need not decide whether to protect “*disclosures of trade secrets* or domestic gossip or other information of purely private concern” (emphasis in original) (quoting *Bartnicki*, 532 U.S. at 533)). One federal district court applying *Bartnicki* emphasized that “trade secrets and commercial information” often needs to be treated with special sensitivity and can justifiably be withheld from public records. *In re Zyprexa Injunction*, 474 F. Supp. 2d 385, 424 (E.D.N.Y. 2007). That part of the decision was addressed to the appropriateness of a court seal, however, not specifically to the issue of public concern under *Bartnicki*.

333. *DNC*, 392 F. Supp. 3d at 436.

information the DNC sought to shield involved matters of “paramount public concern.”³³⁴ Whatever interest the DNC had in secrecy was “dwarfed by the news-worthiness of the documents as [a] whole.”³³⁵

The Seventh Circuit in *Dahlstrom* took a perplexing approach to the public concern issue and, in turn, left another mess for future courts. The court conceded that the *Sun-Times* investigation examining the propriety of a police line-up involving the Mayor’s nephew was a matter of public concern,³³⁶ but concluded that the information the reporters obtained from motor vehicle records was largely duplicative of information the reporters had legally obtained from other sources and was therefore “of less pressing public concern than the [information] in *Bartnicki*.”³³⁷ This ignores the phrasing of Justice Stevens’s opinion, which focused on the “subject matter of the conversation”³³⁸—not particular details—as the basis for gauging the public interest. Also, as the court points out, the material obtained from the records—the height, weight, hair color, and eye color of the officers who participated in the lineup—were readily observable. This does more to undermine the legitimacy of the government’s concealment of these records than to refute the utility of the information for the reporters. (Under the Seventh Circuit’s logic, the government could criminalize the disclosure of a government record indicating that the sun is yellow.) Even if the DPAA records were less essential than the information at issue in *Bartnicki*, it still clearly related to a matter of public interest. Meanwhile, as the court effectively acknowledges, there is no basis for treating the officers’ conspicuous physical characteristics as private.

Courts should fix this by simply striking down as unconstitutional any legislative or administrative provision that criminalizes the possession of, or otherwise suppresses, information that is plainly observable and ipso facto not private. Indeed, one federal district court in 2003, citing *Bartnicki*, did just that, suggesting that this type of information is not constitutionally concealable in the first place³³⁹—something the Seventh

334. *Id.* at 437.

335. *Id.* Judge Koeltl concluded that the publication of this information “allowed the American electorate to look behind the curtain of one of the two major political parties in the United States during a presidential election.” *Id.*

336. *Dahlstrom v. Sun-Times Media, LLC*, 777 F.3d 937, 953 (7th Cir. 2015).

337. *Id.*

338. *Bartnicki v. Vopper*, 532 U.S. 514, 525 (2001).

339. In *Sheehan v. Gregoire*, the court struck down parts of a state statute that criminalized the unauthorized publication of “personal identifying information”—including residential addresses, phone numbers and birth dates. 272 F. Supp. 2d 1135, 1142 (W.D. Wash. 2003). “Defendants cite no authority,” the court held, “for the proposition that truthful lawfully-obtained, publicly-available personal identifying information constitutes a mode of constitutionally proscribable speech.” *Id.*

Circuit seems not to have considered.³⁴⁰

Many of the courts applying *Bartnicki*, no doubt wary of making categorical pronouncements, have focused on the facts of the cases before them and the ways in which those facts might be distinguishable from or analogized to the facts of *Bartnicki*. Unfortunately, some courts have seized on the most sensational aspect of *Bartnicki*—Kane’s “blow off their front porches” comment³⁴¹—using that as the benchmark for “public concern,” effectively narrowing *Bartnicki*’s scope. Although some courts, like the First Circuit in *Jean*, focused its attention on Stevens’s opinion and pointed to the collective bargaining negotiations in *Bartnicki* as the basis for finding the Kane-Bartnicki phone call to be a matter of public concern,³⁴² other courts, like the Seventh Circuit in *Dahlstrom*, largely ignored Stevens’s opinion and instead cited Breyer’s concurring opinion, concluding that the material at issue in *Dahlstrom* was “of less pressing public concern than the *threats of physical violence* in *Bartnicki*.”³⁴³

Even for judges who emphasize Breyer’s concurrence, it is a misreading of *Bartnicki* to conclude that threats of violence are a minimum threshold for establishing that an issue is of public concern. The analogy only works in one direction. It is certainly fair to conclude that information that is at least as consequential as the “porches” threat would clearly be of public concern and would satisfy the four justices signing Stevens’s opinion and the two who signed Breyer’s concurrence. It would not be fair to take from *Bartnicki*, however, that anything falling below that standard is *not* of public concern. Breyer was not marking outer boundaries but merely acknowledging the unusual circumstances of the case.³⁴⁴ Although he warned that Stevens’s opinion should not be read as establishing an all-encompassing public interest exception to privacy laws,³⁴⁵ courts should not read Breyer’s concurrence as rejecting the legitimacy of the public’s interest in anything less consequential than what

340. Relatedly, courts should not accept the designation of a record as “private” without considering its actual content. The DPAA records obtained in *Dahlstrom* were only private in the categorical sense. Similarly, in the dispute between ESPN’s Adam Schefter and NFL player Jason Pierre-Paul, Schefter clearly disclosed a record that had been categorized as private. But the facts revealed—that Pierre-Paul had part of his hand amputated—were not truly private; his hand was plainly observable and so his injury would never remain a secret.

341. *Bartnicki*, 532 U.S. at 519.

342. *Jean v. Mass. State Police*, 492 F.3d 24, 30 (1st Cir. 2007) (concluding that the “warrantless and potentially unlawful search of a private residence” at issue was at least as worthy of public scrutiny as the union battle in *Bartnicki*).

343. *Dahlstrom v. Sun-Times Media, LLC*, 777 F.3d 937, 953 (7th Cir. 2015) (emphasis added) (citing *Bartnicki*, 532 U.S. at 536 (Breyer, J., concurring)) (“noting that the intercepted conversation presented a ‘matter of unusual public concern’”).

344. *Bartnicki*, 532 U.S. at 540 (Breyer, J., concurring).

345. *Id.*

Breyer perceived to be an immediate and credible threat of violence.

Nevertheless, this divide persists and is evidenced by the approaches of the two federal district courts in the DNC hacking cases. In *DNC*, Judge Koeltl concluded that, collectively, the hacked emails addressed matters of public concern because they shed light on the behind-the-scenes operations of a major-party presidential campaign.³⁴⁶ In *Cockrum*, however, Judge Hudson held that *Bartnicki* is “distinguishable from the immediate case” in part because “the information at issue in *Bartnicki* pertained to a contemplated act of violence clearly a matter of public concern”³⁴⁷ and that the evidence in *Cockrum* was insufficient to demonstrate a similarly weighty interest in the DNC emails.³⁴⁸

This division among judges about whether “public concern” should be calculated in an atomized way, looking at the newsworthiness of particular pieces of information, or in a more holistic way, focusing on the broader context of the full communication, is unresolved but particularly salient in some of the newer cases, especially those involving large caches of data. In *Cockrum*, Judge Hudson seemed generally persuaded by the plaintiffs’ argument that “the *First Amendment* does not protect [publication of] large amounts of private information with some isolated facts of public concern,”³⁴⁹ while in *DNC*, Judge Koeltl expressed apprehension about the opposite problem—singling out small pieces of private information to trump “the newsworthiness of the documents as [a] whole.”³⁵⁰ This is clearly an issue that courts need to resolve and one that is particularly complicated in cases involving classified records, like those at the center of the Assange prosecution, where the classification is itself a simultaneous marker of both the sensitivity and newsworthiness of the information.

Going forward, courts should embrace Stevens’s contextual approach to assessing the public interest in communication, at least when applying *Bartnicki* itself.³⁵¹ Where published information includes some particularly invasive revelations, aggrieved plaintiffs can still file separate civil claims targeting that published content, subject to the normal

346. *Democratic Nat’l Comm. (DNC) v. Russian Fed’n*, 392 F. Supp. 3d 410, 437 (S.D.N.Y. 2019).

347. *Cockrum v. Donald J. Trump for President, Inc.*, 365 F. Supp. 3d 652, 657 (E.D. Va. 2019); see also, e.g., *Commonwealth v. F.W.*, 986 N.E.2d 868, 873 (Mass. 2013) (“Here, we are not concerned with a public threat . . .”).

348. *Cockrum*, 365 F. Supp. 3d at 658–59. Judge Hudson ultimately concluded that the release of the hacked emails did “not warrant First Amendment protection.” *Id.* at 659.

349. *Id.* at 658.

350. *DNC*, 392 F. Supp. 3d at 437.

351. It is likely Justice Breyer was not marking a minimum threshold for protection but simply highlighting the most striking aspect of the Kane-Bartnicki phone call, probably as a way of simplifying the decision. In any case, there is no reason courts should assume more than that.

exceptions and defenses that apply to those torts. In *Bartnicki* scenarios, the question is essentially whether courts should circumscribe a publisher's freedoms because of an antecedent violation by someone else—to link one actor to another. The indirectness of this, coupled with what should be a strong First Amendment presumption in favor of disclosing truthful, newsworthy information, augurs for a more capacious understanding of public concern under prong three. In a subsequent, publication-focused action, however—non-*Bartnicki* actions, so to speak—where the attention is on the harm caused by the content itself without regard to its provenance, a more targeted conception of public concern might be easier to justify. In hacking or other scenarios in which large databases or batches of illegally acquired information are involved, recipients of that data should be able to publish it without facing liability for the interception, provided the information *collectively* sheds light on matters of public concern. However, publishers could still be liable, in a subsequent action for, say, public disclosure of private facts, for discrete revelations contained within the aggregate data.³⁵² A better approach, described more fully in the next section, would be to repeal or modify *Bartnicki* to fully disentangle illegal acquisition and subsequent publication.

IV. REPAIRING *BARTNICKI*: THE PATH FORWARD

The Court in *Bartnicki* had an opportunity to resolve the case by leaning on its prior rulings and recognizing, as the Sixth Circuit did in a pre-*Bartnicki* case, that “[n]o matter how inappropriate the acquisition . . . the right to disseminate [newsworthy] information is what the Constitution intended to protect.”³⁵³ Remedies existed then, and are available today, to punish those who violate the law to procure information and those whose publications cause harm. The Court complicated matters by forging an unnecessary link between the two. Breaking that link and decoupling procurement and publication would be the most helpful next step. It would simplify matters both practically and conceptually and would align the law with pre-*Bartnicki* precedent.

352. The normal defense of newsworthiness would certainly apply to these claims, although courts should recognize that plaintiffs' privacy interests are lower with workplace, and particularly government, communications, and that, as a practical matter, there are times in which a private *piece* of information is not readily severable from the newsworthy *whole*. See, e.g., *McNamara v. Freedom Newspapers, Inc.*, 802 S.W.2d 901 (Tex. Ct. App. 1991) (finding that a newspaper photographer's photo of a boy playing in a public soccer match was protected and newsworthy, despite the photo inadvertently capturing the boys exposed genitals).

353. *In re King World Prods., Inc.*, 898 F.2d 56, 59 (6th Cir. 1990).

A. *Reverse and Replace*

Bartnicki was a necessary decision in that it addressed a question the Court had left open almost exactly thirty years earlier in *Pentagon Papers*: to what extent can those who knowingly receive newsworthy information, illegally acquired or leaked by someone else, be subject to post-publication liability without violating the First Amendment? The Court's answer to that question in *Bartnicki* was needlessly convoluted, however. The Court should have simply affirmed the principle from *Daily Mail*—when one “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”³⁵⁴—and added that one does not unlawfully acquire newsworthy information by requesting it or merely coming into possession of it. Courts could express this even more affirmatively: imposing civil or criminal penalties on those who request or possess newsworthy information violates the First Amendment. This approach preserves the free speech interests while disentangling the harms caused by illegal procurement from harms caused by publication, bringing things into alignment with the *Food Lion* principle.³⁵⁵

Decoupling procurement and publication would still allow those who participate in illegal activity, as first links in the chain, to be criminally charged, and it would leave open other remedies for aggrieved plaintiffs. A person whose communications were illegally intercepted could still sue the interceptor for intrusion or bring a suit under the wiretap laws. Plaintiffs could also sue separately for disclosures of their private communications under traditional tort theories, where applicable.³⁵⁶ Of course, decoupling would make deterrence more challenging. The wiretap laws at issue in *Bartnicki* punished the “use” and “disclosure” of confidential communications in part to cut off incentives for interception,³⁵⁷ and there is a risk that future hackers will be emboldened by knowing that others have some latitude to publish the fruits of their interceptions. But legislators can always augment penalties or bolster

354. 443 U.S. 97, 103 (1979).

355. See *supra* text accompanying note 283.

356. For example, if a defendant mischaracterized or selectively edited the intercepted communications in a way that left a false and defamatory impression of the plaintiff, the plaintiff might be able to sustain a libel claim. If the disclosures involved deeply personal information the revelation of which would be considered highly offensive, the plaintiff might be able to succeed on a claim for public disclosure of private facts, although the defendant could defeat this claim by showing that the information was newsworthy. See *supra* text accompanying notes 277–280.

357. 18 U.S.C. § 2511(1)(d)–(e).

enforcement, as Justice Stevens noted in *Bartnicki*.³⁵⁸ Even in situations in which a hacker is never identified or where the hacker is a foreign actor unreachable by a civil suit, plaintiffs would still have recourse to sue for content-related harms, as they do now. So, in situations like the 2014 hack of Sony Pictures, which involved some of the company's unreleased films and developmental scripts,³⁵⁹ the company could sue those who shared its copyrighted content online even without knowing the identity of the original hackers. In situations like the 2010 dispute between Apple and Gizmodo over Gizmodo's reporting about an unreleased iPhone prototype, Apple could at least theoretically sue Gizmodo and others for publishing its trade secrets.³⁶⁰ And in situations like *Bollea v. Gawker Media, LLC*³⁶¹ or the 2014 iCloud hack exposing nude images of female celebrities,³⁶² plaintiffs still have recourse in privacy law irrespective of the means by which the information was originally accessed. In all of these cases, downstream re-publishers could be similarly liable, so there are substantial guardrails in place without having to condition a defendant's right to publish on the purity with which the information was originally procured.

Decoupling procurement and publication would affect the public concern element as well. The newsworthiness of information would continue to be irrelevant to criminal or civil actions targeting illegal procurement, and in publication-focused suits, defendants could still protect themselves in most cases by demonstrating the newsworthiness of the information.

But defendants would not have to demonstrate the newsworthiness of information in order to avoid liability for crimes or torts relating to the initial illegal procurement. There are many situations, especially in hacking cases, where information is acquired that is not sensitive enough to support a civil claim based on its publication but is also not plainly

358. *Bartnicki v. Vopper*, 532 U.S. 514, 529 (2001) ("The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it," and penalties for violations can always "be made more severe.").

359. See generally *A Breakdown and Analysis of the December, 2014 Sony Hack*, RISK BASED SEC. (Dec. 5, 2014), <https://www.riskbasedsecurity.com/2014/12/05/a-breakdown-and-analysis-of-the-december-2014-sony-hack/> [https://perma.cc/LEL2-MPJM].

360. See generally Tim Wu, *Don't Prosecute Gizmodo for the iPhone that Walked into a Bar*, SLATE (Apr. 28, 2010, 4:04 PM), <https://slate.com/technology/2010/04/don-t-prosecute-gizmodo-for-the-lost-4g-iphone.html> [https://perma.cc/CZ54-VPLC]. In that case, Gizmodo obtained an unreleased iPhone that someone found at a bar and then provided to Gizmodo. *Id.* Apple pursued criminal charges against Gizmodo but could plausibly have sued for violation of its trade secrets.

361. No. 522012CA012447, 2016 WL 4073660 (Fla. Cir. Ct. June 8, 2016).

362. See generally Charles Arthur, *Naked Celebrity Hack: Security Experts Focus on iCloud Backup Theory*, THE GUARDIAN (Sept. 1, 2014), <https://www.theguardian.com/technology/2014/sep/01/naked-celebrity-hack-icloud-backup-jennifer-lawrence> [https://perma.cc/2LN2-KQWX].

newsworthy. Separating procurement and publication claims would put the burden on the plaintiffs to demonstrate that published information has caused some actionable harm instead of putting the burden on the defendant to demonstrate the newsworthiness of the information. Under *Bartnicki*, defendants like the Trump Campaign and WikiLeaks can be held liable for publishing banal email correspondence, even without evidence that it caused harm. Although Justice Stevens's opinion did not foreclose the possibility of *Bartnicki* protection for the publication of information *not* addressing matters of public concern—he reserved that question³⁶³—no lower court has extended *Bartnicki* that far, so this risk remains. Indeed, in *Cockrum*, Judge Hudson did not refute the plaintiff's assertion that, as a matter of law, defendants claiming *Bartnicki* protection must demonstrate that *every disclosed fact* relates to a matter of legitimate public concern.³⁶⁴

It might be too much to expect the Court to abandon *Bartnicki* and pursue this decoupling approach, particularly given the changes in the makeup of the Court.³⁶⁵ But short of that, there are interpretive modifications and clarifications the Supreme Court and lower courts could make to the *Bartnicki* framework to help address the problems and circuit splits that have emerged over the past twenty years.

B. *Aiding and Abetting as a New Prong One Standard*

One of the most strongly rooted aspects of the Supreme Court's First Amendment jurisprudence is its rejection of the notion that journalists (or those serving journalistic functions) should be offered special dispensation from criminal sanctions or civil lawsuits targeting their newsgathering behavior.³⁶⁶ Prong one of the *Bartnicki* test will therefore endure, at least to the extent that it denies a legal shield to those who violate the law by stealing or intercepting information and to those who leak information that they were legally obligated to conceal. No courts

363. Stevens wrote that the Court did not need to decide whether the government's interest in deterring interceptions was strong enough to justify the application of the wiretap law to "disclosures of . . . purely private concern," because in *Bartnicki* the law's enforcement implicated "the core purposes of the First Amendment [by imposing] sanctions on the publication of truthful information of public concern." *Bartnicki*, 532 U.S. at 533–34.

364. *Cockrum v. Donald J. Trump for President, Inc.*, 365 F. Supp. 3d 652, 658 (E.D. Va. 2019).

365. Since *Bartnicki* was decided, Justices Souter, Stevens, Kennedy and Ginsburg have been replaced by Justices Sotomayor, Kagan, Kavanaugh and Barrett, respectively. Concurring Justice O'Connor has been replaced by Justice Alito. Dissenting Justices Rehnquist and Scalia have been replaced by Justices Roberts and Gorsuch, respectively. Concurring Justice Breyer, and dissenting Justice Thomas, remain on the Court. See *Justices 1789 to Present*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/members_text.aspx [<https://perma.cc/P7HD-M5YS>].

366. See *supra* text accompanying note 44.

will provide sanctuary to those who are primary participants in the illegal procurement of information, nor to their co-conspirators.³⁶⁷ The courts are deeply divided, however, about the extent to which secondary participants are eligible for *Bartnicki* protection. Justice Stevens did not offer much detail, but Justice Breyer's contingencies provided a script for judges to impose any number of limitations.³⁶⁸

In demarcating this boundary, courts should be mindful of the strong presumption in favor of free speech and press protection when weighed against most other social interests, including personal privacy, as the Court acknowledged.³⁶⁹ They should favor clear lines that minimize ad hoc analyses by judges. And, not incidentally, they should recognize the urgent need for robust journalistic and public scrutiny of powerful institutions in light of the spread of authoritarianism, increasing institutional opacity, withering free-press protections,³⁷⁰ and the fact that new technologies, rather than serving as antidotes to concentrated power, are increasingly exploited by corporations³⁷¹ and governments³⁷² to enlarge their influence over consumers and citizens. With all of this in mind, a reasonable approach would be to extend *Bartnicki* protection to secondary participants except where they actively collaborate with primary participants in a way that is akin to the crime of aiding and abetting.³⁷³ Aiding and abetting charges typically apply to those who actively and knowingly assist someone in the commission of a crime.³⁷⁴ Focusing on these criteria would mean that someone would not lose *Bartnicki* protection merely because they knew the information was

367. See, e.g., *Broidy Cap. Mgmt. LLC v. Muzin*, No. 19-cv-0150 (DLF), 2020 U.S. Dist. LEXIS 58302, at *63 (D.D.C. Mar. 31, 2020) (rejecting defendant's First Amendment defense against a computer hacking claim because he was not merely the publisher of the hacked information but was also "alleged to have conspired with' the hackers and to have taken part in a scheme to disseminate the knowingly hacked information to the media").

368. See *supra* text accompanying notes 95–96.

369. *Bartnicki v. Vopper*, 532 U.S. 514, 534 (2001) (noting that generally "privacy concerns give way when balanced against the interest in publishing matters of public importance").

370. See *supra* notes 17–19.

371. See generally SHOSHANA ZUBOFF, *THE AGE OF SURVEILLANCE CAPITALISM* (1st ed. 2019).

372. See generally Andrea Kendall-Taylor, Erica Frantz & Joseph Wright, *The Digital Dictators: How Technology Strengthens Autocracy*, FOREIGN AFFS. (Mar./Apr. 2020), <https://www.foreignaffairs.com/articles/china/2020-02-06/digital-dictators> [<https://perma.cc/88YZ-B83P>].

373. See, e.g., 18 U.S.C. § 2(a) (authorizing criminal penalties for anyone who "aids, abets, counsels, commands, induces or procures" the commission of a crime). Under the proposal suggested in this Article, publication would not constitute abetting, and "counsels" would mean providing material or technical assistance in the procurement of the information, not merely "encouraging," the leaking of information by the source.

374. *Aiding and Abetting*, JUSTIA, <https://www.justia.com/criminal/offenses/inchoate-crimes/aiding-abetting/> [<https://perma.cc/P7JH-WXPA>].

illegally acquired by a source or where there was direct communication between the source and publisher subsequent to the illegal acquisition by the source. This would simplify matters and resolve the circuit split between the Tenth Circuit (*Quigley*) and the Third Circuit (*Jean*) and fix some of the uncertainty left by the D.C. Circuit's *Boehner* rulings. Applying this rule would offer protection to defendants like *The New York Times*, which received some of Donald Trump's tax returns likely with full knowledge that they had been illegally leaked, and probably after having communicated in some fashion with their source or sources.³⁷⁵

One caveat in this context is that it is crucial that courts not treat information as property, at least where it involves matters of public concern. Although aiding and abetting or illegal possession charges can be brought against those who knowingly receive stolen personal property, the same should not apply to information. There is no public interest served by the illegal possession of stolen personal property.³⁷⁶ At the same time, *Bartnicki* protection could reasonably be denied to someone who knowingly received stolen information that they *knew* did *not* involve matters of public concern and that they knew it was illegal to accept. So, defendants who receive from sources things like stolen credit card numbers or the passwords to protected computer systems could not invoke *Bartnicki* merely because those exchanges involved information rather than tangible property.³⁷⁷

Courts should also extend protection to those who *request* information that has already been stolen by a source. This would support the ruling by Judge Koeltl in *DNC*, in which he held WikiLeaks could not be held liable for requesting information that it knew had been illegally hacked by Russian operatives,³⁷⁸ and it would resolve the apparent split between Judge Koeltl and Judge Hudson in the two DNC hacking cases.³⁷⁹ Courts should take this one step further, however, to make clear that even before-the-fact requests or pleas for information should be protected, provided there is no inducement or coercion by the requester of the source, nor any implicit quid pro quo. It is normal for reporters to ask for information, and, as one court noted, "the First Amendment protects the

375. See *supra* text accompanying note 229.

376. This is why the analogy Judge Randolph used in *Boehner II*—that one can be criminally liable for knowingly accepting a stolen ring—is inapt. *Boehner II*, 441 F.3d 1010, 1017 (D.C. Cir. 2006); see also *supra* text accompanying note 164.

377. Of course, this would be different in cases where the defendant had a good faith belief that the information being offered addressed matters of public concern, even if, after receiving the information, this turned out not to be the case.

378. *Democratic Nat'l Comm. (DNC) v. Russian Fed'n*, 392 F. Supp. 3d 410, 435–36 (S.D.N.Y. 2019).

379. *Id.*; *Cockrum v. Donald J. Trump for President, Inc.*, 365 F. Supp. 3d 652 (E.D. Va. 2019).

ordinary news gathering techniques of reporters and those techniques cannot be stripped of their constitutional shield by calling them tortious.”³⁸⁰ Of course, sources often break the law by leaking non-public records. But to impute that liability to the requester of those records, without any evidence of coercion or inducement, would violate the First Amendment. This might represent an outer-limit interpretation of *Bartnicki*, and no court has yet charted this boundary, but it would create a clearer and more speech- and press-protective standard for linking primary and secondary participants. In ordinary contexts not involving news and information, people can be charged with the crime of solicitation when they influence others to act unlawfully.³⁸¹ But this typically applies in felony cases where one “command[s], forc[es], or induc[es]” someone to commit a crime.³⁸² A simple request or plea for someone to access or leak information in violation of the law should not be sufficient to attach legal liability to the requester, at least where the information sought is about a matter of public concern.³⁸³

When Donald Trump was campaigning against Hillary Clinton in 2016, he publicly urged Russia to engage in computer crimes to locate the thousands of emails Clinton deleted after leaving her job as Secretary of State.³⁸⁴ “Russia, if you’re listening,” Trump said, “I hope you’re able to find the 30,000 emails that are missing.”³⁸⁵ That same day, coincidentally or not, Russian operatives made their first attempts to hack Clinton’s servers.³⁸⁶ Whatever the ethical propriety of Trump’s plea, it should not be treated as a solicitation of crime because he was too far removed from the illegal actors, and the information he sought was of public concern. The same should apply to someone like Nicholas Kristof of *The New York Times* who urged IRS officials—via a tweet—to leak Trump’s tax records to him.³⁸⁷ Even if Kristof’s tweet was a technical breach of the law, as

380. *Nicholson v. McClatchy Newspapers*, 223 Cal. Rptr. 58, 59–60 (Ct. App. 1986).

381. *Solicitation*, JUSTIA, <https://www.justia.com/criminal/offenses/inchoate-crimes/solicitation/> [<https://perma.cc/F7ZA-LLXA>].

382. *Id.*

383. Courts might draw a distinction, for example, between soliciting someone to leak information about clandestine government surveillance of U.S. citizens and soliciting someone to expose the identities of undercover CIA agents.

384. Michael S. Schmidt, *Trump Invited the Russians to Hack Clinton. Were They Listening?*, N.Y. TIMES (July 13, 2018), <https://www.nytimes.com/2018/07/13/us/politics/trump-russia-clinton-emails.html> [<https://perma.cc/RED5-7TL3>].

385. *Id.*

386. *Id.*

387. *See* Kristof, *supra* note 20.

some have suggested,³⁸⁸ it should be protected by the First Amendment. Kristof was not in a position to influence IRS officials, he had no direct contact with them, and the information he sought was plainly newsworthy. Parts of the indictment of Julian Assange target a similarly general exhortation—specifically WikiLeaks’s promulgation on its website of a “Most Wanted Leaks” list.³⁸⁹ However scandalous one might find this kind of communication, it is even less specific than Trump’s plea to the Russians, and in neither case should *Bartnicki* protection be denied on the basis of such indirect communication.

It is a closer call with regard to Assange’s interactions with Chelsea Manning. Assange was in direct and ongoing communication with Manning and made specific and repeated requests for information. Nevertheless, those things alone should not be treated as sufficient to tie the two together criminally or to negate *Bartnicki* protection. Manning was not beholden to Assange or threatened by him, and Assange did not offer any reward.³⁹⁰ Manning was always in control and had the unencumbered discretion to act or not act. This is a crucial principle to recognize because it arises daily in the context of leaks. Courts need to assert once and for all that a reporter neither commits a crime nor loses First Amendment protection by merely asking a source to leak classified information—again, assuming it involves a matter of public concern. The same should apply to those who *encourage* such disclosures, at least where there is no coercion, inducement, or quid pro quo. Assange’s prosecutors, perhaps inspired by Breyer’s concurrence,³⁹¹ rest much of their indictment on the fact that Assange encouraged Manning’s leaks,³⁹² and some media lawyers have suggested that this might be enough to

388. Eugene Volokh, *Is Asking IRS Agents to Leak President Trump’s Tax Return a Crime (and Constitutionally Unprotected)?*, WASH. POST (Mar. 6, 2017), https://www.washingtonpost.com/news/s/volokh-conspiracy/wp/2017/03/06/is-asking-irs-agents-to-leak-president-trumps-tax-return-a-crime-and-constitutionally-unprotected/?utm_term=.08375b889b82 [https://perma.cc/Q3KY-MXCW].

389. *Assange Superseding Indictment*, *supra* note 6, at 5. The indictment alleges that Chelsea Manning’s first disclosures of classified documents were in direct response to the WikiLeaks “Most Wanted Hacks” appeal. *Id.* at 5–6.

390. This refers to a before-the-fact payment, which could serve to induce the illegal actions of the source. After-the-fact payments, if they were never discussed prior to the exchange of information between the publisher and the source, would not negate *Bartnicki* protection. *See* *Allen v. Beirich*, No. CCB-18-3781, 2019 U.S. Dist. LEXIS 197183 (D. Md. Nov. 13, 2019).

391. Breyer implies in *Bartnicki* that a different result might be warranted in cases where a defendant encouraged a source to illegally disclose information. *Bartnicki v. Vopper*, 532 U.S. 514, 538 (2001) (Breyer, J., concurring).

392. *See supra* text accompanying note 232.

negate Assange's possible First Amendment defense.³⁹³ But encouragement is just a more emphatic species of "request" and creates an amorphous threshold for criminal liability—one that is not suitable for situations where substantial First Amendment interests are involved.

Where Assange potentially crossed the line, however, was in providing particularized technical assistance to Manning. First Amendment protection should not be denied to one who merely discusses with a source the virtues of disclosing classified information. Nor should someone be legally vulnerable for urging a source to illegally disclose information. Courts might reasonably draw a distinction, however, between those situations and ones in which the requester engaged in strategic coordination³⁹⁴ with a source and shared expertise to facilitate the actual execution of the illegal acts. So, much of what prosecutors emphasize in the Assange indictment—Assange's general calls for hacks and leaks,³⁹⁵ his encouragement of Manning,³⁹⁶ and his exchanges with Manning about the most potentially fruitful databases to mine³⁹⁷—should not be treated as consequential to Assange's expected First Amendment defense. To the extent that prosecutors can demonstrate that Assange aided and abetted Manning by providing technical assistance, however, courts could treat Assange as a primary participant, akin to the defendant in *Peavy*, whose case Justice Stevens distinguished at the outset of his *Bartnicki* opinion.³⁹⁸ It is not clear, to be sure, that prosecutors will be able to prove that Assange provided such assistance and that it was instrumental to Manning's illegal actions,³⁹⁹ but this is the only basis upon which the court should consider denying *Bartnicki* protection to Assange under prong one.

In order to bring clarity to *Bartnicki*, lower courts should begin to extend protection under prong one to all defendants who were not primary

393. See Floyd Abrams, *What Facts Would Deny the Trump Campaign First Amendment Protections in Colluding with Russia*, JUST SEC. (Oct. 10, 2018), <https://www.justsecurity.org/60995/facts-deny-trump-campaign-amendment-protections-colluding-russia/> [<https://perma.cc/JE2H-Y9TQ>] (suggesting, in discussing the DNC hacking cases, that the Trump Campaign would have "undercut" its First Amendment defense if it had "encouraged the Russians to hack or steal materials" (emphasis added)).

394. This refers to coordination with regard to the illegal act itself, not things like plans for publication or discussions about what types of information would be most useful or newsworthy.

395. *Assange Superseding Indictment*, *supra* note 6, at 20–22.

396. See *supra* text accompanying note 232.

397. *Assange Superseding Indictment*, *supra* note 6, at 6–7.

398. *Bartnicki v. Vopper*, 532 U.S. 514, 522 n.5 (2001).

399. The indictment alleges that Assange advised Manning about the use of a password hash that would enable Manning to access databases without her identity being discovered. *Assange Superseding Indictment*, *supra* note 6, at 7. It is not clear if Manning successfully used this technique, but either way it could demonstrate an attempt by Assange to intervene as a participant in the execution of the illegal act and undermine his expected reliance on *Bartnicki*.

participants, either by virtue of their direct engagement in illegal activity or their aiding or inducement of that activity. A defendant like the *National Enquirer*, which acquired Jeff Bezos's private emails to his mistress, would not lose protection by paying to acquire information that had already been illegally acquired, but it would lose protection if it paid the source to acquire the information in the first place. The latter would essentially make the source an agent of the *Enquirer* and make the *Enquirer* effectively a primary participant in the interception.

Courts should reject Breyer's suggestion that *Bartnicki* protection might be denied to those who "encouraged," or "participated . . . indirectly" in an illegal interception⁴⁰⁰ or to those who, after the fact, helped transport the information from one node to another.⁴⁰¹ Courts should accept Breyer's suggestion, however, that protection be denied to those who "ordered"⁴⁰² illegal activity, but only where the requester had some actual power over the source. Similarly, courts could embrace Breyer's suggestion that requesters who "counseled"⁴⁰³ their source might lose First Amendment protection, provided the counseling involved strategic or technical assistance that enabled the illegal act itself.

C. *Narrow Prong Two: No Liability for Possessing Newsworthy Information*

The second part of the *Bartnicki* test—that the defendant acquired the information lawfully—was very likely added by Justice Stevens to simply acknowledge a question the Court raised but did not answer in *Florida Star*. In that case, the Court held that the First Amendment protected a reporter's publication of non-public information that had been accidentally supplied by a government employee.⁴⁰⁴ The Court declined to decide whether the outcome would be different in situations in which the law specifically prohibited receipt or possession of the information.⁴⁰⁵ In *Bartnicki*, Justice Stevens noted that Yocum and Vopper had acquired

400. *Bartnicki*, 532 U.S. at 538 (Breyer, J., concurring) (quoting Petition for Writ of Certiorari at 33a, *Bartnicki*, 532 U.S. 514 (No. 99-1687)).

401. This was a particularly odd condition for Breyer to mention because transporting an illegally intercepted communication is exactly what Yocum did, yet the Court was clear that Yocum's actions were protected. *See id.* at 525 n.8 (majority opinion) ("[W]e draw no distinction between the media respondents and Yocum.").

402. *Id.* at 538 (Breyer, J., concurring).

403. *Id.*

404. *Fla. Star v. B.J.F.*, 491 U.S. 524, 524 (1989).

405. *Id.* at 535 n.8.

the tape of the intercepted phone conversation lawfully,⁴⁰⁶ so there was once again no reason for the Court to answer the question it reserved in *Florida Star*. Justice Stevens was not necessarily limiting First Amendment protection to situations in which defendants' obtainment or possession of information was lawful; he was recognizing that the lawfulness of the acquisition by Yocum and Vopper was not in dispute.

Lower courts have not focused on the impetus for prong two, in part because it has not been consequential to the outcome of most cases. For those courts that have applied prong two directly, some, like the D.C. Circuit in *Boehner II*, have conflated it with prong one.⁴⁰⁷ Others, like the Seventh Circuit in *Dahlstrom*, have treated the unlawfulness of receiving or possessing information as automatically and fully destructive of *Bartnicki* protection, even when the government supplies the information and it relates to a matter of public concern.⁴⁰⁸ This is a punishingly strict interpretation that treats surface illegality as decisive, even when it implicates First Amendment interests.⁴⁰⁹ It also creates a loophole for legislators to exploit, allowing them to treat newsworthy information as contraband and disrupting the balance of interests the Court sought to achieve in *Bartnicki*. In addition, it creates the further danger of punishing or chilling ordinary newsgathering functions by forcing requesters of information to assume the risk that the information they seek might turn out to fall within the parameters of a statutory prohibition and subject them to civil or criminal penalties.

One viable response to all of this would be for courts to simply ignore prong two, which, for reasons noted above, they are arguably free to do.⁴¹⁰ A more affirmative and speech-protective approach would be to subject to strict scrutiny any government measure authorizing penalties for the possession or receipt of newsworthy information. Information should not be treated like tangible property, except in very unusual situations,⁴¹¹ and never when it involves matters of legitimate public concern. Absent a compelling government interest, laws like the Espionage Act and the Driver's Privacy Protection Act should be struck down to the extent that

406. *Bartnicki*, 532 U.S. at 525.

407. *Boehner II*, 441 F.3d 1010, 1017 (D.C. Cir. 2006) (treating the knowing receipt of illegally acquired information as indistinguishable from direct participation in the illegal acquisition).

408. *Dahlstrom v. Sun-Times Media, LLC*, 777 F.3d 937, 952 (7th Cir. 2015).

409. Indeed, in *Bartnicki*, the Court noted that both Vopper and Yocum violated the law by disclosing illegally acquired communications, but the Court concluded that it must then consider "whether the application of [the wiretap] statutes in such circumstances violates the First Amendment." *Bartnicki*, 532 U.S. at 525.

410. See *supra* text accompanying notes 404–406; see also *supra* note 253.

411. See *Bartnicki*, 532 U.S. at 517–18.

they are designed to, or have the effect of, halting the flow of newsworthy information. If laws either explicitly or effectively prohibit the receipt or possession of newsworthy information by non-custodians, those provisions should be strictly scrutinized and, in most cases, struck down.

The cases of *Guardian* reporter Glenn Greenwald, who has been charged with violating criminal laws in Brazil after accepting hacked information, and Julian Assange, who is being prosecuted under the Espionage Act, should not hinge on the literal language of criminal statutes without regard to the First Amendment interests at stake. Applying prong two of *Bartnicki* too broadly creates an untenable situation in which a legislative act can be used to thwart a criminal defendant's ability to even invoke the *Bartnicki* protection. This puts free speech interests in jeopardy and puts statutory law ahead of constitutional law.

There really is only one scenario in which prong two, or something like it, might be reasonable: where someone seeks information knowing that the receipt or possession of that information is prohibited by law and knowing that the information is not of public concern. But courts should still distinguish the act of obtainment from the act of publication and apply the First Amendment to each independently. There are constitutionally permissible ways in which governments can penalize illegal procurement, unlawful obtainment, or injurious publication. The principal mistake the Supreme Court and many lower courts have made is linking the three instead of treating them as discrete acts requiring discrete constitutional analyses.

D. Affirming the Contextual View of Public Concern Under Prong Three

In *Bartnicki*, Justice Stevens and Justice Breyer appeared to present two different approaches to assessing the extent to which information addresses matters of public concern. Stevens focused on the broader context or social debate to which the information related, while Breyer emphasized the more acute threat posed by Kane's "porches" comment. These are not irreconcilable. One could embrace a contextual approach but also acknowledge that a particular fact makes the newsworthiness of the publication especially obvious. Justice Breyer could simply have been saying that he did not need to examine the broader context of the Kane-Bartnicki phone call because the porches comment, by itself, was sufficient. Nevertheless, some lower courts have seized on the porches comment and Breyer's concurrence to suggest that anything short of a threat of violence will not satisfy prong three. Courts like the Seventh Circuit in *Dahlstrom*, and more recently Judge Hudson's opinion in

Cockrum, treat the porches comment as a minimum threshold, which is almost certainly not what Breyer intended. In any case, that interpretation makes it far too easy for judges to distinguish *Bartnicki* and effectively limit its protection to extreme cases. Lower courts should reject that narrow view (as most have, effectively if not explicitly), which departs from the approach courts have traditionally applied in other cases.

A related issue that courts must resolve is how to assess the newsworthiness of publications involving troves of data where the material generally addresses matters of public concern but where not every component piece of information, in isolation, meets that standard—or where small bits of private information are embedded in the larger collection of newsworthy materials. The competing opinions of Judge Koeltl and Judge Hudson in the two DNC hacking cases showcase this dilemma, with Judge Hudson suggesting that defendants must demonstrate the newsworthiness of all of the revealed *parts*⁴¹² and Judge Koeltl holding that prong three should be analyzed by assessing the newsworthiness of the *whole*.⁴¹³

Courts should embrace Judge Koeltl's view for two related reasons. The first is that the purpose of the *Bartnicki* test is not to determine whether defendants should be fully immune from liability for harms flowing from their publications; it is to determine whether there is a basis for linking the defendants to the illegal actions of those who unlawfully procured the information. Because the defendant publishers are at least a step removed from the first-link actors, and because the purpose of prong three is not to balance the various interests but simply to determine if there is at least some public value served by publication, it makes sense for courts to apply an expansive concept of public interest in that context.

A second reason for embracing a broad definition of public concern is that there are almost always post-publication remedies available to plaintiffs if the published information causes some demonstrable harm. In hacking cases like those involving the DNC, *Bartnicki* would lose all of its force if defendants were required to demonstrate the newsworthiness of every published fragment of information. At the same time, there are real risks that private information will sometimes be swept up and exposed as part of large-scale disclosures. The best accommodation is to take a broad view of public concern under prong three but recognize that publishers receive no special protection from post-publication lawsuits targeting the content of their disclosures. Publishers would therefore still have an incentive to search for and filter out private information, but the

412. See *supra* text accompanying note 349.

413. See *supra* text accompanying note 350.

burden of proof would remain with the plaintiffs to demonstrate, in separate a lawsuit, the specific ways in which the published information has caused them harm.

There are a couple of additional issues under prong three that warrant some attention but that are less critical. One is the lingering confusion about terminology. Chief Justice Rehnquist was not entirely wrong to point out in his dissent that “public concern” is “an amorphous concept.”⁴¹⁴ But the Court added some clarity in two post-*Bartnicki* rulings—*Roe* and *Snyder*⁴¹⁵—and for decades the Supreme Court and lower courts have applied parallel concepts like public issue, public interest, and newsworthiness, so the *Bartnicki* Court’s use of public concern was appropriate for the kind of macro-level test it was articulating. Still, it would be ideal if the Court simply declared that the variations among these terms are not legally consequential in this context.

Finally, there is the issue of the journalistic standing of defendants and whether their credentials, institutional affiliations, or the media through which they communicate are relevant in assessing either their general eligibility for *Bartnicki* protection or their more specific ability to demonstrate the newsworthiness of their disclosures. The indictment of Julian Assange seems carefully framed to downplay the journalistic legitimacy of Wikileaks and to present Assange as a simple vandal. The indictment does not mention the First Amendment, much less *Bartnicki*. But any attempt to deny Assange’s ability to invoke *Bartnicki* finds no support from the *Bartnicki* justices, who made clear that they drew “no distinction between the media respondents and Yocum.”⁴¹⁶ There is also remarkably little support for this view in the two decades of decisions applying *Bartnicki*. Aside from one state district court that made the anomalous and conceptually indefensible⁴¹⁷ claim that defendants might have less *Bartnicki* protection when they publish via commercial media,⁴¹⁸ the other courts have been remarkably consistent in focusing solely on the social value of the information published rather than the characteristics or motives of the publisher. This is one area where the courts have moved toward a more contemporary and egalitarian conception of press freedom.

414. *Bartnicki v. Vopper*, 532 U.S. 514, 542 (Rehnquist, C.J., dissenting).

415. See *supra* text accompanying notes 300–303.

416. *Bartnicki*, 532 U.S. at 525 n.8.

417. Excluding protection for defendants who profit from their publications would necessarily exclude most news organizations, most of which distribute content through purchased media products that are sustained through advertising and subscription fees.

418. See *Bowens v. Ary, Inc.*, No. 282711, 2009 Mich. App. LEXIS 2000, at *21 (Sept. 24, 2009), *rev’d in part*, 489 Mich. 851 (Mich. 2011).

CONCLUSION

The Supreme Court's First Amendment jurisprudence has always emphasized the free flow of information from "diverse and antagonistic"⁴¹⁹ sources of information and the need for "uninhibited, robust, and wide open"⁴²⁰ debate on public issues. Those objectives can be powerfully served by modern communication technology and citizen communicators, but only if those people and tools are not unduly constrained by law. *Bartnicki* was an important decision, rendered at the dawn of the Internet age, that extended the principles of *Pentagon Papers* outside of the prior restraint circumstance and affirmed the constitutional bias in favor of the largely unfettered circulation of newsworthy information—whatever its provenance—by law-abiding communicators. *Bartnicki*'s effect on contemporary communication, however, is less clear. Lower courts applying the decision have reached disparate conclusions and collectively have done more to obfuscate than illuminate the parameters of the *Bartnicki* framework. Many of those courts have also sapped *Bartnicki* of its force by narrowly reading Stevens's opinion or giving almost superseding weight to Breyer's concurrence.

This ambiguity is enormously consequential in light of the ways in which communication is now accessed and shared, and in light of the new wave of cases arriving in U.S. courts. When and if Assange is prosecuted, his case will occur in a legal domain that, two decades after *Bartnicki* and a half-century after *Pentagon Papers*, still has few clear lines of demarcation. This uncertainty was exposed and exacerbated by some of the first post-*Bartnicki* circuit rulings,⁴²¹ and it is apparent in the most recent district court cases as well.⁴²²

Bartnicki was a necessary decision but a needlessly complicated one. The Court could have leaned on earlier precedent—both its own decisions in cases like *Daily Mail* and influential circuit decisions like *Food Lion*—to recognize the separateness of procurement and publication and to treat them as discrete acts subject to discrete remedies and constitutional analyses. That remains the best path forward: untethering people's First Amendment right to publish from their actions, and the actions of their sources, in acquiring information. Short of that, there is substantial work ahead for the courts in clarifying the elements of the *Bartnicki* framework.

419. *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

420. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

421. *Compare* *Quigley v. Rosenthal*, 327 F.3d 1044 (10th Cir. 2003), *with* *Jean v. Mass. State Police*, 492 F.3d 24 (1st Cir. 2007).

422. *Compare* *Cockrum v. Donald J. Trump for President, Inc.*, 365 F. Supp. 3d 652 (E.D. Va. 2019), *with* *Democratic Nat'l Comm. (DNC) v. Russian Fed'n*, 392 F. Supp. 3d 410 (S.D.N.Y. 2019).

With regard to prong one, courts should only deny *Bartnicki* protection to those who were primary participants in illegally procuring information, those who aided and abetted a primary participant by providing significant before-the-fact assistance, or those who intentionally sought out private information that they knew was illegal to disclose and was not of public concern. Courts should effectively eliminate prong two by rejecting the treatment of information as property and closing the loophole exposed by the Seventh Circuit in *Dahlstrom* that authorizes liability for the mere receipt or possession of newsworthy information. This could be used as a back door to criminalize leaks—for both government-leakers and journalist-leakees.⁴²³ Finally, with regard to prong three, courts should embrace Justice Stevens's contextual view of public concern and, with large batches of information, focus on the newsworthiness of the whole while still preserving remedies for plaintiffs who are individually harmed by the publication of their private information.

These and other changes described in this Article will help bring clarity to the law while strengthening the rights of journalists and citizens to circulate information about public issues and hold accountable government and other powerful interests. This would also serve as a small but useful step in halting the broader drift toward authoritarian government, institutional opacity, and concentrated private-sector power.

423. Relatedly, courts should reject the Seventh Circuit's treatment of records requesters as primary participants when information is supplied to them by government agencies and other third parties. See *supra* section III.B.