VOLUME 6 March 2025 ISSUE 1

JOURNAL ON EMERGING TECHNOLOGIES

ARTICLES

THE SUPREME COURT'S RESTRICTIVE FIRST AMENDMENT PROTECTION FOR NEWSGATHERING: KEEPING MEDIA AND OTHERS FROM "PLAY[ING] TYRANT TO THE PEOPLE"

DAVID ELDER

The Supreme Court's Restrictive First Amendment Protection for Newsgathering: Keeping Media and Others from "Play[ing] Tyrant to the People

DAVID ELDER

INTRODUCTION

This article examines the boundaryless media and others' claim of the people's "right to know" based on a self-serving, self-justifying, unfettered right to gather information by any-and-all means available—criminal, tortious, or other wrongful acts—so long as the resulting end is newsworthy. This purported newsworthiness defense is largely undefined, perhaps undefinable, or almost inevitably the media's self-defined construct. If the media decide something is worth publishing to satisfy reader and viewer interests, however sensational or voyeuristic in nature, it is *per se* newsworthy, and how it is *acquired* is irrelevant. As the analysis below evidences, such attempts to "bootstrap" unlawfully obtained information into protected status is not and has never been the law under the Court's limited First Amendment protection for newsgathering. The Court should not revisit and reconsider its traditional posture in the digital era, where everyone with a cell phone becomes a "citizen-journalist"-hunter-gatherer-potential-Internet-disseminator. Yet, the Court should review one of the recurring aggressive attempts by media, First Amendment lawyers, and many scholars to circumvent its traditional jurisprudence through attacks on reasoned and reasonable legislative attempts to limit wrongful newsgathering conduct. The Court should emulate its digital-era Fourth Amendment decisions and provide protection for privacy and private property in dramatic black-letter fashion.

I. THE SUPREME COURT'S REJECTION OF "FIRST AMENDMENT EXCEPTIONALISM" FOR NEWSGATHERING—AN OVERVIEW

The Court plurality declared in amorphous dicta in *Branzburg v. Hayes*:[1] "Nor is it suggested that newsgathering does not qualify for First Amendment protection; without some protection for seeking out the

[1] 408 U.S. 665 (1972).

news, freedom of the press could be eviscerated."[2] In *Zemel v. Rusk*,[3] however, the Court made it clear that "[t]he right to speak and publish does not carry with it the unrestrained right to gather information."[4] It bluntly rejected any suggestion of a private citizen-tourist's First Amendment right to travel abroad to gather information about U.S.-Cuban policies despite conceding this restriction "renders less than wholly free the flow of information" concerning Cuba. The Court warned: "There are few restrictions on action that could not be clothed by ingenious argument in the garb of decreased data flow."[5] There is no indication *Zemel* would have resolved the case differently had petitioner been a newsgatherer.[6] Numerous scholars authoritatively interpret *Branzburg*'s dicta and other amorphous rationales like "decreased data flow" as meaningless drivel.[7]

---

[2] *Id.* at 681 (dicta).

[3] 381 U.S. 1 (1965).

[4] *Zemel*, 381 U.S. at 17. *Compare* the very questionable extension of First Amendment protection to the recording of police in public, both at ground level and via drones, criticized in David A. Elder, *"First Amendment Exceptionalism" and the Specter of an Orwellian America; Recordings of Police, All Public Officials (and Likely All of Us) in Public at Ground Level*, 34 GEO. MASON C.R. L.J. 1, 323 (2024) (hereinafter *Elder, Recordings,* Part I*);* David A. Elder, *Recordings of Police, All Public Officials (and Likely All of Us) in Public at Ground Level and by Drone "Eyes in the Sky"—"First Amendment Exceptionalism"* and the Specter of an Orwellian America, 34 GEO. MASON C.R L.J. 323 Part II (2024) (hereinafter Elder*, Recordings,* Part II).

[5] *Zemel*, 381 U.S. at 16-17 (Prohibited White House ingress denied access to important information but did not support entry as a First Amendment right.); Pell v. Procunier, 417 U.S. 817, 834, n. 9 (1974) (quoting *Zemel*); Houchins v. KQED, Inc., 438 U.S. 1, 11-12 (1978). *And see Branzburg*, 408 U.S. at 682-705 (noting "practical and conceptual difficulties of a high order," including defining who qualified and suggesting almost any writer would correctly argue that person is "contributing to the flow of information to public," relies on confidential sources, and will be silenced by forced disclosures before a grand jury). In the digital age *everyone* is a potential reporter/newsgatherer-hunter-gatherer-disseminator. *See* Elder, *Recordings*, *supra* note 4, Parts I, II.

[6] *Branzburg*'s overall tone rejected any First Amendment right of access to anyone, tourist or journalist. *Branzburg,* 408 U.S. at 15-17 (treating rights of speech and press the same); *id.* at 24-26 (Douglas, J., dissenting). *But see id.* at 28, 38-40 (Goldberg, J., dissenting) (noting government's inconsistent treatment of newspersons' right to travel to Communist China (no) and Cuba (yes), both citizen's and media's constitutional right to gather information and questioning whether Congress, had it dealt with it, would have authorized a newsperson bar in light of U.S. commitments to media freedom).

[7] *See* Erwin Chermerinsky, *Protect the Press: A First Amendment Standard for Safeguarding Aggressive Newsgathering*, 2000 U. RICH. L. REV. 1143, 1144 (2000) (Terming *Branzburg* "empty rhetoric" and conceding the Court's consensus to the contrary, the author proposes applying the intermediate standard of review that would reverse *Cohen v. Cowles Media Co.*–*see infra* text accompanying notes 385-559 and

Justice Rehnquist cautioned media-expression interests are so greatly valued there is "a tendency… to accept virtually any contention supported by a claim of interference" therewith.[8] In cases involving published true matter, the Court has proceeded cautiously and "carefully eschewed"[9] reaching media's categorical position[10] all true matter of public concern can be published with impunity,[11] "mindful that the future may bring scenarios which prudence counsels our not resolving anticipatorily."[12] In this "somewhat uncharted state of the law"[13] —in contrast to settled defamation rules[14]—the Court has emphasized issues should be resolved in the "discrete factual context"[15] by "limited principles that sweep no more broadly"[16] than the facts warrant. The Court has repeatedly suggested this fact-intensive protection of true matter weighs heavily against protection for purely private concern[17] matters.

The Court's cautious approach has nonetheless provided substantial guidance as to what the First Amendment does and does not

---

many of the cases in this article, including *Food Lion v. ABC–see infra* note 712-13, 817, 823-24); Erik Ugland, *Demarcating the Right to Gather News: A Sequential Interpretation of the First Amendment,* 3 DUKE J. CON'L & PUB. POL'Y 113, 183-85 (2008) (The Court has never recognized a right of newsgathering, terming *Branzburg*'s comments "just platitudinous dicta"—suggesting the Court might intervene in a case involving statutes prohibiting interviews or videotaping in public spaces.); Ashutosh Bhagwat, *Producing Speech,* 56 W.&M. L. REV. 1029, 1052-54, 1078-80 (2015) (The Court has "flatly rejected" a constitutionally protected right to gather information–such would "occur even earlier in the chain of events" than the speech production he suggests should be given some protection and be more like the Court's rejection of any requirement that "the government… enable the creation of speech.").

[8] Smith v. Daily Mail Publishing Co., 443 U.S. 97, 107 (1979) (Rehnquist, J., concurring in judgment).

[9] Florida State v. B.J.F, 491 U.S. 524, 532 (1989).

[10] *Id.* at 531-32. *And see* Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 838 (1978) (finding it "unnecessary to adopt this categorical approach").

[11] *The Florida Star*, 491 U.S. at 531.

[12] *Id.* at 532.

[13] *Id.* at 530, n. 5.

[14] *Id.*

[15] *Id.* at 530; *Smith v. Daily Mail Publishing Co.*, 443 U.S. at 105; *Landmark Communications, Inc.*, 535 U.S. at 837, 840; *The Florida Star*, 491 U.S. at 534.

[16] *The Florida Star*, 491 U.S. at 533.

[17] *Id.* at 532-33 (citing Garrison v. Louisiana, 379 U.S. 64, 72, n. 8, 74 (1964) (adopting truth defense but leaving unresolved constitutional status of truth "in the discrete area of purely private libels"); *Cox Broadcasting Co.*, 420 U.S. at 491 (same); Time, Inc. v. Hill, 385 U.S. 374, 383, n. 7 (1967); Snyder v. Phelps, 131 S.Ct. 1207, 1215-21 (2011) (applying public-concern versus purely-private-concern dichotomy in First Amendment defamation law to IIED-"outrage" and intrusion upon seclusion arising from obnoxious picketing of military funeral, holding matters published to be of public concern). *And see* the analysis in *Bartnicki v. Vopper infra* in text accompanying notes 682, 685, 687.

protect. It has squelched attempts to sanction media reportage of true matters of public record or public proceedings [18] or information otherwise in the public domain. [19] Media were entitled to publish information via a reporter's presence during a juvenile court hearing open to the public and photographs taken while the suspect was escorted from the courtroom, [20] publicly filed indictment made available to a reporter during a court recess, [21] transcript of wiretap conversations inadvertently attached to filings with the clerk of court during a preliminary hearing a reporter requested and received copies of,[22] and material gathered during an open preliminary hearing [23] or public criminal trial. [24] The Court has repeatedly reaffirmed that "'[w]hat transpires in the courtroom is public property.'"[25]

By contrast, the Court has treated matters garnered via pretrial discovery to be published in advance of trial in a privacy-protective manner. In *Seattle Times Co. v. Rhinehart,*[26] it unanimously rejected any

---

[18] *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308, 309-12 (1977).
[19] *Id.*
[20] *Id.* (prior-restraint case).
[21] *Cox Broadcasting Co.*, 420 U.S. at 472-73, 496. *And see* Munoz v. American Lawyer Media, L.P., 512 S.E.2d 347, 350 (Ga. App. 1999) (finding picture of plaintiff's breast lawfully acquired from unsealed public record protected by *Cox Broadcasting*), *cert. denied*, 1999 Ga. LEXIS (Ga., June 3, 1999).
[22] In *The* Florida Star *v. B.J.F.*, 491 U.S. 524, 551 and n. 4 (1989), Justice White's dissent questioned whether a pending case. Boettger v. Loverro, 555 A.2d 1234 (Pa. 1989) (upholding statutory civil-liability award), could not be sustained. It was vacated. 493 U.S. 885 (1989). The state court incorporated a *Florida-Star* defense. Boettger v. Loverro, 587 A.2d 712, 716-21 (Pa. 1991). *Compare* Justice Breyer's decision not to stay a ban on publication of confidential information inadvertently released for a short time to media during an *in camera* proceeding under Colorado's rape-shield statute. Associated Press v. District Court For The Fifth District of Colorado, 542 U.S. 1301 (2004).
[23] Nebraska Press Association v. Stuart, 427 U.S. 539, 568-70 (1976).
[24] Sheppard v. Maxwell, 384 U.S. 333, 349-50 (1966) (noting media's function in insuring against "miscarriage of justice" and Court "unwilling[ness] to place any direct limitations on the freedom traditionally exercised by the news media" concerning courtroom events). The Court has created an exception for an affirmative right presumptively favoring right of access to criminal and most civil proceedings based on historical practice to guarantee fairness. *See generally* Ugland, *supra* note 7, at 140-45, 178-79, 187-88 (noting that the Court's partial reliance on a "public-edification rationale" is anomalous and inconsistent with Court precedents denying any First Amendment affirmative access; this approach would justify "an almost boundless mandate for direct public supervision of all government operation"–access protection should be based in the Sixth, Seventh and Eighth Amendments.).
[25] *Sheppard*, 384 U.S. at 350, 362-63 (internal citation omitted).
[26] Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984). *See also* Apple Inc. v. Samsung Electronics Co., Ltd., 727 F.3d 1214, 1217-29 (Fed. Cir. 2013) (allowing litigants to

First Amendment claim [27] to publish undoubtedly newsworthy information–donor financial affairs and lists of a controversial religious foundation[28]–resulting solely from discovery in underlying litigation. The Court emphasized its non-public nature,[29] the extensive intrusion into the affairs and privacy of litigants and third parties under discovery rules,[30] abuse potential,[31] and importance of unimpeded court access–a petitioning right equaling free expression.[32] True information gathered by means independent of discovery could be published with impunity.[33]

Court newsgathering protection is not limited to matters of public concern acquired during open public proceedings or otherwise in the public domain. Under the "*Daily Mail* rule,"[34] it has protected true, lawfully obtained information [35] relating to confidential proceedings pending before a state judicial-review commission, [36] information concerning a juvenile charged with murder gathered by routine monitoring of a police-band radio and by on-site interviews of witnesses,

---

seal–against widespread media opposition–confidential exhibits dealing with financial information and market research not introduced into evidence in an intellectual-property case that "drew an extraordinary amount of attention"); Tacoma News, Inc. v. Cayce, 256 P.3d 1179, 1182-91 (Wash. 2011) (holding that *Seattle Times* bars a right to a deposition of a detained witness in a criminal case in an empty courtroom with a judge present for jailor convenience).

[27] *Seattle Times*, 467 U.S. at 22, 31-37 (noting that access is a "matter of legislative grace"). This was not a "classic prior restraint" requiring "exacting First Amendment scrutiny." *Id*. at 33-34. Protective orders further "a substantial government interest unrelated to the suppression of expression," *id*. at 34, with courts accorded "substantial latitude" in structuring such orders. *Id*. at 36.

[28] *Id*. at 31.

[29] *Id*. at 33 and n. 19.

[30] *Id*. at 30, 35 and n. 21, 37 and n. 24.

[31] *Id*. at 35-37.

[32] *Id*. at 36 and n. 22, 37 and n. 24.

[33] *Id*. at 27 and n. 8, 34, 37.

[34] Butterfield v. Smith, 494 U.S. 624, 632 (1990); The Florida Star v. B.J.F., 491 U.S. 524, 533, 541 (1989) ("[I]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information absent a need to further a state interest of the highest order.") (quoting Smith v. Daily Mail Publishing Co., 443 U.S. 97, 103 (1979) (dicta)). For typical lawful-obtaining cases, *see* Reuber v. Food Chemical News, Inc., 925 F.2d 703, 718-19 (4th Cir. 1991) (Defendant playing "no role" in leaking confidential government disciplinary action had a right to publish it.), *cert. denied,* 501 U.S 1212 (1991); Fann v. City of Fairview, 903 S.W.3d 167, 171-72 (Tenn. App. 1994) (holding newspaper's publication of legally obtained expunged criminal records about a candidate for public office was protected by First Amendment), *app. denied* (1995).

[35] *See infra* text accompanying note 78-84, 471-73, 480, 484, 506, 528, 590, 603, 611, 624, 657, 670.

[36] Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 830, 836-38, 841, 843 (1978) (involving unusual criminal sanction adopted by Virginia and one other state).

police and an assistant prosecutor,[37] the identity of a sex-crime victim in an incident report made available inadvertently in violation of statute,[38] and an indefinite ban on information a reporter gathered about alleged improprieties in the sheriff's office and state's attorney's office before being summoned before a grand jury and independent of his participation therein. [39] These lawful, "routine newspaper reporter techniques" [40] have received the Court's imprimatur. The First Amendment would not bar civil or criminal remedies where the media engaged in loud, blaring attempts to solicit information from the public.[41]

On the other hand, in *Branzburg v. Hayes,*[42] the Court refused to absolve reporters from compliance with a grand-jury subpoena and/or testify at trial regarding confidential sources implicated in crime[43] or providing information in investigating or prosecuting crimes. [44] It affirmed it was neither forbidding nor restricting confidential sources[45] and reporters "remain free to seek news from any source *by means*

---

[37] Smith v. Daily Mail Publishing Co., 443 U.S. 97, 101-06 (1979) (criminal-penalty approach followed by only five states). The narrow crux of the holding was the criminal penalty's imposition only on newspapers, not on radio stations publishing the juvenile's identity. *Id.* at 105. The Court did not reach the serious equal-protection issues presented. *Id.* at 106, n. 4. These concerns indicated these statutory measures did not implement whatever "highest-order" interests the state suggested. *Id. And see id.* at 110 (Rehnquist, J., concurring in judgment) (noting the limited ground for the decision—the statute "largely fail[ed] to achieve its purpose" and the state's argument was "difficult to take very seriously" where inapplicable to the electronic media). Thus, the so-called *rule* quoted above was at least initially double-layered dicta—unnecessary to the case before it and involving a scenario where the statute would have had trouble surviving the barest level of scrutiny under First Amendment or equal-protection analysis.

[38] *Fla. Star*, 491 U.S. at 526-28, 535, 536, 538-39. Failure to fulfill its statutory obligations did not make the "ensuing receipt of this information unlawful." *Id.* at 536. Even assuming the First Amendment authorized the state to prohibit such receipt, the state had not done so. *Id.*

[39] *Butterfield*, 494 U.S. at 626-28, 632-36.

[40] *Daily Mail*, 443 U.S. at 103.

[41] Branzburg v. Hayes, 408 U.S. 665, 719 (1972) (illustration by Douglas, J., dissenting).

[42] *Id.* at 665. The Court reaffirmed the "prevailing view that the press is not free to publish with impunity everything and anything it desires to publish," noting remedies available for knowing or reckless falsehood, including punitive damages and criminal liability under New York Times v. Sullivan, 376 U.S. 254 (1964), and progeny. These did not violate the First Amendment even though they "may deter or regulate what is said or published…" *Id.* at 683-84. *See* DAVID A. ELDER, DEFAMATION: A LAWYER'S GUIDE, Ch. 9 and § 4:5 (2024-25 ed.) (hereinafter ELDER, DEFAMATION).

[43] *Branzburg*, 408 U.S. at 690-708. The Court called the proposed privilege "a virtually impenetrable constitutional shield." *Id.* at 697.

[44] *Id.* at 690-708. The common law treated failure to report crimes as misprision of felony, making the individual a principal or accomplice; this was also a federal statutory felony, provided proof of knowledge and some affirmative participation or concealment was adduced. *Id.* at 696-97 and n. 36.

[45] *Id.* at 681-82.

within the law."[46] Reporters were no different from ordinary citizens, who had no First Amendment privilege to not testify. [47] Any "consequential but uncertain burden"[48] on newsgathering was a non-suspect "incidental burdening" [49] of media resulting from the enforcement of civil and/or criminal statutes of general applicability[50]– here the public interest in law enforcement and investigation of crime.[51] This obligation to provide information did not restrain what information reporters could seek or media employers could publish and did not implicate the "vast bulk" of confidential relations between sources and reporters.[52]

---

[46] *Id.* (emphases supplied). *See also* U.S. v. Matthews, 209 F.3d 338, 344 and n. 3 (4th Cir. 2000) (rejecting journalist's newsgathering defense to dissemination-receipt of child-pornography charges based on use in authoring article on child pornography); State v. Kreuger, 975 P.2d 489, 496-98 (Utah App. 1999) (upholding charges of contributing-to-the-delinquency-of-a-minor against reporter and photographer for encouraging juveniles to chew tobacco to illustrate televised segment on discouraging use as "*setting up* the visual images," not merely "collecting visual images" of children chewing—"[T]he press may not encourage crime so that they may record it and report on it, and then claim the prosecution amounts to an attempt by the government to restrain or abridge the freedom of the press…"); State v. Cantor, 534 A.2d 219, 223-25 (N.J. App. Div. 1987) (upholding reporter's conviction for impersonating public official to get information from homicide-victim's mother, where "deceit was practiced upon an individual… particularly vulnerable"), *rev. denied,* 110 N.J. 291 (1988).

[47] *Branzburg*, 408 U.S. at 682, 690-91, 697, 702, 708.

[48] *Id.*at 690.

[49] *Id.* at 682.

[50] *Id.* The Court appended a caveat concerning grand-jury investigations "instituted or conducted other than in good faith, [which] would pose wholly different" issues: "Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification… grand juries must operate within the limits of the First Amendment…" *Id.* at 707-08. Justice Powell concurred, emphasizing the "limited nature" of the Court's holding, and that it had not held newspeople were "without constitutional rights with respect to the gathering of news or in safeguarding their sources." *Id.* at 709 (Powell, J., concurring). He noted its harassment-bad faith caveat and that a newsperson could challenge a subpoena to provide information "bearing only a remote and tenuous relationship" to the investigated subject and who had "reason to believe" the required testimony "implicates confidential source relationships without a legitimate need of law enforcement…." *Id* at 710. In such cases any privilege claim should balance the co-equal "vital constitutional and societal interests"–freedom of the media and the duty of all to give relevant testimony as to crime–on a case-by-case basis. *Id.* at 710. Both the Court, *id.* at 679-709, and Justice Powell, *id.* at 710*, rejected Justice Stewart's cumulative three-part test, which called Powell's concurrence "enigmatic" but "giv[ing] some hope of a more flexible view in the future." *Id.* 725 (Stewart, J., dissenting). The dissent would have required: "probable cause to believe" the newsperson has information "clearly relevant to a specific probable violation of law;" the information could not be gotten "by alternative means less destructive" of First Amendment rights; "a compelling and overriding interest in the information." *Id.* On the extensive precedent generated by the Powell concurrence, *see infra* 742.

[51] *Branzburg*, 408 U.S. at 679-709.

[52] *Id.* at 691.

The *Branzburg* majority distinguished the media's right to publish information lawfully obtained from its substantial precedent that *rejected* any special rights of *affirmative access* to information[53] within government's[54] or a private person's[55] control, which the governments could deny access to without violating the First Amendment,[56] as even the most-protective free-expression members of the Court conceded.[57] In rejecting First Amendment-based special media access to or superior qualification to assess and publicize malfeasance or misfeasance,[58] the Court listed proceedings or sources of information within government control—whether direct or indirect—for which media, like the public generally, must look for access to the state legislature or Congress:[59] grand-jury proceedings;[60] judicial conferences;[61] executive sessions of official bodies;[62] meetings of private organizations;[63] crime-and-public-disaster scenes;[64] specifically designated inmates[65] of jails or prisons generally for interviews, photographs and recordings for subsequent publication;[66] travel to foreign countries on the federal government's proscribed list;[67] war theaters;[68] restraints on and sanctions imposable on media[69] and other participants in legal proceedings owing fiduciary or parallel duties to the civil- or criminal-justice system;[70] broadly inclusive other non-public information under state or federal government control.[71]

---

[53] Houchins v. KQED, Inc., 438 U.S. 1, 7-16 (1978) (An access right would be standardless, *ad hoc,* and "presumably [would apply to] all other public institutions," including hospitals and mental institutions.); *id.* at 16-19 (Stewart, J., concurring in the judgment) (The Constitution denied the media "any basic right of access superior to that of the public generally," but once opened to the public, the "critical role" of media should be considered in giving to media "effective access" to areas open to the public.). *See also* Pell v. Procunier, 417 U.S. 817, 821, 829-35 (1974) ("[N]ewsmen have no constitutional right of access to prisons or their inmates beyond that afforded by the general public."); *Branzburg*, 408 U.S. at 684-85; Zemel v. Rusk, 381 U.S. 1, 15-17 (1966); Publ'g Co. v. Aichele, 705 F.3d 91 (3rd Cir. 2013) (rejecting media access inside polling places as lacking First Amendment support), *cert. denied*, 133 S.Ct. 2771 (2013); Commonwealth v. Winfield, 464 Mass. 672, 674-85 (Mass. 2013) (rejecting documentary filmmaker's access to unofficial "room recording" of trial where official transcript was available to filmmaker and use of witnesses' actual voices involved "a material risk of emotional distress" to child-victim of forcible rape and family).

[54] *See supra* text accompanying note 52. *See also* Nixon v. Warner Communications, Inc., 435 U.S. 589, 608-09 (1978) (where the Court held media "misconceive[]" *Cox Broadcasting* as a right-of-access case, rejecting its argument that the case before it involved a right of access to tapes greater than the general public's). The contents of tapes played in open court and transcripts had been widely disseminated, with "no question of a truncated flow of information to the public.". *Id.* at 609. *Cox Broadcasting* itself noted it was not dealing with "any constitutional questions which might arise from a state policy not allowing access by the public and press to various

kinds of official records." Cox Broad. Co. v. Cohn, 420 U.S. 469, 496, n. 26 (1975). The Court unequivocally resolved this issue in L.A. Police Dep't v. United Reporting Publ'g Corp., 528 U.S. 32, 34-40 (1999) (upholding statute limiting access to arrestee information used for commercial purposes as involving mere denial of access to information in government control it had no First Amendment duty to disclose). The liberal Justices agreed. *Id.* at 43 (Ginsburg, J., concurring) ("[D]isallowing selective disclosure would lead not to more speech overall but to more secrecy and less speech.").

[55] *Houchins*, 438 U.S. at 11 (*Branzburg* afforded no First Amendment grounds to compel a private person to provide information.).

[56] L.A. Police Dep't. v. United Reporting Publ'g Corp., 528 U.S. 32, 34-40 (1999). See discussion by Daniel J. Solove, *Access and Aggregation: Privacy, Public Records, and the Constitution*, 86 MINN. L. REV. . 1137, 1200-1205 (2002).

[57] *L.A. Police Dep't.*, 528 U.S. at 40.

[58] *Houchins*, 438 U.S. at 13-15 (This conclusion has no First Amendment basis; unlike public bodies and officials, there is neither a constitutional basis nor a public opinion-based compulsion of media to publish "what they might prefer not to make known.").

[59] *Id.,* at 12-13, 15; *Branzburg*, 408 U.S. at 689-90 (noting its powerlessness to stop state, by statute or interpreting its own constitution, from recognizing newsperson privilege, absolute or qualified). Many have done so. *See supra* notes 50, 54 and *infra note* 742.

[60] *Branzburg*, 408 U.S. at 684; Pell v. Procunier, 417 U.S. 817, 834 (1974).

[61] *Id.*

[62] *Branzburg*, 408 U.S. at 684.

[63] *Id.*

[64] *Branzburg*, 408 U.S. 684-85; *Pell*, 417 U.S. at 834; *Houchins*, 438 U.S. at 11. *See also* Zemel v. Rusk, 381 U.S. 1, 15-16 (1966) (The right to travel did not include "areas ravaged by flood, fire or pestilence."); *id.* at 25 (Douglas, J., dissenting). *And see* U.S. v. Sanders, 17 F.Supp.2d 141, 143-44 (E.D.N.Y. 1998) (upholding convictions against free-lance reporter-investigator and wife-assistant for conspiracy with pilot to remove segment of Styrofoam seat from TWA Flight 800, stored in secure hanger during the federal investigation), *aff'd*, 211 F.3d 711, 719-23 (2nd Cir. 2000) (finding wife's persuasive call to pilot to take samples sufficed for conspiracy/aiding-and-abetting convictions); Oak Creek v. King, 436 N.W.2d 285, 293 (Wis. 1989) (rejecting newsperson's right to enter plane-crash site on non-public county land in violation of a police officer's justified directive and defendant's defiance in others' presence in situation with "the potential for significant crowd control" issues and where journalist's "continued penetration into a nonpublic restricted area in the presence of the general public" was "disruptive of good order and tended to cause or provoke a disturbance"); State v. Lashinsky, 81 N.J. 1, 13-19, 404 A.2d 1121, (N.J. 1979) (upholding disorderly-conduct conviction of newsgatherer in case involving accident scene, a single officer, and a dying person, where crowd-control problems were "real, substantial, obvious and exigent" and defendant's "dogged and willful refusal to obey" the officer's order was "palpably unreasonable"); Mazzetti v. U.S., 518 F.2d 781 (10th Circ. 1975) (upholding criminal-contempt conviction against cameraman who persistently violated standing order against photographing arraigned defendants in parking lot outside federal courthouse, provoking violent reaction from prisoners) ("[A] newsman… has no special right to foster a disturbance or create news himself."); Seymour v. U.S., 373 F.2d 620, 631-32 (5th Cir. 1967) (upholding contempt conviction of news photographer for taking photograph of criminal defendant outside courtroom after arraignment, violating court's standing directive). Occasional Sec. 1983 claims have been upheld where police interfere with newsgathering from a public place or a

In other words, the *Branzburg* plurality dicta above allows reporters "an undoubted right to gather news 'from any source *by any means within the law,*'"[72] and the right to publish without restraint

---

place where the newsgatherer has a right to be and is not interfering with or obstructing police functions. Connell v. Hudson, 733 F.Supp. 465, 468-73 (D.N.H. 1990) (upholding free-lance reporter's claim for police interference with attempts to photograph accident site from nearby second-floor window next to other viewers; rejecting police officials' argument they were protecting privacy of accident victim as "paternalistic view of police authority"); Channel 10, Inc. v. Gunmarson, 337 F.Supp. 634, 636-38 (D.Minn. 1972) (involving prior-restraint seizure of newsperson's camera after taking pictures from public sidewalk of officers with arrestee that did not interfere with them executing official duties). This right does not extend to a car parked on an interstate highway and to taking pictures of a major accident. Chavez v. City of Oakland, 414 Fed.Appx. 939, 940-41 (9th Cir. 2011) (quoting *Houchins* and *Branzburg* that "[n]ewsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded," and concluding neither California statute nor Oakland-police practice allowing stoppage provided protected constitutional right). The court upheld the police officer's arrest of Chavez for "impeding the normal and reasonable movement of traffic" and willfully violating a police officer's lawful order to move his car immediately. *Id.* For a detailed critique of the recording-police-in-public cases, *see* Elder, *Recordings, supra* note 4, Part I.

[65] Pell v. Procunier, 417 U.S. 817, 821, 829-36 (1974) (detailing substantial access to prisons and inmates accorded media, rejecting argument face-to-face contact with designated inmates was "an effective and superior method of newsgathering" protected by First Amendment).

[66] *Houchins*, 438 U.S. at 3-16.

[67] *Zemel*, 381 U.S. at 15-17.

[68] *Id.* at 25 (Douglas, J., dissenting) ("O]ther like situations" could be similarly treated where they did not involve protected intellectual discourse.).

[69] *Branzburg*, 408 U.S. at 685 (Reporters "may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal.") (quoting extensively from Sheppard v. Maxwell, 384 U.S. 333, 358-59 (1966)) (reversing conviction where trial court failed to adopt "stricter rules governing the use of the courtroom by newsmen" [and] neglected to insulate witnesses from the press).

[70] *Branzburg*, 408 U.S. at 685 (quoting *Sheppard,* 384 U.S. at 358-59, 361—the trial court "made no 'effort to control the release of leads, information, and gossip to the press by police officers, witnesses, and the counsel for both sides.'").

[71] L.A. Police Dep't. v. United Reporting Publ'g Corp., 528 U.S. 32, 40 (1999) (upholding statute against First Amendment facial overbreadth challenge where it required requests for arrest information to state, under penalty of perjury, the material was to be used for noncommercial purpose, emphasizing state could deny access *in toto* without violating First Amendment); Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 160-75 (2004) (unanimously according protection to surviving family of public figure-public official from FOIA disclosure of graphic death-scene pictures in public park); McBurney v. Young, 133 S.Ct. 1709, 1714-20 (2013) (upholding against privileges-and-immunities and interstate-commerce attacks state FOIA statute limiting access to and copying public records to state citizens).

[72] *Houchins*, 438 U.S. at 10 (quoting *Branzburg*, 408 U.S. at 681-82) (emphases supplied).

"whatever information the media acquires and… elects to reveal."[73] In cases denying any First Amendment-based preferred right of access, the Court has emphasized the myriad sources[74]—obviously less convenient to the media[75]—of evidence and information reporters have access to, particularly as to prisoners and prison conditions,[76] which government could not bar or sanction a willing reporter and publisher from receiving and publishing.[77]

In protecting "paradigmatically 'routine [media] reporting technique[s]'"[78] under the *Smith v. Daily Mail Publishing Co*. rule, *The Florida Star v. B.M.F.*[79] was particularly critical of punishing media strangers[80] for government failure to sequester or keep confidential information within its control.[81] In such cases "a less drastic means"[82]

---

[73] *Houchins,* 438 U.S. at 10. *See also* Pell v. Procunier, 417 U.S. 817, 834 (1974) (distinguishing affirmative right of access from journalist's right "to seek out sources of information not available to members of the general public," denying government any right to "restrain the publication of news emanating from such sources").
[74] *Pell,* 417 U.S. at 21-22; *Houchins*, 438 U.S. at 6, 15 (listing right to receive prisoner letters and interview their lawyers, prison visitors, former inmates, public officials and other institutional personnel and have access to public reports by governmental officials concerning prison conditions).
[75] *Houchins*, 438 U.S. at 15.
[76] *Pell,* 417 U.S. at 821-29; *Houchins,* 438 U.S. at 12-16.
[77] *Houchins,* 438 U.S. at 15 (affirming media's constitutional right to receive inmate correspondence on jail conditions and to criticize prison officers); *Pell,* 417 U.S. at 822 (proceeding on "the hypothesis that under some circumstances the right of free speech includes a right to communicate a person's views to any willing listener, including a willing representative of the press for the purpose of publication by a willing publisher").
[78] Fla. Star v. B. J. F., 491 U.S. 524, 538 (1989). An investigative reporter is not absolved under the constitutional-malice standard for defamation while gathering information. Davis v. Schuchat, 510 F.2d 731, 733-36 (1975). *See* ELDER, DEFAMATION, *supra* note 42, at § 2:4 (Counsel cannot argue with "utter confidence" after *Cohen v. Cowles Media Co*. that *New York Times Co. v. Sullivan* standards control where the defamatory matter published is unlawfully acquired); State v. Baron, 769 N.W.2d 34, 38-48 (Wis. 2009) (upholding theft-of-identity conviction where defendant "hacked" public-official-supervisor's email and disseminated information about extramarital affair, portraying information as official's own account, precipitating official's suicide, rejecting "an unlimited right" to defame absent state's compliance with *New York Times Co. v. Sullivan* because truth and constitutional malice were irrelevant under statute focused on identity thefts to defame). The court followed *Bartnicki v. Voppe—-see infra* text accompanying notes 560-713—affirming the state's interest in prohibiting the interceptor from using unlawfully obtained information. *Id.*
[79] *Fla. Star,* 491 U.S. at 534-39.
[80] *Id.*; Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 837 (1978).
[81] *Fla. Star,* 491 U.S. at 534-39.
[82] *Id.* at 534 (detailing measures government may take, including classification and provision of damages remedy against government or breaching official); *id.* at 538

than punishing publication of truthful private information almost invariably exists. It is "highly anomalous"[83] to punish media rather than the government source of information disclosed. That the government source did not have a legal mandate to disclose did not make it necessarily unlawful for media to receive such when furnished by this source.[84]

The Court has never interpreted the First Amendment to

(finding it "most appropriate to assume that the government had, but failed to utilize, far more limited means of guarding against dissemination than the extreme step of punishing truthful speech"); Seattle Times Co. v. Rhinehart, 467 U.S. 20, 32-33 and n. 18 (1984) (noting instances where Court approved restrictions on statements of trial participants to protect right to fair trial); *Landmark Communications*, 435 U.S. at 837 and n. 10 (There was no constitutional challenge to the state's power to keep the judicial commission's processes confidential or sanction breaching participants.); *id.* at 845 (The risk to the commission's functions could be eliminated via careful procedures internally.); *id.* at 849 (Stewart, J., concurring in the judgment) (The Constitution did not bar the state from sanctioning those breaching confidentiality.); Okla. Publ'g Co. v. District Court of Okla., 430 U.S. 308, 311 (1977) (The trial court failed to close the juvenile-detention hearing to the public, including media who broadcast detainee's name.); Neb. Press Ass'n. v. Stuart, 427 U.S. 539, 553-55, 564-70 (1976) (Participants in a criminal trial and court staff and law enforcement could and should be restricted in discussing a case with media to protect defendant's right to a fair trial.); *id.* at 601, n. 27 (Brennan, J., concurring in the result) (noting fiduciary responsibility of attorney-participants, law-enforcement and court personnel and opining as "very doubtful" that trial court would be prohibited from controlling their release of information in "appropriate cases"); Cox Broad. Co. v. Cohn, 420 U.S. 469, 496 (1975) (If privacy interests exist regarding judicial proceedings, the political branches must balance competing interests and "respond by means which avoid public documentation or other exposure of private information."); Sheppard v. Maxwell, 384 U.S. 333, 357-63 (1966) (reaffirming trial-court's control over police, prosecutor, defense counsel, witnesses, and court personnel to avoid frustration of court's functions). The above persuasively support *Boehner v. McDermott* in imposing liability on defendant for disclosing to media material confidential under House rules. *See infra* text accompanying notes 577-79, 616, 696-99, 725-26, 733, 741.

[83] *Fla. Star*, 491 U.S. at 535. Where city officials disclosed confidential criminal-history materials in violation of the expungement statute, they were liable for invasion of privacy. Fann v. City of Fairview, 905 S.W.2d 167, 173-75 (Tenn. App. 1994), *app. denied* (1995).

[84] *Fla. Star*, 491 U.S. at 536. Applying *Florida Star*, a Texas court upheld a public-disclosure-of-private-facts claim where a newspaper provided details making a rape victim identifiable—although her name was not used—where a question of fact existed whether the reporter had lawfully obtained the police-incident report. Doe v. Star Telegram Co., 864 S.W.2d 790, 792-93 (Tex. App. 1993). The Texas Supreme Court reversed, finding the report of legitimate public concern, and the victim failed to meet an "essential element" of the tort, not reaching the constitutional issue whether truthful information was "lawfully obtained." Star-Telegram, Inc. v. Doe, 915 S.W.2d 471, 474-75 (Tex. 1996). A concurrence emphasized Doe had been slow to use a pseudonym in the proceedings under state law. *Id.* at 477 (Gonzalez, J. concurring). The majority's conclusion, under state law, effectively allows a wrongdoer to "bootstrap" itself from liability for illegally obtaining information by demonstrating the matter published did not meet the common-law newsworthiness test. This seems highly dubious.

authorize media to engage in criminal, tortious, or other legally actionable conduct in gathering the news, at least outside the prior-restraint setting.[85] The collective tenor of Court jurisprudence rejects point-blank any such suggestion. In addition to its plethora of *lawfully-obtained*[86] caveats and rejection of media arguments for protecting all true information of public interest or concern,[87] the Court has repeatedly reconfirmed its view requiring media, like other citizens, to comply with the law. [88] In its powerful rationale for requiring newspersons' compliance with grand-jury subpoenas, the Court made this clear: "It would be frivolous to assert… that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news source to violate valid criminal laws. Although stealing documents or private wiretapping could provide newsworthy information, neither the reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news… [The] First Amendment does not reach so far as to override the interest of the public in ensuring that neither reporter nor source is invading the rights of other citizens through reprehensible conduct forbidden to all other persons."[89]

---

[85] *See infra* text accompanying notes 90-94.

[86] Butterworth v. Smith, 494 U.S. 624, 632 (1990); *Fla. Star*, 491 U.S. at 533, 534, 536, 541; *id;* at 541 (declining to hold there is "no zone of personal privacy within which the state may protect the individual from intrusion by the press"); *id.* at 534 ("To the extent sensitive information rests in private hands, the government may under some circumstances forbid its nonconsensual acquisition, thereby bringing outside of the *Daily Mail* principle the publication of any information so acquired."); Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 105-06 (1979) (There was no question of "unlawful press access" or privacy before it.); *Landmark Communications*, 435 U.S. at 835 (The case was "not concerned" with the criminal statute's application to "one who secures the information by illegal means and thereafter divulges it."); *Okla. Publ'g*, 430 U.S. at 311 (There was no evidence of illegal acquisition "or even without the State's implicit approval."); *Cox Broad.*, 420 U.S. at 496 (There was no contention decedent-victim's name was "obtained in an improper fashion" or was not an official court document open to inspection.).

[87] *Fla. Star*, 491 U.S. at 531 (refusing to reach media's proposal they "may never be published, civilly or criminally, for publishing the truth"); *Landmark Communications*, 435 U.S. at 838 (not reaching argument truthful reportage about public officials related to their public responsibilities was "always insulated" from criminal sanction); *Cox Broad.*, 420 U.S. 489, 497, n. 27 (not adopting "broad holding" proposed—an absolute defense from civil or criminal sanctions for all true or accurate information).

[88] *See infra* text accompanying notes 89-93; Branzburg v. U.S., 408 U.S. 665, 690-92 (1972); *Landmark Communications,* 435 U.S. at 849 and * (Stewart, J., concurring in judgment) (noting state's undoubted right to deny access to information "and punish its theft" but that government could not stop or sanction publication once information "falls into the hands of the press, unless the need for secrecy is manifestly overwhelming," and noting even then the subsequent-punishment versus prior-restraint dichotomy).

[89] *Branzburg*, 408 U.S. at 891-92.

Even the most media-protective members of the Court have concluded the "virtually blanket prohibition"[90] imposing a heavy burden to justify prior restraints[91] on tainted[92] truthful information would not immunize the acquirer from civil or criminal sanctions "for transgressions of general criminal laws during the course of obtaining that information."[93]

One Court caveat to the lawful-obtaining issue–whether illegal acquisition by the *source*[94] forfeited protection for media or non-media disseminators–was resolved on very narrow grounds in *Bartnicki v. Vopper*. The Court did not cite the famous passive-receipt decision in *Pearson v. Dodd.*[95] In *Bartnicki,* an unidentified third-party source illegally intercepted information of undoubted public concern—public employee-negotiators' threat against opponents[96]—and provided it to an activist, who republished it and passed it on to a media entity, which publicly broadcast it.[97] Both non-media and media disseminators had scienter[98] of its illegal acquisition. There was no evidence either played any role in its unlawful interception.[99] The Court analyzed the defect-in-a-chain[100] theory and held none of arguments sufficed to sustain tort liability for damages under the facts—involving public-figure plaintiffs as to matter of "unusually high" public importance—physical threats.[101] Under these circumstances, tort liability for *passive receipt* with scienter and subsequent publication would "disproportionately harm media

---

[90] Neb. Press Ass'n. v. Stuart, 427 U.S. 539, 594 (1976) (Brennan, J., concurring in the judgment); *id.* at 594, n. 20.
[91] *Neb. Press,* 427 U.S. at 558-59, 561-62, 565-70.
[92] *Id.* at 588 (Brennan, J., concurring in the judgment) (applying no-prior-restraint rule to matters about pending criminal proceedings or criminal-justice system's operation, "no matter how shabby the means by which the information is obtained"); *id.* at 599 (applying same prohibition to information regarding criminal-justice system even if from non-public sources "and regardless of the means employed by the press in its acquisition").
[93] *Id.* at 588, n. 15; *id.* at 594, n. 20 ("… [N]o contention is made that the press would be immune from criminal liability for crimes committed in acquiring material for publication.").
[94] Fla. Star v. B.J.F., 491 U.S. 524, 535, n. 8 (1989) (having no occasion to resolve whether *Daily Mail* principle had not settled question of First Amendment protection where information "has been acquired *unlawfully* by a newspaper or by a source," and whether government could sanction "not only the unlawful acquisition, but the ensuring publication as well," an issue "raised but not definitively resolved" in the "Pentagon Papers Case," New York Times Co. v. U.S., 403 U.S. 713 (1971)).
[95] *See infra* text accompanying notes 201, 607-08, 714-22.
[96] Bartnicki v. Vopper, 532 U.S. 514, 514-18, 518-19 (2001).
[97] *Id.*
[98] *Id.* at 519-21, 524-25.
[99] *Id.* at 525-35.
[100] *Id.* at 527-32.
[101] *Id.* at 537, 540-41 (Breyer, J., concurring).

freedom."[102] The Court's clear consensus implication was any active involvement in acquiring the tainted matter would have been treated differently.[103]

Where media were involved in actionable conduct under state contract law, the Court refused First Amendment protection in its hugely important decision—*Cohen v. Cowles Media Co.*[104] It rejected, 5-4, media-defendants' argument editorial overturning of reporter-promised source anonymity was immune from liability[105] for the source's economic losses from termination after defendants' publication of his identity in breaching their promises.[106] The Court so held despite the undoubted public interest in both the information the source provided—core political speech about a Lieutenant Governor candidate's criminal history[107]—and Cohen's identity as political advisor-activist-opposing-party information source.[108] Applying its incidental-impact-on-newsgathering-reportage rule in cases involving rules of general applicability,[109] *Cohen* rejected dissenters' arguments for a First Amendment-based newsworthiness exception under the facts therein.[110]

Cohen finds strong parallels elsewhere in the Court's First Amendment jurisprudence. Consider *Adderley v. Florida,*[111] the speech-

---

[102] *Id.* at 540. This opinion reflects the true majority on point. *See infra* text accompanying notes 560-713.
[103] *See infra* text accompanying notes 385-559.
[104] Cohen v. Cowles Media Co., 501 U.S. 663 (1991).
[105] *Id.* at 669-72.
[106] *Id.*
[107] *Id.* at 665-66.
[108] *Id.*
[109] *Id.* at 670-72.
[110] *Id.* at 669-72. Some scholars strongly criticize *Cohen* and recommend a balancing analysis like that in the dissents that would reverse the result in many wrongful-acquisition cases discussed in this article, including *Cohen. See, e.g.*, Chermerinsky, *supra* note 7, at 1143 (acknowledging consensus of the Court's decisions to the contrary, viewing cases like *Cohen* as wrongly resolved, and proposing intermediate standard of review). For further discussions of the mere-rationality standard in illegal-acquisition cases, *see infra* notes 478, 482, 484, 496-988, 590, 611, 649, 658–61, 682 and Elder, *Recordings*, *supra* note 4, Parts I, II.
[111] *Adderley*, 385 U.S. at 39. *And see* State v. Wells, No. LC2003000566001DT, 2004 WL 1925617, at *2–9 (Ariz. Super. Ct. June 15, 2004) (upholding criminal-trespass conviction against reporter who ignored no-trespassing sign and entered enclosed residential yard to interview police officer involved in shooting, rejecting First Amendment and state constitutional challenges–any other result "would preclude private property ownership from enforcing their right to exclude others, and convert their property into public forums, open to any person claiming a First Amendment right"); United States v. Maldonado-Norat, 122 F.Supp.2d 264, 265-66 (D.P.R. 2000) (upholding criminal-trespass charges against media for entering Naval installation to

assembly-petition counterpart to the Court's refusal to permit a First Amendment privilege for illegal, tortious, and other actionable newsgathering excesses. In *Adderley,* students obstructed jail access to protest student arrests, jail segregation specifically, and segregation generally.[112] After violating a sheriff's leave-or-be-arrested directive, protestors challenged criminal-trespass convictions on First Amendment grounds.[113] A five-member majority upheld "even-handed enforcement"[114] of the state's interest—equivalent to private landowners—in protecting property interests for purposes to which they were "lawfully dedicated."[115] Defendants' use of non-public property[116] as a means and purpose of engaging in expressive speech/conduct was not protected.[117] In other words, the Court rejected the protestors' argument that their benevolent, anti-segregation purpose gave them First Amendment absolution from application of criminal-trespass law,[118] repudiating their "major unarticulated premise… that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please."[119]

---

record protests, rejecting claim for special-access rights under the Court's "overwhelming precedent"); People v. Segal, 358 N.Y.S.2d 866, 867–75 (Crim. Ct. 1974) (upholding criminal convictions of gay activists entering CBS' business premises by fraud or subterfuge and disrupting live news coverage, strongly rejecting the defendants' ends-justifies-the-means reasoning). The latter illustrates the media vigorously defending their rights under the criminal law when their proverbial oxen are gored but feeling free to self-exempt themselves from trespass concerns when they seek to gather news. A later case noted that where facts were "ironically reversed, the First Amendment suffered a strange sea-change." Anderson v. WROC-TV, 441 N.Y.S.2d 220, 224 (Sup. Ct. 1981).

[112] *Adderley*, 385 U.S. at 40.

[113] *Id.* at 46-48.

[114] *Id.* at 47 & n. 6.

[115] *Id.* ("The State, no less than a private owner of property, has power to preserve the property under its control to the use for which it is lawfully dedicated."). *Compare Adderley*, 385 U.S. at 47 & n. 6, with the Court's application of common-law trespass concepts in Fourth Amendment cases *infra* in the text accompanying notes 258-90.

[116] *Id.* at 41, 45.

[117] *Id.* at 46–48.

[118] *Id.* at 41, 43, 46–48. Four dissenters refused to treat this as an "ordinary trespass case," *id.* at 49 (Douglas, J., dissenting), viewing purposeful opposition to segregation as a "petition for redress of grievances" under the First Amendment. *Id.* at 51-52, 54-56. The dissent viewed rights of private landowners to prohibit such a rally on private property as unquestioned. *Id.* at 52-53. The Court reaffirmed a village's authority to criminalize violation of a no-solicitation sign to protect residential privacy. Watchtower Bible & Tract Soc. of N.Y., Inc. v. Village of Stratton, 536 U.S. 150, 168 (2002); *id.* at 180 (Rehnquist, C.J., dissenting).

[119] *Adderley*, 385 U.S. at 47–48. *Adderley* was followed in criminal-trespass cases involving journalists and other trespassing parties. *See* State v. McCormack, 682 P.2d

In *Zacchini v. Scripps-Howard Publishing Co.,* [120] the Court rejected any suggestion the First Amendment protects a purposeful and knowingly objectionable[121] broadcast of petitioner-human cannonball's "entire act[,]"[122] despite the truth and newsworthiness of the matter published.[123] Analogizing parallel intellectual-property interests,[124] it

742, 745–47 (N.M. Ct. App. 1984) (entry on nuclear-waste facility, rejecting First Amendment right of access); Stahl v. State, 665 P.2d 839, 841–42 (Okla. Crim. App. 1983) (entry onto a nuclear-generator site), *cert. denied*, 464 U.S. 1069 (1984); McDonald v. State, 823 S.W.2d 325, 326–27 (Tex. App. 1991) (refusal to leave federal office); State v. Prince, 595 N.E.2d 376, 379-80 (Ohio App. 1991) (trespass into C.I.A office); Zarsky v. State, 827 S.W.2d 408, 410–13 (Tex. App. 1992) (listing cases refusing to hold property open to public as First Amendment public forum for protestors trespassing on or blocking abortion clinics)*;* Tompkins v. Cyr, 202 F.3d 770 (5th Cir. 2000) (upholding huge compensatory and punitive damages award against anti-abortionists' exceptionally egregious, targeted and scary picketing, harassment, and trespasses upon plaintiffs' residential property).

[120] 433 U.S. 562 (1977).

[121] *Id.* at 564. On instruction, the reporter returned and filmed petitioner's act after objection, *id.,* eliminating strict liability by analogy to the Court's defamation jurisprudence. *Id.* at 578.

[122] *Id.* at 564, 569–70, 573–76, 573 n.10.

[123] *Id.* at 565–66, 568–70 (rejecting First Amendment-based legitimate interest-broad-editorial-discretion privilege accorded broadcast of entire performance by the Ohio Supreme Court). A different scenario would arise had respondent reported factually about petitioner's performance and commented, with or without a picture. *Id.* at 569. The Court indicated it would protect "newsworthy facts" reportage, *id.* at 574–75, 574 n.11 (citing "incidental-use" common-law exception protecting newsworthy depictions). *And see id.* at 579–82 (Powell, J., dissenting) (noting petitioner conceded broadcast's newsworthiness and finding this was "routine news coverage" protected by First Amendment). A *Cohen v. Cowles Media Co.* dissent grossly misstated the newsworthiness privilege. *See infra* text accompanying notes 506–11.

[124] *Zacchini,* 435 U.S. at 573, 576–578. *And see* Feraud v. Viewfinder, 489 F.3d 474, 480–84 (2d Cir. 2007) (rejecting argument defendant, on-line, self-described equivalent of *Vogue,* had "categorical" First Amendment newsworthiness privilege regarding fashion issues and "public events," remanding for consideration whether First Amendment-based "fair-use" standards were met regarding French judgment under laws broader than American copyright); Iowa State Univ. Research Found., Inc. v. Am. Broad. Cos., 621 F.2d 57, 61 (2d Cir. 1980) ("The fair use doctrine is not a license for corporate theft empowering a court to ignore copyright whenever it determines the underlying work contains material of possible public importance."); Roy Express Co. Establishment v. Colum. Broad. Sys., 672 F.2d 1095, 1099 (2d Cir. 1982) (rejecting defendant's "generalized First Amendment privilege" for "newsworthy events" for violating copyright). Professor Smolla provides a common-sense rationale for rejecting the *Daily-Mail* principle cases: "We cannot maintain a meaningful regime of intellectual property protection if the property right may be nullified by anyone who may plausibly assert a free speech right to disseminate 'truthful public information.'" Rodney A. Smolla, *Information as Contraband: The First Amendment and Liability for Trafficking Speech,* 96 NW. U . L. REV. 1099, 1174 (2002). *And see* the Court's recent decision dramatically narrowing "fair use" where commercial

treated respondent's appropriation of petitioner's right of publicity as a "theft of goodwill"[125] subject to compensatory damages[126] and/or unjust enrichment.[127] Respondent's appropriation-theft was indistinguishable from preventing him from charging an entrance fee to view it.[128] The Court rejected dissenters' suggestion the broadcast was a "routine example of the press' fulfilling the informing function so vital to our system"[129] by publicizing a concededly newsworthy event.[130]

The Court's holding is technically limited to the "entire act" appropriation-theft before it. Yet, its broader thrust has potential widespread ramifications for unauthorized use via hidden cameras or other tortious use of duped victims as involuntary props, participants, or actors in media-created dramas, television news magazines, tabloid depictions, or newspaper investigative articles. The Court emphasized the expansive and protectable state interest—"'personal control over commercial display and exploitation of his personality and the exercise of his talents[,]'"[131] with concomitant liability where defendant "'pirates[s] the plaintiff's identity for some advantage of his own[,]'"[132] and thereby "'get[s] free some aspect of the plaintiff that would have market value and for which he would normally pay.'"[133] Even Justice Powell's dissent would have upheld petitioner's claim had he made a strong demonstration that the broadcast was "a subterfuge or cover for private or commercial exploitation."[134]

---

copying of photographs was for substantially the same purposes, finding the "transformative-use" doctrine could otherwise be met by "modest alteration to the original." Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith, 598 U.S. 508, 546 (2023).

[125] *Zacchini,* 433 U.S. at 576 (quoting Harry Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong,* 31 L. & CONTEMP. PROBS. 326, 331 (1966)).

[126] *Id.* at 573–74 ("An entertainer…usually has no objection to the widespread publication…as long as he gets the commercial benefit of such publication."); *id.* at 575 & n.12; *id.* at 578; *id.* at 580 & n.2 (Powell, J. dissenting).

[127] *Id.* at 576; *id.* at 580 (Powell, J., dissenting) (quoting Court's unjust-enrichment rationale disgorging "enhanced profits").

[128] *Id.* at 575–76.

[129] *Id.* at 580 (Powell, J., dissenting).

[130] *Id.*; *id.* at 582 (Such was "routine news coverage" "undeniably treated as news" protected by the First Amendment.).

[131] *Id.* at 569 (quoting the Ohio Supreme Court's opinion, in Zacchini v. Scripps-Howard Broad. Co., 351 N.E.2d 454 (Ohio 1976), *rev'd*, 433 U.S. 562 (1977)).

[132] *Id.* at 571 n.7 (quoting William R. Prosser, *Privacy,* 48 CALIF. L. REV. 383, 403 (1960)).

[133] *Id.* at 576 (quoting Kalven, *supra* note 125, at 331 "[t]hat no social purpose is served by" such).

[134] *Id.* at 581-82 (Powell, J., dissenting). The dissent referenced, *id.* at 581 n. 4, the

Similarly, in *Harper & Row v. Nation Enterprises*,[135] the Court rejected First Amendment-based "fair-use" protection for the *Nation*'s scoop publishing pre-publication excerpts of former President Gerald Ford's memoir-autobiography [136] involving the circumstances surrounding President Richard Nixon's pardon. [137] Emphasizing the editor had "knowingly exploited a purloined manuscript[,]"[138] the Court held defendant's arrogation of the right of initial publication— that caused *Time* to cancel its contract for excerpt publication[139]—provided the book publisher a copyright claim.[140] It rejected a newsworthiness-fair-use-First Amendment claim as "'a license for corporate theft,'"[141] effectively abrogating public-figure copyright protection.[142]

Assume a state's "right of publicity" or appropriation of name-likeness-identity tort accords privacy-property protection to individuals against involuntary, unauthorized, misappropriation of identity as a significant—rather than incidental[143]—use in a film, newspaper article, television newsmagazine, or tabloid. This principle is indistinguishable from *Nation*'s "piracy of verbatim quotations" [144] with the enhanced "special air of authenticity"[145] such provides. Under copyright's "Golden Rule" analogue,[146] the hidden-camera victim could not reasonably be deemed to *knowingly* consent.[147] This constitutes serious infringement of the quoted source's right to develop thoughts free of appropriation-

---

Ohio Supreme Court's opinion, *Zacchini*, 351 N.E.2d at 455 (finding protection unavailable where "the actual intent… was to appropriate the benefit of the publicity for some non-privileged private use, or unless the actual intent was to injure the individual"). *Compare* Justice Breyer's provocative illustration in Snyder v. Phelps, 131 S. Ct. 1207 (2011), discussed *infra* in the text accompanying notes 180-83, 191-92.

[135] 471 U.S. 539 (1985).

[136] *Id.* at 542.

[137] *Id.*

[138] *Id.* at 563. An "unidentified person secretly" brought *Nation*'s editor a copy weeks before the book's release. The editor was aware of his unauthorized possession and that it must be returned to the source to circumvent discovery. *Id.* at 543. No tribunal concluded the *Nation* acquired or possessed the manuscript unlawfully or in violation of any protected common-law right of the book publisher. *Id.* at 593 (Brennan, J., dissenting) (Even if "'purloined' by someone, nothing…imputes culpability" to the *Nation*.).

[139] *Harper & Row*, 471 U.S. at 543.

[140] *Id.* at 548–69.

[141] *Id.* at 556–58 (internal citation omitted).

[142] *Harper & Row*, 471 U.S. at 571.

[143] *See* text accompanying note 119.

[144] *Harper & Row*, 471 U.S. at 556.

[145] *Id.* at 568.

[146] *Id.* at 550 & n. 3.

[147] *Id.* at 550.

publicity,[148] abrogates decisions as to whether to publicize the creative product, ideas, or thoughts, when to publish them, and in what form.[149] The Court has repeatedly affirmed[150] that use or publication violates the corollary to the affirmative aspect of free expression[151]—"the right to refrain from speaking."[152] To paraphrase it, there is "no warrant for judicially imposing a 'compulsory license' permitting unfettered access"[153] to pirate plaintiff's identity that is in any measurable way different from a copyright violation. Such parallel what the Court denominated "making a 'news event'" by *Nation*'s unauthorized theft-first publication of copyrighted expression.[154]

Recent Supreme Court decisions involving the First and Fourth Amendments have significant import for newsgathering liability. Media interpret *Snyder v. Phelps*[155]—the soldier-funeral case barring liability on First Amendment grounds for either IIED-"outrage" or intrusion upon seclusion[156]—as a huge victory for media and non-media newsgathering. Nothing could be further from the truth. Chief Justice Roberts's cautious,

---

[148] *Id.* at 559, *id.* at 564 ("The right of first publication encompasses not only the choice whether to publish at all, but also the choice of when, where, and in what form to publish a work."); *id.* at 564 (Surreptitious publication "afforded no such opportunity for creative or quality control.").

[149] *Id.* at 564.

[150] *See* text supported by notes 135–51 and text accompanying notes 153–54, 694.

[151] *Harper & Row,* 471 U.S. at 559.

[152] *Id.*

[153] *Id.* at 569.

[154] *Id.* at 561–62 (This was "not merely the incidental effect but the *intended purpose*."). *Zacchini-Harper & Row* would strongly support denial of First Amendment protection for media victimizers engaged with government in fabricating sensational footage for commercial exploitation in the "ride-along" setting. *See* text supported by and accompanying notes 203–11. They would likewise support liability in *Borat* or comparable settings, where ordinary people are deceitfully duped into becoming involuntary actor-participants and made to play the fool for parallel exploitative purposes. *Compare* Johnston v. One Am. Prods., No. 2:07CV042-P-B, 2007 WL 2433927, at *1–8 (N.D. Miss. Aug. 22, 2007), upholding "false-light" and appropriation claims, where duped plaintiff was falsely portrayed in the "mockumentary" *Borat* as mocking her religion. The court rejected First Amendment protection. *Id.* at 8. The Fifth Circuit denied leave to appeal. http://www.onpointnews.com/NEWS/judge-allows-rare-appeal-inqboratq-casehtml. This was the only plaintiff victory in the unconscionable series of rulings favoring defendants. For example, in Lemerond v. Twentieth Century Fox Film Co., No. 07 Civ. 4635(LAP), 2008 WL 918579, at *1–3 (S.D.N.Y., Mar. 31, 2009), the court found privileged actor-producer Borat-Cohen's orchestrated assaultive-harassing behavior precipitating plaintiff to run away. Whatever the extraordinary protection under New York's stacked-against-plaintiffs' interpretation of its appropriation statute, there would be no First Amendment protection under Justice Breyer's important hypothetical discussed in the text supported by and accompanying notes 180–83, 191–92.

[155] Award totaling $5 million ($2.9 in compensatory damages and $2.1 in punitive damages) remitted from $8 million. *Id.* at 1214.

[156] *Snyder*, 131 S. Ct. at 1219–20.

narrowly focused opinion took pains to emphasize the strict limitations of the Court's holding: peaceful speech from picketing and inflammatory signs from and on public property adjacent to public thoroughfares, complying with police guidelines, involving neither yelling nor profane speech, distant from (1000') and out of respondent's view, and not interfering with the funeral.[157] Most importantly, the plaintiff viewed the signs' very hurtful content while watching a later broadcast.[158] Such *speech* was protected because it "highlight[ed]" a plethora of issues of public concern–the political and public morality of the U.S. and its citizenry, homosexuality in the military, and priestly scandals in the Catholic Church.[159] Since the "overall thrust and dominant theme" was focused on these "broader public issues,"[160] using the soldier-funeral context pursuant to respondents' customary media-attracting strategy did not alter First Amendment protection.[161]

Chief Justice Roberts was careful to emphasize scenarios like *Snyder* where the "content and viewpoint" [162] of the disseminated *message* was the *basis* for the distress and where jurors' subjective views would make it likely they would suppress obnoxious or offensive speech under the IIED-"outrage" tort's outrageousness standard.[163] The Court distinguished its targeted-picketing, content-neutral restrictions in *Frisby v. Schultz,*[164] involving picketing in front or around a specific

---

[157] *Id.* at 1220.
[158] *Id.* at 1213–14, 1218–20. No respondents entered the church hosting the funeral or went to the cemetery. The procession came within 200-300' of the picketers, but Snyder could see only the tops of signs and did not discover their content until a news broadcast. *Compare* Phelps-Roper v. Taft, 523 F.Supp.2d 612, 618–21 (N.D. Ohio 2007) (upholding fixed 300' buffer zone near location of funeral and for hour before and after, affirming "tradition long-held in American culture [that] simply prevents disruption" at such services "from unwanted communications" and protects attendees, applying "captive-audience" doctrine and citing Nat'l Archives & Recs. Admin. v. Favish*,* 541 U.S. 157, 168 (2004)–*see* text supported by and accompanying note 71– and recognition of family interests in grieving for the dead).
[159] *Snyder*, 131 S. Ct. at 1215–17 (distinguishing matters of "purely private significance" under its defamation jurisprudence). The Court makes no distinction between false and true speech for First Amendment purposes in what constitutes "truly private matters." *See* David Elder, *The Law of Defamation, the First Amendment, and Justice William H. Rehnquist's Attempts to "Hold] the Balance True": A Framework for Assessing the Continuing Viability of* New York Times Co. v. Sullivan, 83 LA. L. REV. 129, 190–215, 279 (2022) (hereinafter Elder, Rehnquist's Attempts).
[160] *Snyder*, 131 S. Ct. at 1217.
[161] *Id.* at 1213, 1217. Respondents' picketing was unquestionably sincere. This public-concern-public-nature speech was not to be "contrived to insulate speech on a private matter from liability." *Id.* at 1217.
[162] *Id.* at 1218.
[163] *Id.* at 1218–19.
[164] 487 U.S. 474, 477 (1988).

residence,[165] and *Madsen v. Women's Health Center, Inc.,*[166] affirming injunctive relief mandating a buffer zone between the entrance to an abortion clinic and anti-abortion protestors.[167] Those cases involved "obviously quite different" scenarios "both with respect to the activity being regulated and the means of restricting those activities."[168]

Chief Justice Roberts rejected the "captive-audience" doctrine, noting the First Amendment normally imposed on the viewer a duty to avoid the view.[169] The "captive-audience" doctrine was "… dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner."[170] The Court's sparing recognition had been limited to targeted residential-picketing cases like *Frisby*[171] and offensive-mail restrictions at personal residences,[172] like *Rowan v. Post Office Dept.*[173]

Applying *Florida Star v. B.J.F.*'s narrow, fact-limited holding,[174] Chief Justice Roberts emphasized that the speech at issue was on matters of "public import on public property"[175]– speech traditionally accorded particular deference[176]–communicated "in a peaceful manner, in full compliance" with police guidance.[177] He emphasized *Snyder* was a *speech,* not a *conduct*-in-newsgathering-or-otherwise case:

> Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and–as it did here–inflict great pain… [W]e cannot react to that pain by punishing the *speaker*. As a Nation we have chosen a different course–to protect even hurtful *speech* on public issues to ensure that

---

[165] *Snyder,* 131 S. Ct. at 1218.
[166] 512 U.S. 753 (1994).
[167] *Snyder*, 131 S. Ct. at 1218.
[168] *Id.*
[169] *Id.* at 1220.
[170] *Id.* (quoting Cohen v. California, 403 U.S. 15, 21 (1971)).
[171] *See* text supported by and accompanying notes 164–67.
[172] *Snyder*, 131 S. Ct. at 1220.
[173] 397 U.S. 728, 736–39 (1970) (Emphasizing the right "'to be let alone'" in "today's complex society [when] we are inescapably captive audiences for many purposes," the Court reaffirmed the common-law rule in Martin v. City of Struthers, 319 U.S. 141 (1943) (*see* text supported by and accompanying note 262)–to "traditionally respect the right of householders to bar, by order or notice, solicitors, hawkers, and peddlers from his property[]"–holding a mailer's "right to communicate must stop at the mailbox of unreceptive audiences.").
[174] *Snyder*, 131 S. Ct. at 1220.
[175] *Id.* at 1218, 1220.
[176] *Id.* at 1218 (subject to reasonable time/place/manner restrictions). The Court said content-neutral restrictions on funeral picketing—neither Maryland's new statute nor those in 43 other jurisdictions were before it. *Id.*
[177] *Id.* at 1220–21 (Breyer, J., concurring).

we do not stifle public debate …[178]

Justice Alito dissented, stating the First Amendment is "not a license for the vicious verbal assault" turning the funeral into a "tumultuous media event." [179] He agreed [180] with Justice Breyer's concurrence, which concluded these facts did not suggest states were always impotent [181] to protect private individuals' privacy-related interests, even where picketing involved matters of undoubted public concern–citing *Frisby*.[182]

Justice Breyer provided a portentous exemplar of unprotected newsgathering misconduct: "… [S]uppose that A were physically to assault B, knowing that the assault (being newsworthy) would provide A with an opportunity to transmit to the public his views on a matter of public concern. The constitutionally protected nature of the ends would not shield A's use of unlawful, unprotected means."[183] In addition, "in some circumstances the use of certain words as means would be similarly unprotected."[184] Justice Breyer cited the "fighting words"[185] doctrine and concluded the Court did not hold or intimate states were barred from protecting private persons in such setting. [186] Indeed, the Court's jurisprudence dealing with "cross-burning" and beyond unequivocally indicates "true threats" garner no First Amendment protection.[187]

---

[178] *Snyder*, 131 S. Ct. at 1220 (emphasis added). Justice Sotomayor recently described *Snyder* as a "hateful-*rhetoric*" case. Counterman v. Colorado, 600 U.S. 66 (2023) (Sotomayor, J., concurring in part and concurring in the judgment) (emphasis supplied).

[179] *Snyder*, 131 S. Ct. at 1222 (Alito, J., dissenting) (noting respondents had not attempted to show the IIED-"outrage" requirements were unmet). He emphasized their limitless alternative-picketing locations. *Id.* at 1223–24.

[180] *Id.* at 1222.

[181] *Id.* at 1221 (Breyer, J. concurring) ("… [T]he Court's opinion… does not hold or imply that the state is always powerless to protect private individuals against invasions of, *e.g.*, personal privacy, even in the most horrendous of circumstances…").

[182] *Id.*

[183] *Id.* Justice Breyer emphasized the church's picketing was lawful, complying with police directives. *Id.*

[184] *Snyder*, 131 S. Ct. at 1221 (Breyer, J., concurring).

[185] *Id.* at 1221 (citing Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (suggesting "fighting words" were outside the First Amendment). Justice Breyer followed up on Justice Alito's vigorous dissent and whether the Court's holding would bar liability in the following scenario under the IIED-"outrage" tort: "… where A (in order to draw attention to his views on a public matter) might launch a verbal assault upon B, a private person, publicly revealing the most intimate details of B's private life, while knowing that the revelation will cause B severe emotional harm… As I understand the Court's opinion, it does not hold or imply that the state is always powerless to provide private individuals with necessary protection." *Id.*

[186] *Id.* at 1221–22.

[187] *See Counterman*, 600 U.S. 66 (All Justices agreed "true threats" are unprotected by the First Amendment but differed on the appropriate standard.).

In sum, all Court members—with the exception of Justice Alito and his "verbal-assault"[188] assessment—treated *Snyder* as a protected-*speech*[189] case. All Court members viewed *Snyder*'s public-place aspect as non-dispositive.[190] Some acts or even speech–"fighting words" at least–presumably remained actionable. Justices Breyer and Alito viewed as unprotected the actual-physical-assault setting with knowledge the assault will be used as an "opportunity to transmit to the public" the assaulter's newsworthy-public-concern matter.[191] Both interpreted the Court as agreeing.[192] This strongly indicates the *entire* Court would be very sympathetic to claims emanating from publication of newsworthy information acquired by tortious, criminal, or other-wrongful *conduct* or where the newsgatherer engaged in such as an adjunct of or as a pretext for public dissemination. There is not even a hint in the hypothetical that the general damages thereby resulting would be limited to those suggested by *Cohen*'s double-layered dubious dicta discussed below.[193]

The Court clearly indicated that had the picketing-expressive conduct measurably interfered with the funeral, even from a public place adjacent thereto or nearby, the result would have been different. In other words, when "extreme-and-outrageous" "expressive-speech" acts of defendant move into the realm of *interfering conduct*, they are like the actionable invasions in *Frisbie* and *Madsen*. In interference scenarios the notoriety of events resulting from media attention generated thereby would not be "bootstrapped" into First Amendment protection as to the interferer, even though the scenario became a matter of public interest or concern. Any suggestion defendant's conduct-based interference or the publicity generated thereby–and resulting general damages–is protected by the First Amendment is clearly wrong. It would fall within the *Cohen v. Cowles Media Co.-Bartnicki v. Vopper* culpable-conduct doctrine and be indistinguishable from Justice Breyer's "physical-assault" scenario discussed above. The IIED-"outrage" tort requires severe emotional distress.[194]

---

[188] *See* text supported by and accompanying note 179.
[189] *See* text supported by and accompanying notes 155–87.
[190] *Snyder,* 131 S. Ct. at 1218 & n. 4 (rejecting Justice Alito's "free-fire-zone" comment); *id.* at 1221–22 (Breyer, J., concurring); *id.* at 1227 (Alito, J., dissenting) (A physical assault may occur *sans* a trespass–it is "no defense that the perpetrator had 'the right to be' where [he] was…" Neither "fighting words" nor defamation are immune because issued in a public setting.).
[191] *Snyder,* 131 S. Ct. at 1221–22 (Breyer, J., concurring); *id.* at 1226 (Alito, J., dissenting).
[192] *Id.* The Court does not take issue with–nor could it–the physical assault-no First-Amendment-protection analysis. *Id.*
[193] *See* text supported by and accompanying notes 537–40, 556–59.
[194] RESTATEMENT (SECOND) OF TORTS § 46, CMT. J (AM. L. INST. 1965).

Under both the measurable-interference interpretation of *Snyder* and Justices Breyer-Alito's physical-assault analysis—implicitly concurred in by the Court—defendant would not be immune for unauthorized entry into a home or apartment to film an emergency team's resuscitation efforts,[195] film the corpse of plaintiff's deceased mother,[196] target small children to collect responses to the mother killing neighbor playmates[197]–or numerous other such scenarios analyzed in this article.[198] In these cases, "[t]he constitutionally protected nature of the end [speech of public concern] would not shield…use of unlawful, unprotected means,"[199] and the generally applicable rules on damages for the particular tort under state law.

II. THE SUPREME COURT'S DIGITAL-ERA FOURTH AMENDMENT JURISPRUDENCE—LESSONS FOR MEDIA AND OTHERS REGARDING NEWSGATHERING MISCONDUCT

Although not First Amendment decisions, the Court's recent Fourth Amendment decisions have major newsgathering ramifications. The Court's unanimous opinion in *U.S. v. Jones*[200] invalidating a car's warrantless search by GPS on public roads has huge import for privacy liability generally, and particularly for newsgathering. Common-law courts[201] often cite *Katz v. U.S.*'s[202] people-not-places focus in exploring reasonableness of privacy expectations in the intrusion-upon-seclusion tort context. It is very unlikely the Court and federal and state courts would accord First Amendment protections to newsgathering excesses, that, if engaged in by government, would violate Fourth Amendment proscriptions. Consider the media-defendant-governmental-officials joint-actor cases.[203] The courts have found governmental agents to be

---

[195] *See* Miller v. Nat'l Broad. Co., 232 Cal. Rptr. 668 (Cal. Ct. App. 1986).
[196] *See* Barrett v. Outlet Broad., Inc., 22 F.Supp.2d 726 (S.D. Ohio 1997).
[197] See KOVR-TV, Inc. v. Superior Ct., 37 Cal. Rptr.2d 431 (Cal. Ct. App. 1995).
[198] *See* text supported by and accompanying notes 481, 495, 537–40, 548–59, 689.
[199] *Snyder,* 131 S. Ct. at 1221 (Breyer, J., concurring).
[200] 132 S. Ct. 945 (2012).
[201] See *Pearson v. Dodd*, in text accompanying note 95, 607–08, 714–22.
[202] 389 U.S. 347, 351 (1967). The link between Fourth and First is aptly evidenced by citation by the court below in *Jones* to cases with First Amendment implications. U.S. v. Maynard, 615 F.3d 544, 561–63, 566 (D.C. Cir. 2010) (citing *Galella v. Onassis–see* notes 290, 464–as exemplifying actionable "prolonged surveillance," *U.S. Dept. of Justice v. Reporters Committee for Freedom of the Press*, involving access to "rap sheets"–*see* text accompanying notes 56, 71–as an exemplar of the "mosaic theory" adopted on the Fourth Amendment search issue, and Judge Breitel's famous concurrence in Nader v. General Motors Corp., 255 N.E.2d 765 (N.Y. 1970), adopting the "mosaic theory" in an intrusion-upon-seclusion surveillance-harassment case).
[203] *See* DAVID A. ELDER, PRIVACY TORTS, § 2:18 (Thompson Reuters, 2024-25 ed.) (hereinafter, ELDER, PRIVACY TORTS).

joint actors with media in many "ride-along" cases, and upheld constitutional torts–together with common-law claims–and denied First Amendment protection.[204] For example, in the well-known exemplar *Berger v. Hanlon,*[205] the Court let stand–after extensive briefing and argument[206]—the Ninth Circuit's decision permitting media liability[207] and denying qualified immunity for media Fourth Amendment violations.[208]

Assume XYZ, Inc., a global telecommunications entity operating in the U.S., suspects an American citizen, Q, of Iranian-born parents, is an active Iranian secret agent fomenting terror in America. XYZ takes its suspicions to the Department of Homeland Security, which suggests XYZ install a GPS tracking device on Q's vehicle without a search warrant. Homeland Security provides XYZ with state-of-the-art tracking devices and expert directions on how to use them. XYZ agrees to keep Homeland Security informed and provide it with any surveillance fruits. Homeland Security agrees to give XYZ a journalistic coup when the story breaks and Q is arrested. XYZ is likely a joint actor.[209] Fourth Amendment doctrine will control, without, of course, XYZ having *any* claim to executive-officer qualified immunity. XYZ—and maybe the Government under the Federal Torts Claims Act, with vicarious liability for employee torts within scope of employment[210]—will likely be liable for common-law intentional torts such as intrusion upon seclusion, trespass to chattels, conversion, and conduct-based IIED-"outrage."[211]

The Court's opinions in *Jones* are pivotal on the joint actor-constitutional-tort issue, provide strong guidance on common-law torts issues, and offer a firm basis for denying a First Amendment newsgathering privilege. The Federal District Court in *Jones* held no warrant was required because a person driving a vehicle on a public

---

[204] *Id.*
[205] Berger v. Hanlon, 188 F.3d 1155, 1156–57 (9th Cir. 1999), *aff'g,* 129 F.3d 505, 507–18 (9th Cir. 1997).
[206] Cable News Network, Inc. v. Berger, 526 U.S. 1154 (1999).
[207] *Id.*
[208] *Berger*, 188 F.3d at 1156–57 (following Wyatt v. Cole, 508 U.S. 158, 167–69 (1992) (refusing qualified immunity in implementing state replevin statutes); Richardson v. McKnight, 521 U.S. 399, 401–14 (1997) (same regarding private-prison guards)).
[209] *Berger*, 129 F.3d at 515–17 (detailing contract between federal agents and CNN providing specific mutual involvement and benefits–footage for CNN's environmental program and publicity for federal agency's efforts preventing poisoning of eagles, including an inside-the-house surreptitious recording with "sound bites" to enhance entertainment value–and CNN's "'inextricable' involvement in all aspects of activity).
[210] *See* ELDER, PRIVACY TORTS, *supra* note 203, at § 2:2.
[211] *Id.* (These torts are not within the FTCA's intentional-tort exclusion.).

thoroughfare had no reasonable expectation of privacy.[212] Repudiating this view, Justice Scalia concluded that governmental installation and use of the GPS on Jones's vehicle constituted a Fourth Amendment "search" of an "effect" [213] because government "physically occupied private property for the purpose of obtaining information." [214] Emphasizing Framers' 1791 intent, he found the Fourth Amendment closely linked to common-law trespass to chattels.[215]

Justice Scalia did not reach the *Katz v. U.S.* issue,[216] concluding the Court's intent therein was not to retrench from protection theretofore existing.[217] Under this historical approach, a mere technical trespass to chattels—or land—did not suffice. [218] There had to be a "meaningful interference with an individual's possessory interests in that property."[219] That standard was met where, as in *Jones*, the trespass was "conjoined with … an attempt to find something or to obtain information."[220] This "classic trespassory search"[221] by GPS tracking device was more than a visual inspection of the vehicle's exterior—it "encroached on a protected area."[222] Unlike Justice Alito's *Katz* exclusive reasonable-expectation-of-privacy test, the trespassory-invasion test was a threshold minimum.[223]

---

[212] *Jones*, 132 S. Ct. at 948.
[213] *Id.* at 949. Device insertion inside the car would have been more clearly a "search." *Id.* at 952 ("[A]n officer's momentary reaching into the interior of a car" was a search.). The inside-versus-outside distinction raises serious questions about the dissent's critique of the majority's reliance on trespass to chattels.
[214] *Id.* at 949. It was installed and the battery later replaced on the Jeep's underbody in a public parking lot. *Id.* at 948. The device evidenced the Jeep's location to within 50-100', transferred it by cell phone to a government computer, collecting over 2000 data pages during the four weeks at issue. *Id.* The data linked Jones to the drug co-conspirators' "stash house." Convicted, he was sentenced to life in prison. *Id.* at 948–49. The District of Columbia reversed because of evidence from the warrantless GPS device. *Id.* at 949.
[215] *Id.* at 240–50, 253.
[216] *Jones,* 132 S. Ct. at 950–54. *Katz* would apply in non-trespass cases involving transmitted electronic signals. *Id.* 953.
[217] *Id.* at 950-54.
[218] *Id.* at 951 & n. 5; *id.* at 952–53 & n. 8.
[219] *Id.* at 951 & n. 5 (required for "seizure" or "search"). Justice Scalia responded to Justice Alito's reference to a constable hiding in a stagecoach to track the coach's movements as "not far afield." There was "no doubt that information gained by that trespassory activity would be the product of an illegal search"–whether that information consisted of the conversations occurring in the coach, or of the destinations to which the coach traveled. *Id.* at 950 & n. 3.
[220] *Id.* at 951 & n. 5.
[221] *Id.* at 954.
[222] *Id.* at 952. Whether non-trespassory methods of electronic surveillance could have achieved the same information without violating the Fourth Amendment was not before it. *Id.* 953–54.
[223] *Id.* at 952.

Justice Scalia noted the concurrence's "thorny problems,"[224] including its relatively short-term-versus-long-term dichotomy.[225]

Justice Sotomayor concurred, finding the government "usurped Jones' property"[226] to surveil him, "invading privacy interests long afforded" Fourth Amendment protection,[227] concluding the Alito concurrence "erodes that longstanding protection for privacy expectations inherent in items of property that people possess or control."[228] The Court's standard "reflects an irreducible constitutional minimum[.]"[229] She agreed with Justice Alito modern technology made physical intrusion unnecessary for many surveillance options and the majority's approach may provide little direction in such cases.[230] The *Katz* standard would control.[231] She agreed longer-term, non-physically invasive surveillance would be subject to *Katz*[232] and technology making non-trespassory surveillance possible will affect *Katz* "by shaping the evaluation of societal privacy expectations."[233]

Justice Sotomayor did not embrace Justice Alito's concurrence regarding *Katz*'s inapplicability to short-term GPS monitoring. In such cases, GPS could provide "a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations" government could maintain and "mine" for years unconstrained by traditional financial and other limitations on physical surveillance.[234] Emulating *Barnicki v. Vopper*'s approach in First Amendment cases,[235] she emphasized "[a]wareness that the government may be watching chills

---

[224] *Id.* at 954 (Such brought "yet another novelty" into the Court's jurisprudence: "[T]here is no precedent for the proposition that whether a search has occurred depends on the nature of the crime being investigated.").
[225] *Id.*
[226] *Id.*
[227] *Id.* at 954 (Sotomayor, J., concurring).
[228] *Id.* at 955. *See also* RESTATEMENT (SECOND) OF TORTS § 652H(a)–(c), cmts. a–b (AM. L. INST. 1977) (Violations of 652B entitle claimant to recover for "intrusion upon his solitude or seclusion" and any foreseeable emotional distress and humiliation.).
[229] *Jones,* 132 S. Ct. at 955 ("When the government physically invades personal property to gather information, a search occurs.").
[230] *Id* at 953 (noting governments' ability "[w]ith increasing regularity" to duplicate the monitoring herein by "enlisting factory-or owner-installed vehicle tracking devices or GPS-enabled smartphones").
[231] *Id.*
[232] *Id.*
[233] *Id.*
[234] *Id.* at 955–56.
[235] *See* text supported by and accompanying notes 560–713.

associational and expressive freedoms."[236] Importantly, Court jurisprudence finding no reasonable expectation of privacy in data or information once "voluntarily disclosed to third parties" was "ill suited" to the digital era and needed reexamination.[237] She strongly rejected "secrecy as a prerequisite for privacy"[238]—reflecting much modern privacy-torts jurisprudence.[239]

Justice Alito derided Justice Scalia's opinion as "based on 18th-century tort law"[240] inconsistent with today's tort doctrine, which protects not the dignitary interest in a chattel's exclusive possession nor inviolability, but requires some actual damages.[241] As no damage to Jones' vehicle was shown, this requisite could not be met.[242] He criticized the majority as finding a search based on trivial and harmless contact with the vehicle chattel.[243] He questioned whether the Court's emphasis on trespassory invasions might be a change in 1791 law rather than classic tort doctrine applied to a novel scenario involving an electronic interference but no "physical contact."[244] Justice Alito constructed the

---

[236] *Jones,* 132 S. Ct. at 956 (Sotomayor, J., concurring) ("[T]he government's unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse." She asked "whether people reasonably expect that their movements will be recorded and aggregated in a manner that enables the government to ascertain, more or less at will, their political and religious beliefs, sexual habits, and so on."). Justice Sotomayor has evinced parallel concerns about privately operated drones. *See* Elder, *Recordings, supra* note 4 at Part II.

[237] *Jones*, 132 S. Ct. at 959 (Sotomayor, J., concurring) ("[P]eople reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks…I for one doubt that people would accept without complaint the warrantless disclosure to the government of a list of every Web site they have visited in the last week, or month, or year.").

[238] *Id.* ("I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection.").

[239] *See* ELDER, *supra* note 203, at § 2:7, 3:5.

[240] *Jones,* 132 S. Ct. at 957 (Alito, J., concurring in the judgment).

[241] *Id.* at 957-58 & n. 2.

[242] *Id.* at 958, 961.

[243] *Id.*

[244] *Id.* at 962 (Citing cases like CompuServe, Inc. v. Cyber Promotions, Inc., 962 F.Supp. 1015, 1021 (S.D. Ohio 1997), he queried whether such scenarios courts had recently "wrestled with" "represent a change in the law or simply the application of old tort law to new situations?"). Wrongful access to a complex group of devices is the prototypical modern intrusion upon seclusion to secure information. *See* ELDER, PRIVACY TORTS, *supra* note 203, at § 2:6. Justice Alito's originalism concerns appear to have evaporated, as the Court will analyze modern analogues. *See* United States v. Carpenter, 138 S. Ct. 2206, 2268–71 (2018) (Gorsusch, J., dissenting) (citing emails as modern equivalents to sealed letters); N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 30 (2022) ("… [A]nalogical reasoning requires only that the government identify a well-established and representative historical *analog,* not a historical *twin*. So even if a modern day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass Constitutional muster.").

long-term versus short-term dichotomy regarding monitoring individual movement on a public thoroughfare[245] and provided no guidance in applying the distinction other than it was violated before the four-week point.[246] He conceded his exclusive *Katz*-based rule was founded in "a degree of circularity," with changing technology possibly modifying privacy expectations.[247]

Justice Alito's emphasis on actual damages as superseding an earlier emphasis also on protecting dignitary interests is a doubtful interpretation of black-letter law. The latter protects the interest in the existing possession or the physical condition of chattels to the prejudice of the person in possession.[248] The black-letter rule requiring more than a technical intermeddling alternately finds sufficient the chattel's actual impairment as to its "condition, quality, or value…" [249] Usually this involves some impairment of the chattel's physical condition. [250] The Restatement (Second) of Torts recognized, however, that the protected dignitary interest in a particular chattel may be in misusing it in a manner not affecting its physical condition. It cited examples of using a toothbrush or intimate clothing as persuading "a person of ordinary sensibilities to regard the article as utterly incapable of further use" or which "may reasonably destroy its value" in the person's eyes.[251]

Thus, chattel impairment may be in denying or seriously interfering with the owner-possessor's privacy-autonomy-dignitary interest therein. The Court's reliance on the government's misuse to usurp/encroach/occupy/intrude to find something or "obtain information"[252] about the victim or antithetical to the victim's interests is an even more compelling parallel. An owner-possessor who finds out a vehicle has been subject to an attached, intrusive tracking device–long-

---

[245] *Jones*, 132 S. Ct. at 957, 961–64 (Alito, J., concurring in the judgment).
[246] *Id.* at 964 (Whether "prolonged" monitoring "involving extraordinary offenses" would violate the Fourth Amendment was not it.).
[247] *Id.* at 962 ("… [T]he *Katz* test rests on the assumption that this hypothetical reasonable person has a well-developed and stable set of privacy expectations… Dramatic technological change may lead to periods in which popular expectations are in flux and may ultimately produce significant changes in popular attitudes. New technology may provide increased convenience or security at the expense of privacy, and many may find that tradeoff worthwhile. And even if the public does not welcome the diminution of privacy that new technology entails, they may eventually reconcile themselves to this development as inevitable."). Justice Alito noted novel privacy intrusions might precipitate Congressional action, as in *Katz,* possibly the best resolution. *Id.* at 962-64.
[248] RESTATEMENT (SECOND) OF TORTS Sec. 216 (1965) (Scope Note).
[249] *Id.*, sec. 218(b).
[250] *Id.*, cmt. h.
[251] *Id.*
[252] *Jones*, 132 S.Ct. at 951.

or short-term–might view it as "utterly in capable of further use," or as a "meaningful interference," or as "reasonably destroy[ing] its value."[253] It's hugely doubtful a tortfeasor could legitimately claim attaching a GPS tracking device to the vehicle of public or private persons–elected official, candidate for office, public figure, prominent actor, suspect in a criminal investigation–to surveil movements is so minor or trivial no trespass to chattel occurs and any intrusion would be either not private or not highly offensive. Any other conclusion boggles the mind. *Jones* provides powerful arguments for rejecting such machinations.[254]

An exemplar of the proposed rule–if law enforcement can't do it under the Fourth, media and others are not protected under the First–is *Simmons v. Bauer Media Group USA, LLC*, which involved a private investigator employed by tabloid media who attached Live View GPS devices to plaintiff-celebrity's live-in caregiver-driver's car by entering residential property and tracking movements for over a year in pursuit of false rumors co-plaintiff Simmons was undergoing gender-transition surgery. Plaintiffs' tort claims for general and punitive damages for "egregious intrusion" involved criminal acts into their private lives.[255] Under whichever alternative majority of *U.S. v. Jones* one adopts–the property-rights baseline or the *Katz*-based reasonable-expectation-of-privacy criterion[256]–neither investigator nor employer could claim this intrusion is an "indispensable tool of newsgathering."[257]

In *Florida v. Jardines*, [258] Justice Scalia again applied the

---

[253] *See supra* text accompanying notes 218-23.

[254] *Compare* the post-*Jones* article detailing uses of GPS tracking devices by private investigators in divorce cases and employees on an employer's behalf of a vehicle owned or co-owned by the one employing the investigatory, involving likely claims of consent or privilege. *See* Eric Echolm, *Private Snoops Find GPS Trail Legal to Follow*, N.Y. TIMES, Jan 29, 2012, at 1, 11. That is not the scenario contemplated in the hypothetical.

[255] Simmons v. Mathews, Case No. BC708736 (June 18, 2018) (hereinafter "Simmons complaint"), at 2-8 (asserting intrusion upon seclusion, CAL.CIV.CODE Sec. 1708.8(b) (constructive-technological invasion of privacy), trespass to land (Simmons) and trespass to chattel (Reveles), the live-in caregiver/driver, negligent hiring/supervision of and vicarious liability for employee acts, and "oppression, fraud and malice" under California's punitive-damages statute).

[256] *See supra* text accompanying notes 200-51.

[257] *Simmons* Complaint, at 5. The appellate court found the alleged conduct "falls outside the protection of the First Amendment" and outside Sec. 426.15, the California Anti-SLAAP statute. *Id.*

[258] 133 S.Ct. 1409 (2013) (quoting Entick v. Carrington, 95 Eng.Rep. 807 (K.B. 1765) ("… [O]ur law holds the property of every man so sacred that no man can set his foot upon his neighbor's close without his leave; if he does so he is a trespasser, though he does no damage at all; if he will tread upon his neighbor's ground, he must justify it by law.")).

property-rights-baseline approach, which "keeps easy cases easy,"[259] in a case involving a police search using a drug-detection dog's "bracketing"-tracking behavior on the owner's front porch in order to justify a search warrant for the house.[260] Reaffirming the homeowner's right to protect curtilage, one with "ancient and durable roots,"[261] the Court analyzed the "front-door-knocker"-implied-license rule based on prevailing social customs and norms,[262] one "generally managed without incident by the Nation's Girl Scouts and trick-or-treaters." [263] Under customary practices, "[t]o find a visitor knocking on the door is routine (even if sometimes unwelcome); to spot that same visitor exploring the front path with a metal detector or marching his bloodhound into the garden before saying hello and asking permission, would inspire most of us to–well, call the police."[264]

In other words, a license's scope—whether express or implied—is limited not only to a particular area and time of entry but also to a specific *purpose*.[265] Under the implied-license rule, a police officer is entitled to knock on the door and ask questions ("knock and talk"), but has no customary implied invitation to enter the premises for the "objectively reveal[ed] purpose" of "conduct[ing] a search, which is not what anyone would think he had a license to do."[266] Ordinary persons "would find it 'cause for great alarm'… to find a stranger snooping about his front porch *with or without* a dog."[267] Under this specific-purpose limitation, "no one is impliedly invited to enter the protected premises of the home in order

---

[259] *Jardines*, 133 S.Ct. at 1417. For discussion of the Court's demonstrated preference for black-letter rules, *see* Elder, *Recordings, supra* note 4, Part II.
[260] *Jardines*, 133 S.Ct. at 1413.
[261] *Id.* at 1414 (Curtilage, the area "immediately surrounding" the home, "enjoys protection as part of the home itself," the "first among equals" under the Fourth Amendment.).
[262] *Id.* at 1416 (In striking down a city ordinance barring door-knocking or doorbell-ringing as violating free-expression guarantees, the Court reaffirmed the door-knocker-rule corollary–such "common practice" is dependent "upon the will of the individual master of each household," who has the right to *bar* visitors by proper notice–Martin v. City of Struthers, 319 U.S. 141, 141-49 (1943)–leaving the home-owner full right to determine whether to accept strangers as visitors.).
[263] *Jardines*, 133 S.Ct. at 1415-16.
[264] *Id.* at 1415-16 ("This implied license typically permits the visitor to approach the house by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave.") *id.* at 1415, n. 2 ("…[T]he dissent does not even try to argue that it would be customary, usual, reasonable, respectful, ordinary, typical, nonalarming, etc., for a stranger to explore the curtilage of the home with trained drug dogs.").
[265] *Id.* at 1416.
[266] *Id.* at 1417.
[267] *Id.* at 1416 & n. 3 (The dissent conceded "cause for great alarm" for violating its "no-night-visitor-rule.").

to do nothing but conduct a search."[268]

Justice Kagan, with Justices Ginsburg and Sotomayor concurring, joined in Justice Scalia's opinion and provided a hypothetical but parallel analogy of a stranger whose "uncommon behavior" with "super-high-sensitive binoculars" "peer[s] through your windows into your home's furthest corners… [which] allows him to learn details of your life you disclose to no one."[269] Using an equivalent trained drug-detection dog to discover what was not "in plain view (or plain smell)" about one's home–a particularly private area and "most intimate and familiar space"[270]–exceeded any implied license to enter property *and* violated homeowner's reasonable expectation of privacy under *Katz*.[271]

In dissent, Justice Alioto erroneously concluded the Court's "putative rule of trespass law… is nowhere to be found in the annals of Anglo-American jurisprudence."[272] In rejecting the majority's exceeding-the-police-implied-license conclusion, the dissent quoted the beloved-by-media iconoclastic minority view[273] of Judge Richard A. Posner in *Desnick v. ABC*: "[C]onsent to an entry is often given legal effect though the entrant has intentions that if known to the owner of the property would cause him for the perfectly understood and generally understood reasons to revoke his consent."[274] The dissent emphasized once the purpose of police utilizing "knock-and-talk" was conceded–"gathering evidence–even damning evidence–is a lawful entry… within the scope of the license to approach"[275]—*any means used* in evidence-gathering, including the drug-detection dog, would be within such exceptionally broad, if not unfettered, evidence-gathering purpose.[276]

Jardines has major ramifications for newsgathering trespasses to land and intrusions upon seclusion by media and non-media. All Court

---

[268] *Id.* at 1416-17 & n. 4.
[269] *Id.* at 1418 (Kagan, J., concurring).
[270] *Id.* at 1419.
[271] *Id.* 1418-20.
[272] *Id.* 1420 (Alito, J., dissenting). *Compare Le Mistral v. CBS, Inc.* discussed *infra* in text accompanying notes 287-90.
[273] *See infra* note 275.
[274] *Jardines,* 133 S.Ct. at 1422 (Alito, J., dissenting) (quoting Desnick v. American Broadcasting Cos., 44 F.3d 1345, 1351 (7th Cir. 1995). Judge Posner provided no substantial torts authority, ignored black-letter case law and RESTATEMENT (SECOND) OF TORTS Sec. 330, cmt. g (1965) and RESTATEMENT (SECOND) OF TORTS Secs. 892, A-B (1979) on fraud-vitiating-consent-to-enter. *Desnick* has been ignored by several subsequent decisions on parallel facts. *See Recordings*, I, *supra* note 4.
[275] *Jardines*, 133 S.Ct. at 1423 (Alito, J., dissenting).
[276] *Id.* at 1416 & n. 3 ("The dissent would let police do whatever they want by way of gathering evidence so long as they stay in the base-bath. From that vantage point they can presumably peer into the house through binoculars with impunity. That is not the law, as even the State concedes.").

members affirmed the spatial and temporal limitations on the implied license allowing incursions on home and curtilage. In the words of Justice Alito, any visitor to property "cannot traipse through the garden, meander into the backyard or take other circuitous detours from the pathway,"[277] visit late at night or the middle of the night, or "linger at the front door for an extended period."[278] The Court *rejected* the dubious views expressed in *Desnick* and the dissenters' limitless allowance of police or others "trawl[ing] for evidence with impunity,"[279] as long as the visitor "stay[s] on the base-path…"[280]

The dissent's view, if adopted, would have allowed interlopers, who—like the police—have a right to knock on the homeowner's door, a legal right to utilize unbounded, privacy-invasive high-technology newsgathering techniques and devices–high-powered binoculars and visual and audio devices capable of seeing and hearing what would otherwise not be available to one standing on the pathway or porch. Fortunately, the Court disagreed, emphasizing common-law distinctions reflecting common sense and community mores rather than "fine-grained legal knowledge."[281]

Justice Scalia strongly suggested, correctly the author believes, a broader interpretation of the common-law "specific-purpose" limitation. He stated that "the right to retreat would be significantly diminished if the police [or media!] could entry a man's property to observe his repose from just outside the front window."[282] In other words, there must be some limitations on what police can legitimately deem in plain view to justify a search warrant. Consider the following: Knowing a homeowner is not present—-and cannot answer questions—police officers acting on

---

[277] *Id.* at 1422 (Alito, J., dissenting).
[278] *Id.* at 1422-23 (Alito, J., dissenting).
[279] *Id.* at 1414.
[280] *Id.* at 1416 & n. 3.
[281] *Id.* at 1415.
[282] *Id.* at 1414. The dissent made the correct point officers are "permitted to see hear, and smell whatever can be detected from a lawful vantage point." *Id.* at 1423 (Alito, J., dissenting). This plain view/smell rule does *not* apply if the officers entered *unlawfully*. Nor does it apply if officers otherwise exceed limitations on the implied license to "knock-and-talk." *See* Justice Scalia's description of how circumscribed the license is. Under his description one could argue persuasively licensees have no right to look in windows, particularly if such viewing requires the entrant to deviate significantly from the direct path to the door. *And see* his analysis in *U.S. v. Jones*– "[t]his Court has to date not deviated from the understanding that mere visual observation does not constitute a search"–which was said in the context of observations where the government agent had a right to be. *See* U.S. v. Jones, 132 S.Ct. 945, 953 (2012). This rule is inapplicable where any entrants—including an investigative reporter or other hunter-gatherer—is a trespasser *ab initio* or deviates from limitations imposed by the license.

"an unverified tip" a la *Jardines*[283] traverse the drive and pathway to the homeowner's porch. They peer through windows ten feet from the door—on one side, the living room, on the other a bedroom. By the naked eye, they see distant drug paraphernalia. Or a burglar decides to case a property, aware homeowners are abroad, to determine whether there are sufficient valuables inside to warrant illegal entry. Or a media employee enters the property knowing the owner—an object of public interest—is in seclusion elsewhere and looks through these windows from the porch for visible-to-the-naked-eye insights into the personal lifestyle, personality, indicia of criminality, and whatever else interests the intruder.

All three–police officer, burglar, media newsgatherer–are trespassers and intruders upon curtilage seclusion by calculated attempts to circumvent the "sharply circumscribed"[284] while-on-the-premises license for visitors to private premises by "gather[ing] that information by physically entering and occupying the area to engage in conduct not explicitly or implicitly permitted by the homeowner"[285] under *Jardines*. The burglar utilizes the "knock-on-the-front-door"-implied license as a pretext-subterfuge to case a possible burglary victim. Police and media entrants are no different. They are all trespassers because their purposes *ab initio*[286] are not within the strict customary constraints on licensee status. The media entrant is indistinguishable from the trespass-to-land involving potential substantial punitive damages in *Le Mistral v. CBS,*[287] where defendants entered plaintiff's restaurant and remained over plaintiff's directive to leave, with bright lights and "cameras rolling."[288] They were not there for any purpose covered by either invitee or licensee status. The court held them to be mere trespassers:[289] "There is no threat to a free press in requiring its agents to act within the law."[290]

---

[283] *Jardines*, 133 S.Ct. at 1413.
[284] *Id.* at 1415.
[285] *Id.* at 1414.
[286] *Id.* at 1417 ("That the officers learned what they learned only by physically intruding… to gather evidence is enough to establish that a search occurred."). Justice Scalia found the argument Jardines conceded "the officers had a right to be where they were… misstates the record." He "conceded nothing more than the unsurprising proposition that the officers could have lawfully approached his house to knock on the front door in hopes of speaking to him. This they did not do." *Id.* at 1415, n. 1.
[287] 402 N.Y.S.2d 815, 816 (N.Y. App. Div. 1978).
[288] *Id.* at 816.
[289] *Id.* at 816 & n. 1.
[290] *Id.* at 817 (quoting Galella v. Onassis, 487 F.2d 986, 996 (2d Cir. 1973)). *See supra* note 202 and *infra* note 464.

The Court's unanimous decision in *Riley v. California*[291] similarly sheds brilliance on what newsgatherers' are prohibited from doing under the First Amendment. The Court's search-incident-to-arrest decision adopted a "categorical rule" providing clear direction[292] to police and others that cell phones function as "mini-computers"[293] and "place vast amounts of personal information in the hands of individuals," [294] revealing private matters such as disease symptoms and enabling third parties to "reconstruct… specific movements down to the minute, not only around town but also within a particular building." [295] These searches "typically expose … more than the most exhaustive search of a home."[296] Cell phones are such "a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they are an important part of human anatomy.[297]

Riley's bipartisan approach to digital technology indicates Court members were "trying hard, collectively, to get it right" [298] while recognizing that "[p]rivacy comes at a cost."[299] Justice Alito recognized technology facilitates both the ability of governmental and nongovernmental actors "to amass a wealth of information about the lives of ordinary Americans."[300] Having found a cell phone an "effect" under the Fourth Amendment, it is extraordinarily unlikely the Court would countenance a newsgatherer's theft of and accessing a person's cell phone and transmitting such data to the public,[301] doing the same as to a cell phone left on a restaurant table, in a library cubicle or car, bribing an employee custodian of cell-phone data, hacking a cell phone either directly or remotely,[302] or honing in on and using sophisticated drone technology to read what an individual is viewing or listening to on a cell

---

[291] 134 S.Ct. 2473 (2014).
[292] *Id.* at 2491-93.
[293] *Id.* at 2488-89 (Cell phones "could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers.").
[294] *Id.* at 2485.
[295] *Id.* at 2490.
[296] *Id.* at 2490-91 (The average user has 33 apps, which collectively "can form a revealing montage of the user's life.").
[297] *Id.* at 2484.
[298] Linda Greenhouse, *The Supreme Court Justices Have Cellphones, Too*, N.Y. TIMES (June 25, 2014), https:www.nytimes.com//2014/06/26/linda-greenhouse-the-supreme-court-justices-have-cellphones-too.html.
[299] *Riley,* 134 S.Ct. at 2493.
[300] *Id.* at 2497 (Alito, J., concurring in part and concurring in the judgment).
[301] Such may also be a battery. *See infra* text accompanying notes 305-11.
[302] *See* ELDER, PRIVACY TORTS, *supra* note 203, at § 2:18.20 (discussing British "hacking" scandal).

phone.[303] As the Court said in *Riley,* cell phones are not merely a technological device, but "'hold for many the privacies of life.'"[304]

Other digital-era privacy-protective decisions provide guidance regarding the Court's likely conclusions for newsgatherers' First Amendment protection in acquiring information by criminal, tortious, or other wrongful conduct. The Court's unanimous 2015 decision in *Grady v. North Carolina*[305] is illustrative. The Court extended the *Jones-Jardines* physical-intrusion doctrine to a civil statutory mandate that a convicted, recidivist sex offender who had served his sentence wear a continuing, life-long, time-correlated, satellite-based tracking device—an ankle bracelet[306]—calculated to collect information "by physically intruding on a subject's body" without consent[307] and tracking him wherever he went–a statutorily mandated battery of his "person" under the Fourth Amendment.

Under the author's analysis, a newsgatherer's installation of a tracking device in whatever form of whatever kind in or on the plaintiff's person[308] or any object intimately associated therewith[309] would constitute a battery violating the victim's rights of autonomy and dignity[310] and an intrusion upon seclusion.[311] Examples would include a miniscule tracking device put in a drink and swallowed, a pen containing a parallel device, a device inserted in the lining of a cap, hat, lining of a hand-bag or wallet, substitution of a pair of glasses incorporating a tracking device, or myriad other James Bondian surveillance devices.

The Court's momentous *Carpenter v. U.S.* decision[312] likewise provides direction as to why newsgatherers replicating law-enforcement excesses will not receive First Amendment protection. Chief Justice Robert's opinion relied on *Katz*-based and property-rights analyses in its digital-era jurisprudence and emphasized the Court would not

---

[303] *See* Elder, *Recordings,* Part II, and Kyllo v. U.S., 533 U.S. 27, 40 (2001) (finding prohibited search in using thermal-imaging device to explore details of private home previously unknowable absent physical incursion upon property).
[304] *Riley*, 134 S.Ct. at 2494-95 (internal citation omitted).
[305] 135 S.Ct. 1368 (2015).
[306] *Id.* at 1369-70.
[307] *Id.* at 1371.
[308] DAN B. DOBBS ET. AL., HORNBOOK ON TORTS 60-64, 67 (2d ed. 2016) (hereinafter "DOBBS ET. AL.").
[309] *Id.* at 68.
[310] *Id.* at 62 ("Battery today vindicates the plaintiff's rights of autonomy and self-determination, her right to decide for herself how her body will be treated by others, and her right to exclude their invasions as a matter of personal preference… an offensive touching infringes a reasonable sense of personal dignity…").
[311] ELDER, PRIVACY TORTS, *supra* note 203, at § 2:5.
[312] 138 S.Ct. 2206 (2018).

"uncritically extend" old cases to scenarios with "new concerns wrought by digital technology."[313] He analyzed how "detailed, encyclopedic, and effortlessly compiled" [314] information stored by third parties is "remarkably easy, cheap and efficient compared to traditional investigative tools." [315] Tracking movement via cell-phone records "provides an intimate window in a person's life, revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations.'"[316] *Carpenter* held that information within the control of third-party cell-phone companies is "not truly shared," [317] rejecting the argument cell-phone owners "'voluntarily assume[ ] the risk'" such information will be transformed into a "comprehensive dossier"[318] of physical movements.

Justice Gorsuch's dissent eviscerated the Court's third-party doctrine precedents as "not only wrongly but horribly wrong"[319] and as left on "life support"[320] by the Court majority. Justice Gorsuch pilloried *Katz* as "yield[ing] an often unpredictable–and sometimes unbelievable jurisprudence" in the third-party context and beyond. [321] He tersely excoriated two of the Court's most ridiculed cases with newsgathering implications. He defenestrated *Greenwood v. California*,[322] where it found bagged curbside trash "readily accessible to animals, children, scavengers, snoops, and other members of the public'"[323] had no Fourth Amendment protection: "But the habits of raccoons don't prove much about the habits of the country. I don't think most people spotting a neighbor rummaging through their garbage would think they lack reasonable grounds to confront the rummager." [324] He similarly disparaged *Florida v. Riley,*[325] the Court's anti-civil liberties helicopter-

---

[313] *Id.* at 2222.
[314] *Id.* at 2209.
[315] *Id.* at 2218.
[316] *Id.* at 2217 (quoting U.S. v. Jones, 132 S.Ct. 945, 955 (2012) (Sotomayor, J., concurring).
[317] *Id.* at 2220.
[318] *Id.* (internal citation omitted).
[319] *Id.* at 2262-63 (Gorsuch, J., dissenting) (quoting Orin S. Kerr, *The Case for the Third Party Doctrine*, 107 MICH. L. REV. 501, 563, n. 5, 564 (2009).
[320] *Carpenter*, 138 S.Ct. at 2272 (Defense counsel failed to develop the "most promising" argument based on a property-rights analysis.).
[321] *Id.* at 2266.
[322] 486 U.S. 35 (1988).
[323] *Carpenter*, 138 S.Ct. at 2266 (Gorsuch, J., dissenting) (quoting *Greenwood*, 486 U.S. at 40).
[324] *Id.* at 2266. What made the Court's decision particularly strange was its "curious substitution" for California law that specifically protected the owner's interest in garbage privacy. *Id.*
[325] 488 U.S. 445 (1989). For a detailed analysis, *see* Elder, *Recordings, supra* note 4, Part II.

surveillance case: "… [A] police helicopter hovering 400 feet above a person's property invaded no reasonable expectation of property. Try that one out on your neighbor."[326]

The Roberts and Gorsuch opinions provide provocative fodder for counsel endeavoring to demonstrate that egregious newsgatherer surveillance, even in public spaces, has no First Amendment protection. As in *Riley v. Califoria,* newsgatherers who hack into, otherwise pilfer, or bribe or induce cell-phone-provider employees to breach confidentiality [327] lack constitutional protection. *Carpenter* likewise suggests use of modern technology to engage in intrusive, highly offensive surveillance in public–even where no physical interference with a chattel, person, or land is involved–will nonetheless be deemed to invade a reasonable expectation of privacy. This would include, for example, deeply intrusive surveillance of the subject-victim by helicopter(s) or drone(s) or even comparable surveillance by a single newsgatherer in public for a significant period of time wherever the subject victim goes.[328] The Court and Justice Gorsuch shredded any jurisprudential basis in the third-party-doctrine for a conclusion that people must remain captive in their homes or forfeit the risk of such surveillance.

Justice Gorsuch's sarcastic *Greenwood* and *Florida v. Riley* discussions likewise provide important guidance. No one can defend with a straight face newsgathering–by neighborhood snoops trying to sell information on the Internet, paparazzi, media employees/contractors or other information-hunter-gatherers–in stealing or sifting through bagged garbage as protected First Amendment activity. It is very doubtful the disturbingly haunting, outrageous conclusions of *Greenwood* [329] remain persuasive either as controlling Fourth or First Amendment doctrine. The rummaging of Henry Kissinger's garbage discussed in *Greenwood*[330] is highly unlikely to be viewed under the Court's First

---

[326] *Carpenter*, 138 S.Ct. at 2266 (Gorsuch, J., dissenting). Justice Gorsuch's sarcasm mentioning "rummager" and "neighbor" suggests his views are not limited to governmental actors.

[327] *See supra* text accompanying notes 26-33, 82-88 and *infra* text accompanying notes 476-559, 578-99, 616, 696-99, 725-26, 741.

[328] *See supra* text accompanying notes 202, 290, 332-37, 464.

[329] *See supra* text accompanying notes 322-23.

[330] Greenwood v. California, 486 U.S. 35, 45-56 (1988) (Brennan, J. dissenting) (Detailing the enormous amount of personal, intimate, professional and political information gatherable from trash, Justice Brennan found such indistinguishable from taping calls or rummaging through drawers—most of society "would be incensed to see a meddler—whether a neighbor, reporter, or a detective—scrutinizing" sealed containers, citing the reaction to rummaging Henry Kissinger's trash.).

Amendment precedent as "paradigmatically 'routine'"[331] newsgathering activity.

Newsgatherers' fervent claim for First Amendment protection for intrusive surveillance by a hovering and circling helicopter or drone—or a bevy thereof—within the "immediate reaches" above private property[332] or from above adjacent private or public property appears to be a veritable pipe dream.[333] Despite its strong support by the media, drone enthusiasts, and the drone industry,[334] *Riley v. California-Carpenter v. U.S.*'s savaging of the third-party doctrine and its voluntary exposure-assumed-risk underpinnings—together with Justice Gorsuch's dissent therein and brutal critique of *Florida v. Riley*[335]—fatally undermine this claim. This is particularly true for drones, with their unique capabilities and threats to human freedom.[336] Claims for unfettered overflight surveillance protection are particularly dubious when the Court's modern privacy analysis is conjoined with *Jones-Jardines's* protection of property rights and its implicit authorization for state legislative action to protect landowner property and privacy rights within the "immediate reaches" above property.[337]

III. THE SUPREME COURT'S FORGOTTEN DECISION—*SHEVIN V. SUNBEAM TELEVISION CORP.*

In closing this overview, it's worthwhile discussing an important 1977 case*, Shevin v. Sunbeam Television Corp.*,[338] upholding Florida's all-party-consent statute. Media challengers—a local television station and a newspaper with a state-wide readership—appealed.[339] The Court dismissed the appeal "for want of a substantial federal question." Justices Brennan, White, and Blackmun would have scheduled it for argument.[340] *Shevin* is significant for several reasons. The Court denied review during

---

[331] The Florida Star v. B.J.F., 491 U.S. 524, 538 (1989).
[332] Elder, *Recordings, supra* note 4, Part II.
[333] *Id.*
[334] *Id.*
[335] *See supra* text accompanying notes 291-331.
[336] *See* Elder, *Recordings, supra* note 4, Part II.
[337] *Id.*
[338] 351 So.2d 723 (Fla. 1977). There was no indication in the Florida Supreme Court's decision or the briefs media were concerned with liability for passively received material unlawfully acquired by third-party strangers–the *Bartnicki v. Vopper* scenario. Parties and the court exclusively focused on media-employee interceptions.
[339] *Shevin*, 351 So.2d at 724.
[340] 435 U.S. 920 (1978).

the pendency of *Landmark Communications, Inc. v. Virginia.*[341] The Florida Supreme Court applied a very deferential standard of review,[342] rejecting compelling-state-interest, close-scrutiny, and narrow-tailoring requirements.[343]

Shevin epitomized the media's defense of aggressive newsgathering, proffering evidence of a series of award-winning consumer-affairs, official-corruption and housing-discrimination stories,[344] presaging the scenarios Judge Richard A. Posner tried to protect on state-law grounds in *Desnick v. American Broadcasting Cos.*[345] The Florida Supreme Court did not feel bound by the Court's Fourth Amendment cases.[346] Most importantly and inexplicably, *Shevin* has been ignored in the federal appellate litigation involving recording police in public despite media emphasis on such public-official recordings in *Shevin*'s briefs.[347]

A detailed look at *Shevin* is revealing. Justice James C. Adkins's opinion rejected media arguments: any privacy of the recorded party was subservient to appellees' First Amendment right based on their need to protect accuracy, candidness, and corroboration; this right entitled them to engage in surreptitious or concealed recordings; the all-party consent mandate—-and felony penalty—considerably impaired newsgathering activities.[348] He emphasized appellees were not claiming "any impairment of their freedom to publish… they rely on their right to gather news without governmental interference."[349]

Justice Adkins relied in part on the Court's restrictive-access jurisprudence, including the argument rejected by *Saxbe v. Washington*

---

[341] 435 U.S. 829 (1978) (*see supra* text accompanying notes 36, 80, 82, 86-88), noted in Sunbeam v. Television Corp. v. Shevin, Motion to Vacate Dismissal of Appeal and Petition for Rehearing, No. 1977-1056 (1978), at 7-9 (hereinafter "Pet. for Reh'g").
[342] *Shevin*, 351 So.2d at 725-27.
[343] Sunbeam Television Corp. v. Shevin, No. 377-1056, Appellants' Brief on Appeal, App. B. (Op. Cir. Ct., Jan. 14, 1977), at App. 15 (hereinafter "Appellants' Brief").
[344] *Shevin*, 351 So.2d at 725.
[345] 44 F.3d 1345, 1351-53 (7th Cir. 1995) (Conceding "there is no journalists' privilege to trespass," Judge Posner treated defendants as equivalent to testers seeking evidence of antidiscrimination-law violations and finding that defendants' entry did not invade the interests trespass law was intended to protect.).
[346] *Shevin*, 351 So.2d 726-27 (following the left-largely-to-the-states rule in Katz v. U.S., 389 U.S. 347, 350 (1967), and the *Branzburg v. Hayes* quote discussed *infra* text accompanying note 355). Media relied heavily on Fourth Amendment cases. *Shevin* found the latter Amendment, at most, a *threshold minimum,* but Florida could provide greater protection for conversational-privacy intrusions without violating the First Amendment. *See supra* text accompanying notes 200-337.
[347] *See* Elder, *Recording, supra* note 4, Part I.
[348] *Shevin*, 351 So.2d at 725.
[349] *Id.*

Post Co.[350] In *Saxbe,* the media relied heavily on the fact a reporter-expert with 1600 interviews found such interviews necessary for truth-telling. Justice Adkins emphasized *Saxbe* rejected First Amendment protection[351] despite this factual substratum.[352] He quoted lengthily from *Branzburg v. Hayes*,[353] including the Court's powerful pronouncement that "[it] would be frivolous to assert… the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his source to violate valid criminal laws. Although stealing documents or private wiretapping could provide newsworthy information, neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news"[354]

Justice Adkins continued quoting *Branzburg*: "Neither are we convinced that a virtually impenetrable constitutional shield, beyond legislative or judicial control, should be forged to protect a private system of informers operated by the press to report on criminal conduct, a system that would be unaccountable to the public, would pose a threat to the citizen's justifiable expectation of privacy, and would equally protect well-intentioned informants and those who for pay or otherwise betray their trust to their employer or associates" —the citizenry "through its elected and appointed officers regularly utilizes informers, and in proper circumstances may assert a privilege against disclosing the identity of these informers."[355]

Justice Adkins ratified the all-party-consent statute's legislative policy "to allow each party to a conversation to have an expectation of privacy from interception by another party to the [same] conversation."[356] The statute did "not exclude any source from the press, intrude upon the activities of the news media in contacting sources, prevent the parties to the conversation from consenting to the recording, or restrict the publication of any information gained from the communication." [357] The First Amendment provided no right to verify/corroborate newsgathering activities in the face of a statute protecting individual rights in a federalist system where the Supreme Court had recognized privacy protection as left preeminently to the

---

[350] 417 U.S. 843 (1974).
[351] *Shevin*, 351 So.2d at 725.
[352] *Id.*
[353] *See supra* text accompanying notes 1-2, 42-52, 59-64, 69-70, 72, 88-89 and *infra* text accompanying notes 354-55, 457, 459, 482, 485.
[354] *Shevin*, 351 So.2d at 726 (quoting Branzburg v. Hayes, 408 U.S. 665, 697-98 (1972)).
[355] *Id.*
[356] *Id.* at 726-27.
[357] *Id.* at 727.

states.[358]

Synthesizing the pivotal case of *Dietemann v. Time, Inc.*, Justice Adkins found newsgathering "an integral part of news dissemination" but concluded "hidden mechanical devices are not indispensable tools of newsgathering," as the "ancient art of investigative reporting was successfully practiced long before the invention of electronic devices."[359] The First Amendment "is not a license to trespass or to intrude by electronic means into the sanctity of another's home or office," and does "not become such simply because the person subjected to the intrusion is reasonably suspected of committing a crime." [360] Following *Dietemann*, Justice Adkins rejected the argument a party to a conversation assumed the risk of dissemination to the public. The latter would result in "a most pernicious effect upon the dignity of man."[361] He further denied the suggestion the statute impermissibly dampened First Amendment rights.[362]

Media appealed to the Supreme Court. The briefs are revealing. Media contended the statute's chilling effect was "devastating," [363] explored in detail stories resulting from surreptitious recordings,[364] and contended the statute's "novel and expansive reading of privacy"[365]—"a privacy interest of unprecedented breadth and scope"[366] covering all oral and voluntary conversations—"threatens to 'swallow' up the First Amendment right to gather the news"[367] and constituted an "onerous burden" [368] on media. Media seemed stunned the same court had enforced the statute's use-of-evidence prohibition in a case involving recording by an extortion party-victim.[369]

Relying on Fourth Amendment cases, media characterized the notion of privacy in two-party conversations as "meaningless,"[370] with the corollary: "If one has no privacy interest in a particular conversation,

---

[358] *Id.*
[359] 449 F.2d 245, 249 (9th Cir. 1971). *See infra* notes 360-62, 373.
[360] *Shevin*, 351 So.2d at 727.
[361] *Id.*
[362] *Id.*
[363] Pet. for Reh'g, *supra* note 341, at 3.
[364] App.'s Brief, *supra* note 343, at 8-12.
[365] Pet. for Reh'g, *supra* note 341, at 4.
[366] App.'s Brief, *supra* note 343, at 16.
[367] Pet. for Reh'g, *supra* note 341, at 4.
[368] *Id.* at 6.
[369] *Id.* at 4-6 (discussing State v. Walls, 356 So.2d 294, 296 (Fla. 1978) (following *Shevin* and the legislature's policy—"the right of any caller to the privacy of his conversation is of greater social value than the interest served by permitting eavesdropping or wiretapping") (internal citation omitted).
[370] App.'s Brief, *supra* note 343, at 18.

then the means by which it is recalled, pen and pad, or tape, is immaterial."[371] The briefs emphasized the statute had no locational limitation, like a home or office, and no content restriction, but applied to all conversations everywhere.[372] Appellants fulminated it was "now illegal in Florida for a reporter conducting an interview with a public official about public business in a public place to tape record that conversation because the politician 'should not be required to take the risk that what is heard… will be transmitted by… hi-fi to the public at large.'"[373] Florida's approach treated privacy as having "remarkable" protection "constitutionally elevated over the public's right to know,"[374] and provided protection for "unlawful or undesirable conduct"[375]—a "wholly unnecessary and unacceptable affront to the First Amendment,"[376] particularly since law enforcement was exempt.[377]

Appellants' highly developed argument for surreptitious recording's indispensability was substantially undercut by their experts/reporters' testimony such was "preferred"[378] and by the state's detailing of the plethora of available alternatives: "transcribing or note taking; relying on records to corroborate statements; accompanying public officials; interviewing public officials; interviewing victims; using two reporters to corroborate; using another individual from the Better Business Bureau; and using [the] '60 Minutes' technique of reporting conversations of only the undercover reporter."[379] The state provided numerous illustrations of the same reporters-witnesses engaging in

---

[371] *Id.* (quoting U.S. v. White, 401 U.S. 745, 753 (1971) (rejecting argument a defendant with no Fourth Amendment "right to exclude the informer's unaided testimony nevertheless has a Fourth Amendment privilege against a more accurate [recorded] version of the events in question").
[372] *Id.* at 16.
[373] *Id.* at 20. The briefs repeatedly referenced surreptitious recordings of police and official corruption. *Id.* at 7-12.
[374] *Id.* at 20-21.
[375] *Id.* at 14. Appellants' breast-thumping claim of constitutional entitlement to violate the criminal law to gather such information did not attempt to conceal its hypocrisy. *Compare* Justice Breyer's concurrence in *Snyder v. Phelps, see supra* text accompanying notes 134, 180-83, 191-92 and the parallel hypocrisy in *Cohen v. Cowles Media Co.,* where media claimed a statutory shield to protect them from source disclosure, but no claim should be allowed in cases of breached source-anonymity promises. *See infra* text accompany notes 385-559.
[376] App.'s Brief, *supra* note 343, at 27.
[377] *Id.* at 20 (arguing statute's "privacy premise is even more suspect" under the exception in Sec. 934.03(2)(c): "If privacy justifies the statute in all circumstances, how is the privacy interest lost because a policeman is interested in the conversation?").
[378] Sunbeam Television Corp. v. Shevin, No. 77-1056, Brief in Support of Motion to Dismiss or to Affirm (1978), at 4.
[379] *Id.*

investigative reportage after the statute's effective date and complying therewith [380] —a not-too-subtle reminder of what the Court has denominated as "paradigmatically 'routine,'" time-honored newsgathering.[381]

Whatever the precedential importance of the Court's "want of a substantial federal question" basis for denying the appeal,[382] *Shevin* presents a compelling prototype for the deferential *Cohen-Bartnicki-Snyder* trilogy standard as to all manner of generally applicable criminal, tortious, and other wrongful conduct in acquiring otherwise newsworthy information in the interest of protecting conversational privacy–"the Good, the Bad, and the Ugly"–an interest the Court finds equivalent to free expression.[383] *Shevin* rejected unequivocally media attempts to circumvent the Court's limitations on traditional reportorial techniques and to let media engage in newsgathering on the cheap. The Court agreed with the Florida Supreme Court. The federal appellate courts adopting the "growing-consensus" rule to record police in public with impunity universally ignore *Shevin*. They should take heed—but probably will not.[384]

IV. MEDIA PROMISES OF SOURCE ANONYMITY AND NON-IDENTIFIABILITY—THE SUPREME COURT'S PIVOTAL DECISION IN *COHEN V. COWLES MEDIA CO.*

Dan Cohen—a political-activist-public-person, behind-the-scenes-advisor, public-relations director for the Independent-Republican candidate for Governor[385]—provided confidential "political dynamite" [386] public-record material about the Lieutenant-Governor candidate of the Democratic-Farm-Labor Party during the closing days of the campaign when the Independent-Republican candidate was

---

[380] *Id.* at 4-5.
[381] The Florida Star v. B.J.F., 491 U.S. 524, 538 (1989).
[382] *See* Jonathan L. Estin, *Insubstantial Questions and Federal Jurisdiction, A Footnote to the Term-limits Debate*, 2 NEV. L.J. 608, 628 (2002) (suggesting lack of direction on the issue decided "militates against reading too much into such a disposition"). *Compare* Warren Weaver, Jr., *Justices Will Decide Press Freedom Case*, N.Y. TIMES , Mar. 21, 1978 ("The effect of the [Court's *Shevin*] decision is to leave the Florida law in force and encourage other states to adopt similar statutes.").
[383] *See infra* text accompanying notes 617-18, 646-47.
[384] *See* Elder, *Recordings, supra* note 4, Parts I, II.
[385] Cohen v. Cowles Media Co., 457 N.W.2d 199, 201, n. 3 (Minn. 1990) (hereinafter *Cohen II*) (detailing activities as public figure, candidate, and elected official).
[386] Cohen v. Cowles Media Co., 445 N.W. 2d 248, 252 (Minn. App. 1989) (hereinafter, *Cohen I*).

polling well-behind.[387] Overruling seasoned reporters who knew the source and his affiliations,[388] two newspapers identified Cohen as their source, deciding his identity was as–if not more–newsworthy than the material provided[389] –three dated, minor, later-dismissed, illegal-assembly charges and dated, vacated, minor conviction for shoplifting during a period of intense emotional distress.[390]

One newspaper identified Cohen's employer.[391] Neither disclosed pre-election their ethical shortcomings in dishonoring reporters' promises[392] while excoriating Cohen's attempts to disseminate but remain aloof from the debate.[393] Fired the day of publication,[394] Cohen sued in contract for his economic losses and fraud for punitive damages. A jury awarded $200,000 in economic job losses against the co-defendants jointly and severally and $500,000 in punitive damages, half

---

[387] Brief of Respondent Cowles Media Company, 1991 WL 11007830, 5; Brief for Respondent Northwest Publications, Inc., 1991 WL 537105, 5. Just after those polls, the I-R Lieutenant-Governor candidate was interviewed on radio about the campaign. The interviewer referred to "an old criminal offense," leading to a search by I-R supporters for the records at issue. *Id*. There is no indication either co-defendant or other local media searched for them. They were viewed, as respondent later claimed, as of "obsolete and minor character." *Id*. at 23. Interestingly, the brief quoted, *id*. at 18, Ocala Star-Banner Co. v. Damron, 401 U.S. 295, 300 (1971) ("[A] charge of criminal conduct against an official or a candidate, no matter how remote in time or place, is always 'relevant to his fitness for office.'").

[388] *Cohen II*, 457 N.W.2d at 200-01.

[389] Cohen v. Cowles Media Co., 479 N.W.2d 387, 389 (Minn. 1992) (hereinafter *Cohen IV*). The Minnesota Supreme Court synthesized co-defendants' reasons for dishonoring their promises: the source information was as newsworthy as Cohen's information—"the real news story was one of political intrigue"—with candidate information "an incomplete part" of the story; non-disclosure would be deceptive, throwing suspicion on other possible sources; the identifying source would likely be disclosed by other media; one co-defendant felt withholding Cohen's identity might be perceived as protecting DFL candidates it endorsed.

[390] *Cohen II*, 457 N.W.2d at 200-02 and n. 2.

[391] *Cohen I*, 445 N.W.2d at 253.

[392] *Id*. The *Star Tribune* reporter was so incensed she refused to have her name attached to the article. *Id*. Two other media honored the promise. One stated the material had been "slipped to reporters." A second decided not to use the story or its source. These actions seriously undermined the argument breach of anonymity was a necessary or indispensable aspect of newsgathering. The Minnesota Supreme Court ultimately agreed. *See infra* text accompanying notes 541-47.

[393] *Id*. at 254. One co-defendant excoriated Cohen for self-righteous, unfair campaign maneuvers. The following day it ran an editorial cartoon of a trick-or-treater as a garbage can at DFL headquarters, with a label, "[l]ast minute campaign smears," with the DFL gubernatorial candidate opening the door and saying, "[i]t's Dan Cohen." Four days post-election one co-defendant published on the editorial page a letter criticizing the breach-of-anonymity, with an edited version in the other, with an explanation why it dishonored the promise.

[394] *Cohen II*, 457 N.W.2d at 202.

against each.[395]

The Minnesota Court of Appeals found no fraud and reversed the punitive damages.[396] It upheld the breach-of-contract claim[397] and rejected the argument that a contract remedy was unnecessary in light of the deluge of criticism.[398] The court recognized that providing a remedy would "promote the free flow of information to the media and, ultimately, to the public," rather than "dry up" news sources.[399] It found a waiver of First Amendment rights[400] and no intrusion into the editorial process by providing a remedy: "We do not think it an undue burden to require the press to keep its promises."[401] A partial dissenter categorized the material provided as a public figure's "political scheme to broadcast a political attack" while covering-up his activity. Disclosure of Cohen's identity was true, legitimately newsworthy, and protected by the First Amendment and Minnesota Constitution.[402]

The Minnesota Supreme Court concurred as to the fraud-based punitive damages[403] but disagreed as to breach of contract.[404] While conceding a promise of anonymity and keeping such promises were "common, well-established journalistic practice[s]"[405]—no one recalled a

---

[395] *Id.* at 200. Damages issues like loss of reputation and emotional distress may pose major problems and vary depending on which theory–breach of contract, fiduciary duty, tort-based breach of confidentiality–is chosen. *See* Susan M. Gilles, *Promises Betrayed: Breach of Confidence as a Remedy for Invasion of Privacy*, 43 BUFF. L. REV. 1, 15-62 (1995) (hereinafter Gilles).

[396] *Cohen I*, 445 N.W.2d at 259-60. Absent an independent tort like fraud, no punitive damages were impermissible in contract.

[397] *Id.* at 256-58.

[398] *Id.* at 257 (Criticism had not sufficed—"[t]he specter of a large damage award is a much more effective incentive.").

[399] *Id.*

[400] *Id.* at 258-260.

[401] *Id.* at 257-58 (Absent such, news sources would "dry up, resulting in less newsworthy information to publish;" a damage remedy was a counterpart to the legislative interest in enhancing source confidentiality found in the reporters' shield statute.). For an analysis of *Cohen* and the peril of "burning" sources, *see* Joseph W. Ragusa, *Biting the Hand that Feeds You: The Reporter Confidential Source Relationship in the Wake of Cohen v. Cowles Media Co.*, 67 ST. JOHN'S L. REV. 15, 139-40 (1993) (The chilling-effect criticism of *Cohen* is "misplaced" —"some reporters have even expressed satisfaction" with the decision.) (hereinafter Ragusa); Jerome Barron, *Cohen v. Cowles Media and Its Significance for First Amendment Law And Journalism*, 3 WM. & MARY BILL OF RIGHTS J. 419, 462-65 (1994) (hereinafter Barron).

[402] *Cohen I*, 445 N.W.2d at 262, 265-66 (Crippen, J., concurring in part, dissenting in part).

[403] *Cohen II*, 457 N.W.2d at 202 (Reporters and editors intended to fulfill the promise until more information was acquired and subsequent discussions occurred, so fraud was absent.).

[404] *Id.*at 202-03. Defamation was unavailable, as the information was true.

[405] *Id.* at 201.

prior editorial repudiation [406] —the court refused to enforce the underlying promise despite its admitted clarity.[407] The court analyzed the source-reporter relationship and was unpersuaded the parties "ordinarily believe" they are participants in constructing a binding contract.[408] Contract law was viewed as an "ill fit," barring consideration of the pivotal factors underlying the source-reporter relationship.[409] The promise reflected merely an ethical or moral obligation, with participants assuming the risk of the other's good faith and trustworthiness.[410]

The Minnesota Supreme Court addressed an issue not briefed that arose during oral arguments—whether the well-established Minnesota doctrine of promissory estoppel was an alternative basis for sustaining compensatory damages.[411] The majority conceded intended reliance to Cohen's detriment could be easily demonstrated. The third requirement–avoidance of injustice only by promise enforcement–would mandate that the court scrutinize a transaction "fraught with moral ambiguity,"[412] with participants claiming pristine behavior while portraying each other as ethically challenged[413]–"the pot calling the kettle black."[414] This "justice" inquiry would entail analysis of why defendants breached and available alternatives, including attribution to a source linked to the Independent-Republican campaign–factors weighed in First Amendment analysis.[415] The promise's political-campaign setting was critical—"the classic First Amendment context of quintessential public debate in our democratic society."[416] The resultant chilling of public debate would violate media-defendants' First Amendment rights.[417]

Justice Lawrence R. Yetka's blistering dissent would have upheld the compensatory award under either a contract or promissory-estoppel theory. Both were generally established bases for liability. [418] He emphasized the "deplorable" future consequences of not providing a

---

[406] *Id*. *See* Ragusa, *supra* note 401, at 142 (The breach precipitated "almost universal condemnation by the journalism community.").
[407] *Cohen II*, 457 N.W.2d at 203.
[408] *Id.*
[409] *Id.*
[410] *Id*. (characterizing such as an "'I'll-scratch-your-back-if-you'll-scratch-mine' accommodation").
[411] *Id*.at 203-04, n. 5.
[412] *Id*. at 204.
[413] *Id*. (each imputing "dirty tricks" to the other).
[414] *Cohen IV*, 479 N.W.2d at 389.
[415] *Cohen II*, 457 N.W.2d at 205.
[416] *Id*. The court found him a public figure. *Id*. at 201, n. 3.
[417] *Id*. at 205. Cases might exist where promissory-estoppel might countervail First Amendment concerns. The case before it did not qualify.
[418] *Id*. at 205 (Yetka, J., dissenting).

remedy. Sources would be reluctant to provide information and the public might be denied pertinent and important information on qualifications of future candidates.[419] He concluded media should be required to keep their promises like ordinary citizens.[420] Any other result offended the "fundamental principle of equality under the law."[421] The majority's undoubted message was the law was inapplicable to wealthy and powerful entities or people.[422] Justice Yetka chastised media for inconsistency. They aggressively advocated a no-one-is-above-the-law Watergate mantra.[423] Yet, they adamantly demanded absolute discretion to hide behind source confidentiality when they so decided,[424] while claiming the right to violate confidentiality with absolute editorial impunity if a story would become "more sensational and profitable" thereby.[425] The majority result was a "sad day in the history of a responsible press in America."[426]

Justice Glenn E. Kelley gave an equally bruising critique, emphasizing other commercial or private citizens would have been liable under parallel circumstances.[427] He found the court's lack-of-intent-to-be-bound-by-contract-law and assumed-risk-of-non-trustworthiness rationales unpersuasive because the parties testified unequivocally they *intended* to keep their promises.[428] In this respect, the majority delved into inappropriate appellate factual determinations[429] and deviated from the Minnesota Constitution's right-to-remedy provision.[430] Justice Kelly detailed the co-defendants' deep, aggressive, and effective involvement in lobbying for the state's reporter-shield law.[431] In his view, the majority

---

[419] *Id.* at 206.
[420] *Id.* at 205-06.
[421] *Id.* at 206.
[422] *Id. Compare* Court rejection of wealth-based Fourth Amendment distinctions. Collins v. Virginia, 138 S.Ct. 1663, 1675 (2018) (internal citation omitted) (rejecting distinction between residences with and without garages in determining curtilage protection: "[T]he most frail cottage in the Kingdom is absolutely entitled to the same guaranties of privacy as the most majestic mansion.").
[423] *Cohen II*, 457 N.W.2d at 206 (Yetka, J., dissenting).
[424] *Id.*
[425] *Id.*
[426] *Id.*
[427] *Id.* at 206 (Kelley, J., dissenting).
[428] *Id.* at 206-07 (concurring as to the legitimacy of the express-contract claim).
[429] *Id.* 207.
[430] *Id.* (citing Minn. Con., Art. 1, Sec. 8).
[431] *Id.* at 207 and n. 1. A leading media lawyer criticized media as "want[ing] it both ways: constitutional protection from having to reveal (their sources); constitutional protection from having to pay damages if they do." Richard N. Winfield, *Standing a Privilege On Its Head*, COMM. L. at 3 (1989).

had stunningly delegated largely unfettered control of the right-to-know and duties of confidentiality to media executives.[432] This attempt to "crawl under the edges of the First Amendment" would impair rather than enhance First Amendment values by "drying up" sources.[433]

An analysis of briefs and oral arguments before the Supreme Court reveals the difficulties respondents and amici curiae had in claiming a unilateral, at-whim-and-will right-to-dishonor clear-and-unequivocal source-anonymity agreements.[434]

First, potent, uncontested evidence was proffered between 30% and one-third of newspaper stories and 75-85% of newsmagazine stories emanated from sources promised anonymity.[435] This raised the specter of undermining future source availability, a point made repeatedly by most Minnesota appellate judges.[436]

Second, the significance of identifying Cohen was not compelling[437] despite media attempts to magnify its importance[438] and emphasize the significance of the information he supplied.[439] Two media entities provided this information either protected his anonymity or declined to use it.[440]

Third, media's have-its-cake-and-eat-it-too arguments left it sputtering to defend glaringly inconsistent positions. These entities had stoutly lobbied for and defended shield laws to protect source anonymity

---

[432] *CohenII*, 457 N.W.2d at 207 and n. 1 (Kelley, J., dissenting).

[433] *Id.* at 207. Every judge expressed concern about "drying up" sources. The majority conceded dishonoring such promises was "dishonorable" and might "dry up" sources. *Id.* at 202-03; *id.* at 206 (Yetka, J., dissenting). *Compare Bartnicki v. Vopper infra* in text accompanying 560-713.

[434] *See Cohen II*, *supra* note 407; *infra* text accompanying notes 441-45, 447-50, 466-70, 474.

[435] Transcript of Oral Argument, Cohen v. Cowles Media Co., 501 U.S. 663 (1991) (No. 90-634), 1991 WL 636589, at *3 (hereinafter *Cohen III*). *See* Brief for the Petitioner, 1991 WL 11007829, at 5 (detailing expert-witness testimony at least 33% of newspaper articles and up to 85% of magazine articles used "veiled attribution," high-government officers "often provide" information only after receiving promised confidentiality, and 30% or higher of D.C. interviews were off-record).

[436] *See supra* text accompanying notes 399, 401, 405-07, 419, 433, 435.

[437] Transcript of Oral Argument, *supra* note 435, at 26 (Counsel for Respondents, John D. French, acknowledged in response to sharp questioning it was indeed possible for news organizations to have left out Cohen's identity, as two of four had done; a follow-up question suggested such evidenced "reasonable news editors could differ as to the public significance of the information.").

[438] *See supra* text accompanying notes 385-433.

[439] *Id.*

[440] *See supra* text accompanying notes 389, 437*;* Brief for the Petitioner, 1991 WL 11007829, Cohen v. Cowles Media Co., 501 U.S. 663 (1991) (No. 90-634), at 13.

from compelled disclosure.[441] Illogically, they claimed unfettered discretion to breach promised source anonymity free from sanction.[442] Media were adamant employees with work-related information of compelling public concern[443] who tried to share or sell proprietary information to a competitor should be liable for breaching a fiduciary duty to the employer.[444] Media were in the anomalous position of rejecting the right of a reporter wishing to revisit and dishonor source-anonymity in order to disclose newsworthy, identifying information. That reporter had a "very thin" First Amendment argument.[445] In sum, media had all the legal rights and others had only, at most, moral commitments unworthy of legal enforcement[446] —a breathtakingly distorted disequilibrium.

Fourth, what the media claimed as a First Amendment *right* involved media "unclean hands"[447] and significant and deceptive omissions.[448] Media wanted the right to fulminate against and disparage

---

[441] *See supra* text accompanying notes 401, 423-26, 431-33; *see infra* note 451; Reply Brief of Petitioner, Cohen v. Cowles Media Co., 501 U.S. 663 (1991) (No. 90-634), 1991 WL 537108, at 6-7; Reply Brief of Petitioner, Cohen v. Cowles Media Co., 501 U.S. 663 (1991) (No. 90-634), 1991 WL 11007833, at 5, 7 and n. 5.

[442] *See supra* text accompanying notes 423-32 and *infra* notes 448, 450, 467-70.

[443] Transcript of Oral Argument, Cohen v. Cowles Media Co., 501 U.S. 663 (1991) (No. 90-634), 1991 WL 636589, at 13 (question as to "the most newsworthy material in the world").

[444] *Id.* at 13-14. A question suggested: "It's a very odd calculus that the person closest to the truth—in this case the source—cannot protect his ability to divulge or not to divulge but that as you get further away from the sources of truth, i.e., in the newspaper room you say, oh, then the newspaper has a right to protect its information by contract suit… [I]t seems to me the calculus should be the other way around." *Id.*

[445] *Id.* at 14 (Asked why employers should not be liable for "misdeeds of its agents" but the reporter would be liable, Mr. French stumbled: "No, I'm—the First Amendment always counts. I—I have to come back to that.").

[446] Brief of Petitioner, Cohen v. Cowles Media Co., 501 U.S. 663 (1991) (No. 90-634), 1991 WL 537107, at 10: "Promises by newspapers would become meaningless if they are given the right to use the First Amendment to escape the consequences of violating even unambiguous and undisputed promises."

[447] *See supra* text accompanying notes 423-26, 431-33, 441-45, and *infra* text 448, 465-70, 474.

[448] *See infra* text accompanying notes 393, 413-14; *infra* text accompanying notes 459, 460, 465-70*; see* Transcript of Oral Argument, Cohen v. Cowles Media Co., 501 U.S. 663 (1991) (No. 90-634), 1991 WL 636589, at 13 (concession by Mr. French it was "absolutely right" "all the truth" was not published by respondents but citing First Amendment right of editorial discretion). Follow-up questions suggested Mr. French was asking the Court "to vindicate… publication of truth as truth is defined by the editors" but without contractual obligations standing in their way.

Cohen's ethics as "dirty tricks" and sleaze-mongering [449] while not disclosing—at least pre-election—their own calculated refusals to enforce reporters' promises.[450]

Fifth, media's public's-right-to-know arguments conflicted with *Branzburg v. Hayes,*[451] which found no First Amendment justification for reporters' refusals to comply with grand-jury subpoenas, and with the Court's rejected protection for appropriation-theft-by-publication/use in *Zacchini v. Scripps-Howard Publishing Co.* [452] Furthermore, respondent's non-viability-of-contract-remedy argument was significantly undermined by the Court's evident willingness to ignore the First Amendment in cases involving government-employment contractual limitations—*Snepp v. United States* [453] —and confidential pretrial information of public concern secured through compulsory judicial processes—*Rinehart v. Seattle Times Co.*[454]

Sixth, media had difficulty drawing and defending the parameters of the *legal-versus-illegal-acquisition* dichotomy postulated in

---

[449] Brief of Amici Curiae Advance Publications, Inc., et.al., Cohen v. Cowles Media Co., 501 U.S. 663 (1991) (No. 90-634), 1991 WL 11007832, at 5-6 (Cohen engaged in a "political smear campaign without taking responsibility for his action[s]" and "inject[ed] misleading information into the debate during an election in an effort to smear a political opponent."). *See* Cohen's compelling reply. Reply Brief of Petitioner, Cohen v. Cowles Media Co., 501 U.S. 663 (1991) (No. 90-634), 1991 WL 537108, at 3-4 (noting several misstatements and the only person to use "dirty trick[s]" was Northwest Publication's current vice-president, who used it not to criticize Cohen but "to condemn the violation of a journalistic promise of confidentiality"). *See supra* notes 386, 389-90, 393, 402, 413-14, 437; *infra* notes 473-75.

[450] *See supra* note 392, 413-14, 448; *infra* text accompanying notes 460, 466-67. Petitioner stated respondents' claim for protection of "truthful but illegally obtained" information would be *denied* to governmental parties–judge, juries, law enforcement–that violated others' rights to acquire information, citing James v. Illinois, 493 U.S. 648, 307, 313-20 (1990) (rejecting admission of illegally obtained evidence to impeach defense witnesses' testimony under the "impeachment exception"); Brief of Petitioner on Writ of Certiorari, Cohen v. Cowles Media Co., 501 U.S. 663 (1991) (No. 90-634), 1991 WL 537107, at 12.

[451] *See supra* text accompanying notes 1-2, 42, 70, 72, 89, 353-55; *infra* notes 457, 482, 485;*see* Transcript of Oral Argument, Cohen v. Cowles Media Co., 501 U.S. 663 (1991) (No. 90-634), 1991 WL 636589, at 14 (A question suggested Mr. French's editorial-discretion argument for the respondents "would lead the Court to reach a different result in *Branzburg v. Hayes* as well.").

[452] *See supra* text accompanying notes 120-34; *infra* text accompanying note 486.

[453] 444 U.S. 507, 511-16 (1980) (upholding constructive trust to disgorge profits by former CIA agent who breached fiduciary obligation for prepublication view, rejecting prior-restraint argument).

[454] *See supra* text accompanying notes 26-33; *infra* note 661.

Branzburg.[455] Media conceded true crimes conducted in media newsgathering–burglary to get documents,[456] "outright theft" of documents,[457] murder of a source,[458] private wiretapping[459] –were unprotected by the First Amendment and further acknowledged a promise by a reporter of source anonymity he or she never intended to keep would have presented a stronger case of "closer-to-fraud"-in-acquisition.[460]

Seventh, media briefs attempted–very unsuccessfully–to massage the tortious-acquisition-in-newsgathering corollary of Cohen's contract claim by regularly citing the libel-and-other-torts' *pure-expression* claims[461] in *New York Times Co. v. Sullivan* and progeny[462] and *Hustler Magazine Inc. v. Falwell*.[463] This legal-versus-illegal-acquisition issue was pivotal in the Court's prior newsgathering decisions. Media did not

---

[455] *See supra* text accompanying notes 1-2, 42, 70, 72, 89, 353-55, 451; *infra* text accompanying notes 457, 482, 485.

[456] Brief of Amici Curiae Advance Publications, Inc. et al., 1991 WL 11007832, at 25.

[457] *Id.*; Brief of Respondent Cowles Media Co., 1991 WL 537106, at 15-16 (citing *Branzburg*'s analysis).

[458] *See supra* note 456.

[459] Brief of Respondent Cowles Media Company, 1991 WL 537106, at 14 (citing *Branzburg* analysis).

[460] Transcript, Oral Argument, 1991 WL 636589, at 29-30 (statement of Mr. D. French). A follow-up question asked whether "the degree of wrong, the egregiousness of the press misrepresentation… controls the case?" *Id.* Mr. French responded the Court need only reject the argument by Cohen's counsel, Mr. Rothenberg, the First Amendment lacked any relevance. *Id.* at 13. A questioner returned to the hypothetical of the deliberately misleading reporter who knows his promise will be dishonored: "And it seems to me that's a very, very difficult position." *Id.* at 47. The questioner added: "[w]hat the First Amendment consequences are you haven't explained this in a coherent theory." *Id.* One brief acknowledged a different case would be presented had Petitioner bargained for an explicit damage remedy for breach-of-confidentiality. Brief of Amicus Curiae Advance Publications, Inc., et al., 1991 WL 11007832, at 15, n. 9. *See infra* text accompanying notes 490-91.

[461] *See, e.g.*, Brief of Amici Curiae Advance Publications, Inc., *et.al.*, 1991 WL 11007832, at 28.

[462] 376 U.S. 254, 279-80 (1964) (requiring proof of constitutional malice by clear-and-convincing evidence in public-official defamation cases). For a detailed critique, *see* Elder, *Rehnquist's Attempts, supra* note 159.

[463] 108 S.Ct. 876, at 877 (1988) (rejecting IIED-"outrage" ad-parody in case of public figure not complying with *New York Times*). *See* Brief of Respondent Cowles Media Co. in Opposition to Petition, 1990 WL 10022943, at 11 (portraying Cohen's contract claim as "nothing more nor less than another effort to recover defamation-type damages while avoiding defamation defenses"). On the latter, *see supra* text accompanying note 193-94 and *infra* notes 481, 485, 537-40, 556-59, 611, 689.

deal with it very effectively in *Cohen*.[464] A crime in acquisition is not measurably different from a tort in acquisition— almost all crimes that media might engage in have tort counterparts. A tortious acquisition does not differ in any material way from a breach-of-contract acquisition. Media's arthritic, slight-of-hand responses were unhelpful and diminished their credibility.

By contrast, petitioners made effective use of *New York Times*, which the Court analogized to the common-law tort of deceit with its scienter requirement.[465] Any "knowing and deliberate violation of clear-cut and undisputed promises" deserved "equal censure" to *New York Times* and should be actionable under general rules of contract law,[466] particularly where doubly deceitful conduct—including pre-election omission to acknowledge defendants' unethical behavior [467] —was demonstrated. If there is no absolute immunity in core political-campaign cases for "calculated falsehoods" under its *Garrison v. Lousiana*[468]-*New York Times Co. v. Sullivan*[469] line of precedent[470] for pure expression, there assuredly should be no-greater protection for deceitful-or-other-tortious-conduct-inducing-reliance in *acquiring* true, newsworthy information.

Eighth, media greatly understated the difficulties for the Court of media-proposed balancing under the weaselly criteria stated in the *Smith*

---

[464] Brief for Respondent Northwest Publications, Inc., 1991 WL 537105, at 34-36 (distinguishing *Galella v. Onassis* (*see supra* notes 202, 290) and *Dietemann v. Time, Inc.* (*see supra* notes 359-62, 373; and *infra* notes 801-02, 805) on ground respondents engaged in "no unlawful or wrongful act in *receiving* the information" petitioner proffered).

[465] Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, at 502 and n. 19 (1984) (finding common-law standard relied on in *New York Times* paralleled fraud-deceit "honest-liar" formula).

[466] Brief of Petitioner, 1991 WL 537107, at 24 (The Court had not "condoned" such "intentional or reckless wrongdoing by the press" even in public-official defamation cases.); Brief of Petitioner, 1991 WL 537107, at 24 (same). *See also* Rodney A. Smolla, *The First Amendment and the New Civil Liability,* 88 Va. L. Rev. 919, 938-49 (2002) (asking and answering question "on what logic a higher standard of fault [than in *New York Times Co. v. Sullivan*] be imposed when society seeks to recompense for physical injury or death? …[N]o strong reasons leap to mind.").

[467] Brief of Petitioner, 1991 WL 537017, at 12. *See* text accompanying notes 392-93, 413-14, 450, 460.

[468] 379 U.S. 64, at 75 (1964) (applying *New York Times Co.* to public-official criminal-libel prosecutions).

[469] *See supra* note 462-63, 466, 468.

[470] *See* ELDER, DEFAMATION, *supra* note 42, chs. 4, 7; Elder, *Rehnquist's Attempts, supra* note 159.

v. Daily Mail Publ'g Co.[471] rule, while at the same time condescendingly denigrating Cohen's argument for a *per se* breach-of-contract, crime, or other wrongful-act-in-acquisition rule as one of "audacious scope."[472] Cohen's negative-campaigning-insistence-on-anonymity posture was so "significantly weak" *any* media interest or concern clearly countervailed. [473] This withering attack detailing the purported illegitimacy of Cohen's interest[474] probably harmed the media case.[475]

In *Cohen v. Cowles Media Co.*,[476] the Court agreed with petitioner Cohen 5-4 in a strong opinion by Justice White, joined by Chief Justice Rehnquist and Justices Stevens, Scalia, and Kennedy.[477] The majority held the accepted contract doctrine of promissory estoppel posed *no* First Amendment bar to Cohen's claim.[478] Justice White noted the Minnesota

---

[471] *See supra* text accompanying notes 36-41, 78-84 and *infra* notes 471-73, 480, 484, 524, 528, 590, 593, 603, 611, 624, 657, 670.

[472] Brief of Respondent Cowles Media Co., 1990 WL 10022943, at 12 (Petitioner's claims "left no room for consideration of free press interests or of the public's interests in obtaining full and fair information about an upcoming election;" once a breach occurred, the only issue was damages—an approved claim "could produce enormous court intrusions on newsgathering activities.").

[473] Brief of Respondent Cowles Media Co. in Opposition to Petition, 1990 WL 10022943, at 5. Respondent also argued petitioner's interest did not meet the "highest-order" requirement of the *Smith v. Daily Mail Publ'g Co.* rule. *Id.* at n.2. This media two-step resounded throughout the briefs.

[474] Brief of Amici Curiae Advance Publications, Inc., et al., 1991 WL 11007832, at 5 (characterizing petitioner's interest in "a political smear campaign without taking responsibility… [as] no interest at all"); Brief for Respondent Northwest Publications, Inc., 1991 WL 537105, at 31 (disparaging petitioner's "minimal interest in denying responsibility for his attack on a political opponent").

[475] *See, e.g.*, Brief for Respondent Northwest Publications, Inc., 1991 WL 537105, at 17 (Publishing truthful information was at the First Amendment's "core.").

[476] *Cohen III,* 501 U.S. at 663.

[477] *Id.* at 664-65.

[478] *Id.* at 668-72. *See* Richard Epstein, *Privacy, Publication and the First Amendment: The Dangers of First Amendment Exceptionalism,* 52 STAN. L. REV. 1003, 1026 (2000) (writing *Cohen* upholds against First Amendment attack *all* rules of torts, contracts, and property and "all rules, whether at common law or by statute, that bring about some general social improvement from the common law baselines"). *See also* Clay Calvert, *Sifting Through the Wreckage of ABC Reportage: Little Victories, Big Defeats & (and) Unbridled Media Arrogance*, 19 HASTINGS COMM. & ENT. L.J. 795, 798, 809 (1997) (referencing *Cohen*'s refusal to provide a journalistic "buffer zone" where generally applicable laws or torts do not target newsgathering activities and excoriating media like ABC for *Cohen*'s message, "apparently… unheeded by investigative journalists," relying on the "somewhat hackneyed justification for

Supreme Court's weighing-balancing approach [479] and the Court's parallel (much tighter) standard in the *Smith v. Daily Mail Publ'g Co*.[480] rule–"truthful matter of public significance" could not be sanctioned or punished "absent a need to further a State interest of the highest order." *Cohen* viewed the latter as "unexceptionable" for "truthful, *lawfully obtained* information."[481] The case before it, was controlled by "equally well-established" precedent holding "generally applicable laws do not offend the First Amendment simply because their enforcement …has incidental effects on its ability to gather and report the news."[482]

---

intrusive news gathering tactics–the public's so called 'right to know'"). *Compare* Eugene Volokh, *Speech As Conduct: Generally Applicable Laws, Illegal Courses of Content, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1294-97 (2005) (Interpreting *Cohen* as stating the "parties themselves… determined the scope of their legal obligation" and that such restrictions are thus "self-imposed," Professor Volokh concludes: "[T]he Court rejected the free-speech argument based on the principle that free speech rights, like most other rights, are waivable, rather than on an assertion that speech-neutral laws are per se constitutional."). His argument has been overwhelmingly ignored by courts. *But see People for the Ethical Treatment of Animals, Inc. v. North Carolina Farm Bureau Fed'n, Inc.*, 60 F.4th 815, 827, n. 4 (4th Cir. 2023), *cert. denied,* Oct. 16, 2023; *IMDb.com Inc. v. Becerra*, 962 F.3d 1111, 1120 (9th Cir. 2020).

[479] *Cohen III,* 501 U.S. at 667.

[480] 443 U.S. 97, 103 (1979); Florida Star v. B.J.F, 491 U.S. 524, 533-35 (1989) ("the *Daily Mail* principle"). *See supra* text accompanying notes 34-41, 78-84, 471-473, 480; *see infra* notes 484, 528, 590, 593, 603, 611, 624, 657, 670.

[481] *Cohen III*, 501 U.S. at 668-69 (emphases supplied). *See also* Dickerson v. Raphael, 564 N.W.2d 85, 92 (Mich. App. 1997) (relying on *Cohen* and upholding claim under all-party-consent statute against producer and celebrity-show host for surreptitiously recording and disseminating excerpts of family conversation, rejecting First Amendment right "to provide a forum" for the story: "While the First Amendment protects the publication of truthful information of legitimate public concern… the information may not be obtained unlawfully."), *rev'd on other grounds,* 601 N.W.2d 108 (Mich. 1999).

[482] *Cohen III*, 501 U.S. at 669. *See also* Univ. of Pa. v. E.E.O.C., 493 U.S. 182, 196-201 (1990) (rejecting special academic-freedom rule for compelled submission of internal documents related to personnel determinations, finding First Amendment claim "extremely attenuated" and "speculative" under *Branzburg*); Zurcher v. Stanford Daily, 436 U.S. 547, 556-72 (1978) (finding search warrant rather than *subpoena duces tecum* to look for evidence of crime at newspaper at most a constitutionally insignificant incidental effect); National Broadcasting Co. v. U.S., 319 U.S. 190, 226-27 (1943) (upholding FCC regulations of radio licensees because, "[u]nlike other modes of expression, radio inherently is not available to all" and is "subject to government regulation;" allowing regulation of specific "network practices" where not choosing

The Court rejected strict scrutiny or any special privilege or immunity of the media vis-à-vis other entities and persons.[483] As the Court's precedents recognized, "the truthful information sought to be published *must have been lawfully acquired*. The press may not with impunity break and enter into an office or dwelling to gather news."[484]

---

applications based on "political, economic, or social views, or upon any other capricious basis" without violating the First Amendment; finding "[t]he right of free speech does not include… the right to use the facilities of radio without a license," but concluding license denial based on statutory criterion of "public interest, convenience, or necessity" did not deny free speech); Associated Press v. Labor Board, 301 U.S. 103, 132-33 (1937) (holding order requiring media to reinstate employee terminated for union activities did not violate the First Amendment).

[483] *Cohen III*, 501 U.S. at 670.

[484] *Id.* at 669 (emphases supplied). For ardent criticism of *Cohen*'s lawfully obtained-generally applicable laws-incidental effects limitations, *see* Eric B. Easton, *Two Wrongs Mock a Right: Overcoming the* Cohen *Maledicta That Bar First Amendment Protection for Newsgathering,* 58 OHIO ST. L.J. 1135, 1135-39, 1143 (1997) ("insidious," "pernicious," "misguided," "maledicta," "false doctrines") (hereinafter Easton). A leading scholar correctly describes *Cohen* as rejecting "any heightened First Amendment standard" despite the case's "numerous intersections with expressive activity." Rodney A. Smolla, *Information Contraband: The First Amendment and Liability for Trafficking in Speech*, 96 NW. U. L. REV. 1099, 1120 (2002) (hereinafter Smolla, *Contraband*). *Compare* those of Professor Gilles. Under *Cohen,* "non-speech-focus actions"—promissory estoppel, contract and fiduciary-duty variations of breach of confidence—will be subject to "minimal" "constitutional scrutiny." *See* Gilles, *supra* note 395, at 3, 71-72, 78. A breach-of-confidence tort will be treated by the Court "as non-neutral, and presumptively unconstitutional" under "strict scrutiny," as it "targets only speech" and "seeks to punish only the communication of [true] information." *Id.* at 71-74. She interprets the "unlawfully obtained" caveat as "flirted with" in *Cohen* but concludes "a "scrupulous reading" of *Florida Star-Daily Mail* refutes such. *Id.* at 74 and n. 331. Accordingly, a breach-of-confidence claim "faces either automatic unconstitutionality or a scrutiny so strict that no plaintiff can recover." *Id.* at 75. The author strongly disagrees. As *Cohen* indicated, the newspapers published information only because they breached an assumed obligation, whether framed in contract, fiduciary duty, or another tort. *Cohen* focused on this affirmative action of breaching a duty assumed by defendant-publishers. The *Florida Star-Daily Mail* cases did not involve a breached duty, only a breach of duty by third parties or governmental entities in failing to properly secure the private information in question. Professor Gilles did not have the benefit of *Bartnicki v. Vopper*'s adoption of an active-participation-versus-passive-receipt dichotomy. But surely *Cohen* itself involved active participation. The newspapers assumed a duty they actively breached. Professor Gilles views *Cohen* as "erroneous," "conflict[ing] with" and "at odds" with *Hustler Magazine Co. v. Falwell,* "a non-speech focused action" subject to strict scrutiny. *Id.* at 77-79. Her conclusion is overly broad. IIIED-"outrage" is usually *conduct*-based.

The First Amendment did not abrogate the duty of a reporter of an obligation shared with fellow citizens to respond to grand-jury subpoenas relevant to a criminal inquisition[485] or bar liability protecting a property interest in copyrighted information in cases of media appropriation-theft.[486] Like the above, promissory-estoppel law did not single out or target the media[487] but applied equally to all citizens' daily transactions. The First Amendment did not bar its application to media.[488]

The Court backed off somewhat from earlier commingling civil and criminal sanctions as equivalent punishments.[489] The compensatory damages at issue here were indistinguishable from a liquidated-damages provision in an express contract [490] or a "generous bonus" to a confidential source. [491] The majority also rejected the suggestion the information was licitly acquired. This was "not at all clear"—the

---

Presumably, Professor Gilles would view the reporter's outrageous conduct in interviewing small children about the murder of neighboring children-friends that was the basis of an IIED-"outrage" claim as "a non-speech focused action." *See* the discussion of *KOVR-TV v. Superior Court supra* in text accompanying note 197. This author would agree. That conduct-based tort claim was and is hugely different from an ad parody-*pure-expression* case like *Hustler*. What controls is the affirmative breach of duty–whatever version of breach of confidence is adopted. Otherwise, Doe v. Roe*,* 400 N.Y.S.2d 668, 671-80 (Sup. Ct. 1977)—where a psychotherapist's breach of duty of confidentiality in publishing a book about an identifiable patient was actionable in damages, including damages arising from publication, subject to injunctive relief and destruction of remaining copies, and without *any* First Amendment protection—would be almost assuredly unconstitutional. That is not the law and is inconsistent with the Court's carefully nuanced implications in *Snyder v. Phelps* regarding the IIED-"outrage" tort for interfering *conduct*, rather than the *pure speech* therein. *See supra* text accompanying notes 134, 155-99.

[485] *Cohen III*, 501 U.S. at 669 (reaffirming *Branzburg v. Hayes*). *See supra* text accompanying notes 1-2, 42, 70, 72, 89, 353-55, 455, 457, 459, 477, 482.

[486] *Cohen III*, 501 U.S. at 669 (citing *Zacchini v. Scripps-Howard Broadcasting Co.*). *See supra* text accompanying notes 120-34, 452, 486.

[487] *Cohen III*, 501 U.S. at 670.

[488] *Id. Compare* Steele v. Isikoff, 130 F.Supp.2d 23, 37 (D.D.C. 2000) (finding no First Amendment bar to claims based on a breach-of-source-anonymity agreement but concluding claims asserted were unavailable under state law).

[489] *Cohen III*, 501 U.S. at 670-71 (concluding compensatory damages were distinguishable from criminal penalties in *Smith v. Daily Mail*). *Compare id.* at 676, n. 4 (Blackmun, J., dissenting) (criticizing deviation from long-recognized equation of civil and criminal sanctions).

[490] *Id.* at 670 (Such equated to "a cost of acquiring newsworthy material to be published at a profit.").

[491] *See Cohen,* 501 U.S. at 670 (describing how the payment characterized is irrelevant for First Amendment purposes under general laws not targeting media).

information the media secured was based only on unmet promises of anonymity.[492] The Court unequivocally repudiated what it viewed as the broad thrust of both dissenting opinions—media "should not be subject to any law, including copyright law for example, which in any fashion or to any degree limits or restricts [their] right to report truthful information. The First Amendment does not grant the [media] such limitless protection."[493]

Respondents and Justice Blackmun contended that a contract-damages remedy under promissory estoppel for Cohen's economic losses might inhibit media incentives to publish newsworthy, truthful information about a confidential source's identity.[494] If that occurred, the Court responded those obligations were self-imposed.[495] Moreover, such a disincentive was "no more than the incidental, and constitutionally insignificant, consequence" of extending to media a generally applicable law requiring those who make certain types of promises fulfill them.[496] The Court remanded, identifying options protecting co-defendants'

---

[492] *See Cohen,* 501 U.S. at 671.

[493] *Id.* (describing that a public-concern test for abrogating source-anonymity would be open-ended); *see* Reply Br. of Pet'r, 1991 WL 11007833, at 7 (arguing that "[r]espondents' excuses… for identifying Mr. Cohen despite their promises could be used to attempt to evade obligations to any other person promised confidentiality").

[494] *Cohen III*, 501 U.S. at 672 (Blackmun, J., dissenting).

[495] *Id.* at 670–71 (distinguishing *Florida Star v. B.J.F.* and *Smith v. Daily Mail Publ'g Co.,* where state-designated content triggered liability). The Court found enforcement of promissory estoppel met the state-action requirement. *Id.* at 668. Three dissenters agreed. *Id.* at 672 (Blackmun, J., dissenting). Professor Gilles notes the Court was careful to leave open the issue as to whether a pure contract action would constitute state action, agreeing with others this distinction is unsatisfactory. A determination to enforce a pure contract constitutes "as much a policy decision" as a court decision to apply and enforce one based on promissory estoppel, breach of fiduciary duty, or a tort breach of confidence. *See* Gilles, *supra* note 395, at 63-64. Yet, however inadequate, the Court may apply this criterion and find contract enforcement is not state action, with enforcement evading First Amendment review. *Id.* at 64. *Compare* Pierce v. St. Vrain School Dist. RE-1J, 981 P.2d 600, 602–07 (Colo. 1999) (following *Cohen*, upholding under First Amendment and more-protective Colorado Constitution a claim for breach of negotiated retirement settlement and covenant-not-to-disparage plaintiff-superintendent, despite information involving matter of public concern, implying damages available would include those for reputation).

[496] *Cohen III*, 501 U.S. at 671–72. *Cohen* was followed in upholding a contribution claim by medical providers breaching a duty of confidentiality by allowing plaintiff-patient to be identifiable on defendant's television program, violating a promise to digitize identity. *See* Anderson v. Strong Hosp., 573 N.Y.S.2d 828, 830–33 (Sup. Ct. 1991): "Compelling the press to respect a promise made and relied on and to be responsible for that commitment does no more than compel the press to act as any other responsible citizen with respect to laws of general application." *Id.* The court rejected protection under New York's more-protective constitution. *Id.* It quoted an editorial on *Cohen*: "The First Amendment gives us the 'right to lie'… Talk about a blow to the First Amendment: If people do not trust us, they wouldn't tell us anything. Then we wouldn't print the truth, and you couldn't read it." *Id.* at 833.

breaches—further consideration of promissory estoppel under state law, whether Minnesota's Constitution provided greater free expression protection.[497] Absent enhanced state-law protection, *Cohen*'s impact is broad. Only those claims based exclusively in pure expression or publication—like defamation and "false-light" privacy—will be subjected to *New York Times'* constitutional scrutiny.[498]

Justice Blackmun dissented,[499] criticizing the majority's refusal to apply the *Smith v. Dail Mail Publ'g Co.* doctrine,[500] finding *Hustler Magazine, Inc. v. Falwell*'s[501] rejection of IIED-"outrage" in public-figure cases absent compliance with *New York Times*[502] controlling[503]—a typical example of a generally applicable rule.[504] The dissent emphasized, as in *Hustler Magazine*, publication of "important political speech" was the claimed tort. Such truthful information could never be sanctioned.[505] Blackmun's dissent treated pure-expression defamation and IIED-"outrage" cases as indistinguishable from public-interest information acquired by breach of promise—or apparently other crimes, torts, or other wrongful actions—published by the unlawful acquirer as a consequence of tainted acquisition. To Justice Blackmun, the sole foci were truth and newsworthiness, however acquired—prototypical media "bootstrapping."

Justice Blackmun distinguished *Zacchini v. Scripps Howard Publishing Co.*[506]—holding unprotected the appropriation-theft of the publicity value in petitioner's entire human-cannonball act[507]—in a

---

[497] *Cohen III*, 501 U.S. at 672. Professor Barron suggests these specified alternatives indicated Cohen won only a "pyrrhic victory," providing openings to the Minnesota Supreme Court to bar Cohen's recovery, but the court did not so interpret it. Barron, *supra* note 401, at 446–47.

[498] Ragusa, *supra* note 401, at 136.

[499] *Cohen III*, 501 U.S. at 672 (Blackmun, J., dissenting). The dissenters interpreted the Court as rejecting any suggestion media have "special immunity," interpreting its precedent as concluding First Amendment protection would be "equally available to non-media defendants." *Id.* at 673–674. On the media-non-media divide, *see* the discussion in *Bartnicki v. Vopper supra* in text accompanying note 642, and Elder, *Recordings, supra* note 4, Parts I and II.

[500] *Cohen III*, 501 U.S. at 672–674.

[501] 485 U.S. 46 (1988).

[502] *Id.* at 50.

[503] *Cohen III*, 501 U.S. at 674 (Blackmun, J., dissenting).

[504] *Id.* at 674–75 (concluding IIED-"outrage" claim in *Hustler Magazine* was a general rule "unrelated to suppression of speech").

[505] *Id.* at 675–76. The dissenters concluded, if ever sanctionable, a highest-order state interest must be demonstrated under the *Smith v. Dail Maily Publ'g Co.* rule. *Id.* at 676. The Minnesota Supreme Court found promissory estoppel "far from compelling." *Id.*

[506] *See supra* text accompanying notes 120–134, 452, 486.

[507] *Id.*

misleading and disingenuous fashion.[508] *Zacchini* suggested a comment from or about petitioner's entire performance—which would not have eviscerated his intellectual-property interest[509]—would be protected by the First Amendment.[510] It did not, as Justice Blackmun suggested, grant a First Amendment-based general-public-interest exemption to appropriation-thefts. *Zacchini* rejected immunity unequivocally for defendant's destruction of the value of petitioner's entire performance by publication—the contents of which were equally newsworthy. The Court held appropriation of Zacchini's right of publicity indistinguishable from any copyright violation or other intellectual-property theft.[511]

Justice Souter[512] wrote another *Cohen* dissent adopting a case-by-case totality-of-the-circumstances approach.[513] Violating a rule of general applicability was not determinative.[514] Courts must "articulate, measure, and compare the competing interests"[515] in assessing the legitimacy of burdening First Amendment interests.[516] In rejecting the majority's waiver argument,[517] the dissent emphasized the public's right—not the speaker's—was paramount.[518] The information in the required balancing process epitomized speech subject to strict scrutiny.[519] Source credibility could reflect on the candidate employing him as campaign advisor and determine an election.[520]

Two caveats exemplified and magnified the loosey-goosey, waffly, open-ended balancing adopted in Justice Souter's four-Justice dissent. He declined to view source-anonymity promises as *per se* unenforceable. He envisioned scenarios where a private individual's identity was of

---

[508] *Cohen III*, 501 U.S. at 674, n.1 (Blackmun, J., dissenting) ("*Zacchini* cannot support the majority's conclusion that 'a law of general applicability'… may not violate the First Amendment when employed to penalize the dissemination of truthful information or the expression of opinion."). *Compare* injunctive relief upheld against usage of copyrighted, unpublished letters of a famous author. Sallinger v. Random House, Inc., 811 F.2d 90, 94–100 (2d Cir. 1987).
[509] *See supra* text accompanying notes 120–34, 452, 486.
[510] *Id.* at 123–30.
[511] *Id.* at 120-34, 452, 486. It is specious to contend a reference/comment/excerpt of Zacchini's act is legitimately newsworthy, but the entire performance is not.
[512] *Cohen III*, 501 U.S. at 676 (Souter, J., dissenting).
[513] *Id.* at 676–79.
[514] *Id.* at 677.
[515] *Id.*
[516] *Id.*
[517] *Id.* (concluding elements were unmet).
[518] *Id.* at 678.
[519] *Id.*
[520] *Id.*

less—but apparently some—public interest,[521] where source-anonymity enforcement *might* not be proscribed.[522] He declined to suggest circumstances of acquisition are irrelevant in the balancing process.[523] In essence, a balancing approach should be adopted providing little, if any guidance, as to whom, when, where, and to what extent illegality-of-acquisition might be relevant. The dissent adopted a sliding scale of matters of public concern from core political-campaign speech[524] to other types of public-concern-private-person-identifying or other speech. All would be thrown into the peripatetic balancing blender, creating a type of pro-media constitutional smoothie.[525]

What is remarkable is *Cohen*'s implicit but clear repudiation of an

---

[521] *Id.* at 678–79. Only private individuals seem to be covered by this caveat. Presumably, the quartet intended to treat all public officials and public figures differently. Presumably Cohen did not qualify as a private individual. *See supra* note 416.

[522] *Id.* at 679.

[523] *Id.*

[524] *See supra* text accompanying notes 519-20. Mr. French suggested the Court "could go far beyond [his minimum argument affirming the Minnesota Supreme Court's conclusion that the First Amendment should be considered in the balance] and erect a much more absolutist rule… the First Amendment interest is so paramount that we cannot think of a circumstance in which the promise must be kept"—a position he was not advocating, because he didn't need to. Citing Court precedent, apparently the "*Daily Mail* rule," he argued for the "paramount" First Amendment interest in publishing truthful information of matters of public concern, conceding the Court's right to counterbalance a highest-order state concern. He revealingly disclosed: "But I haven't seen one of those yet." Tr., Oral Arg., 1991 WL 636589, at 48. Another response speculated that if one saw enough fact patterns, some would involve "insignificant" claimant interests which the First Amendment "always overrides." He conceded in a highest-order-state-interest case the Court might appropriately compel media to honor its promise. *Id.* He provided no example of such. Respondents' arguments—the Court should approve the Minnesota Supreme Court's balancing approach and alternatively petitioners had not demonstrated a higher-order interest—were developed at length. Brief of Respondent Cowles Media Company, 1991 WL 11007830, at 13–20; Brief of Respondent Cowles Media Co. in Opposition to Petition, 1990 WL 10022943, at 4, n. 2 (Cohen's interest was "sufficiently weak" that "any free press interest at all" should suffice to override it.). During an interview, John Borger, counsel for the *Star Tribune* in *Cohen*, offered an example of a breach that *might* support a promissory-estoppel claim—a source identifies a Mafia boss upon an express promise of anonymity and disappears the day following a story mistakenly identifying the source. Barron, *supra* note 401, at 432–33.

[525] For a devastating critique of *ad hoc* balancing, *see* Wesley J. Campbell, *Speech Facilitating Conduct,* 68 STAN. L. REV. 1, 55–62 (2016) (Discussing "conduct-based-approaches," the author says: "As these decisions move to higher and higher levels of abstraction—as they surely would once judges confront these impossibly difficult line-drawing problems—the relevant tests would start to look more and more like questions of public policy rather than constitutional law, forcing judges to weigh speculative costs against speculative benefits… requiring judges to make a wide range of content-based policy judgments."). For a detailed discussion, *see* Elder, *Recordings, supra* note 4, Part II.

amicus curiae brief filed for a huge media segment[526] aggressively asserting there was no or minimal state interest under the facts in protecting the confidential-source agreements[527] and either *Smith v. Daily Publ'g Co*. controlled or the First Amendment otherwise mandated [528] that the Court superimpose detailed ameliorative limitations if it found enforcement not precluded by the First Amendment. The list of impliedly rejected requests is long: discouragement of "marginal claims" "at the outset" or disposition "at an early stage" by required plaintiff proof of the agreement and its "clear, specific terms" by "clear and convincing evidence," and "[a]mbiguous terms or agreement" "should be construed" against the enforcer, with such "further served" by barring all oral understandings;[529] the source be required to affirmatively prove an explicit anonymity request, the reporter expressly promised the agreement would be enforceable by a damages claim, and demonstrate by clear-and-convincing evidence media conduct "clearly and intentionally violated" its terms; [530] the claimant "should be required" in cases where he or she was not actually injured to prove special damages as a lawsuit prerequisite;[531] the media employer or other enterprise "should be" immune from liability" for unapproved promises of subordinates absent a showing the subordinate was "clearly vested with authority to accept the terms" of the agreement;[532] the Court "should" decide the agreement is not enforceable where the information at issue or source identity is in the public domain or independently acquired via other means;[533] the Court should adopt a high standard of culpability regarding breach of the agreement since

---

[526] Brief of Amicus Curiae Advance Publications, Inc., *et.al.*, 1991 WL 11007832, at 3–4. The resources available to and utilized by media to counter *any* perceived threat to immunity from liability is a major theme developed throughout this article. *See also* Elder, *Recordings,* Parts I, II, and Elder, *Rehnquist's Attempts, supra* note 159.

[527] Brief of Amicus Curiae Advance Publications, Inc., *et.al.,* 1991 WL 11007832, at 5–6, 8, 13–14. In the face of the extensive testimony to the contrary at trial cited in petitioner's brief, compare the amazing statement in the amicus brief petitioner "has not presented any evidence whatsoever which even remotely suggests that the relationships will not continue, without civil remedies against reporters." *Id.* at 13. *Compare supra* text accompanying notes 399, 401, 405–07, 419, 433, 435–36, 496.

[528] Brief of Amicus Curiae, 1991 WL 11007832, at 5, 14–16.

[529] *Id.* para 27 and n. 17.

[530] *Id.* para. 27

[531] *Id.* para. 28 "… [C]onsistent with the general principles of promissory estoppel, only consequential or special damages should be recoverable.").

[532] *Id.*para. 28. The Court has made it clear general state-law standards of vicarious liability apply, at least for actual damages, in defamation and "false light"-privacy. *See* ELDER, DEFAMATION, *supra* note 42, at 152 (No special First Amendment rules are necessary.). *Id.* The brief made no reference to this precedent.

[533] Brief of Amicus Curiae Advance Publications, Inc., *et.al.*, 1991 WL 1007832, ¶28-29.

Cohen's information involved core matters in American democracy[534]—the subordinate induced source revelation by representations of source confidentiality not intended to be kept [535] or acted grossly irresponsibly.[536]

While *Cohen* did not adopt this extensive grab bag-laundry list of *musts* and *shoulds*, it did respond briefly to the argument that Cohen was trying to evade the defamation requirements of *Hustler Magazine*[537] by declaring Cohen was not endeavoring to utilize promissory estoppel to evade the mandates imposed by the Court's defamation jurisprudence. He was not seeking state-of-mind or reputational damages but only sought damages for a breach precipitating loss of his job and diminishing his earning capacity. Accordingly, *Cohen* was different from the Court's ad-parody, IIED "outrage" claim in *Hustler Magazine, Inc. v. Falwell*.[538]

Two aspects of the Court's brief analysis veritably leap off the page. No general damages had been claimed or were at issue, so its analysis was dicta. Moreover, it characterized Cohen's claim expansively—including damages related to "lowering… [his] earning capacity"[539]—which was broader than economic losses directly related to losing his job. Justice Blackmun's dissent rejected any subdivision of permissible damages as indefensible: "I perceive no meaningful distinction between a statute that penalizes published speech in order to protect the individual's psychological well-being or reputational interest and one that exacts the same penalty in order to compensate the loss of employment or earning potential… *Hustler* recognized no such

---

[534] *Id.* para. 29. How this relates to the intentional and deliberate violations in *Cohen* is not developed.

[535] *Id*. This would interpose the equivalent of an independent-fraud requirement. The Minnesota courts had previously found such lacking. *See supra* text accompanying notes 396, 403.

[536] Brief of Amicus Curiae Advance Publications, Inc., *et.al.,* 1991 WL 1007832, ¶29. The brief relied on the private-person-public-concern defamation standard adopted by New York post-*Gertz v. Robert Welch, Inc. See* ELDER, DEFAMATION, *supra* note 42, at § 6:10. It cited Virelli v. Goodson-Todman Enterprises, Ltd., 536 N.Y.S.2d 51 (N.Y. App. Div. 1989), *app. after remand,* 558 N.Y.S.2d 314 (N.Y. App. Div. 1990). A case following *Cohen* refused to apply *Virelli*. Anderson v. Strong Hospital, 573 N.Y.S.2d 828, 829-32 (N.Y. App. Div. 1991).

[537] *See, e.g.*, Brief of Respondent Cowles Media Co. in Opposition to Petition, 10022943, at 11.

[538] *Cohen III*, 501 U.S. at 671 (dicta). One strong *Cohen* critic disparages this distinguishing of *Hustler Magazine* as a "meaningless truism." Easton, *supra* note 484, at 1172.

[539] *Cohen III*, 501 U.S. at 671.

distinction."[540]

On remand, the Minnesota Supreme Court rejected non-enforcement of promissory estoppel and arguments for enhanced state-constitutional and public-policy protection on an issue of purported "grave importance."[541] Noting reciprocal charges of unethical behavior, the court found that neither party clearly held "the higher moral ground." [542] Given the unquestioned "long-standing journalistic tradition" on which Cohen relied [543] and co-defendants' and their reporters' acknowledgements of the importance of honoring such promises, [544] the avoidance-of-injustice component of promissory estoppel favored enforcing source-anonymity promises. [545] This was particularly so since they could have divulged the entire truth—identifying the source as close to the Independent-Republican campaign.[546] The co-defendants had otherwise not demonstrated any "compelling need[547] to breach their promises.

Another Minnesota case by Elliott C. Rothenberg, *Ruzicka v. Conde Nast Publications, Inc.,* [548] involved similar breach-of-contract/promissory-estoppel claims, where defendant-publisher of *Glamour Magazine* published data allowing readers to identify plaintiff—a more sympathetic complainant than Cohen—as the person

---

[540] *Id.* at 675, n. 3 (Blackmun, J., dissenting). *And see* Easton, *supra* note 484, at 1180 and n. 295 (concluding Cohen's damages, "although characterized as nonreputational, were precisely that," as he lost his position "because the story exposed his lack of character"). Easton compares Cohen's damages to Food Lion v. Capital Cities/ABC, Inc., 964 F.Supp. 956, 962–63 (M.D.N.C. 1997) (disallowing claims for business losses or a dip in stock value unless Food Lion attacked publication directly, not defendants' newsgathering behavior). Easton criticizes Justice White's assertion as "highly questionable." *Id.* at 1198–99. It clearly is. *See supra* text accompanying notes 193–94, 481, 485, 495, 537–39 and text *infra* accompanying notes 556–59, 611, 689.

[541] *Cohen IV,* 479 N.W.2d at 390–91. *Compare* Steele v. Isikoff, 130 F.Supp.2d 23, 33–34 (D.D.C. 2000) (On facts paralleling *Cohen,* the court rejected promissory estoppel as unavailable under Virginia law and rejected an unjust-enrichment claim due to plaintiff's "unclean hands," *i.e.,* her intent to lie to the reporter *ab initio*.). Some protection-of-source-anonymity promises may be unenforceable under state public policies. *See, e.g.,* Ventura v. The Cincinnati Enquirer, 396 F.3d 784, 790–91 (6th Cir. 2005) (finding unenforceable plaintiff's agreement with defendant's co-employee-reporter to conceal evidence of plaintiff's crimes).

[542] *Cohen IV*, 479 N.W.2d at 392.

[543] *Id.*

[544] *Id.* at 391–92 (quoting co-defendant's former managing editor it "hung Mr. Cohen out to dry because they didn't regard him very highly as a source").

[545] *Id.* at 391.

[546] *Id.* at 388.

[547] *Id.* at 392 (finding new damages trial unnecessary). *And see* Easton, *supra* note 484, at 1183 (This "may have been the first time any court has required a newspaper to show a 'compelling need' to publish in order to avoid damages.").

[548] Ruzicka v. Conde Nast Publications, Inc., 999 F.2d 1319 (8th Cir. 1993).

who disclosed highly private, never-previously-revealed details about familial incest as part of a story on psychotherapists' sexual abuse of patients.[549] The Eighth Circuit remanded after *Cohen*.[550] On remand, the federal trial court rejected promissory estoppel because the promise plaintiff would not be either identified or identifiable failed the clarity-and-definiteness requirements for promissory-estoppel, making enforcement unnecessary to avoid injustice.[551]

The Eighth Circuit reversed again, finding the singular promise made "sufficiently specific and distinct"[552] and identifiability a fact-intensive concept reasonably understandable by a jury, as in defamation.[553] It was not necessary to prove use of plaintiff's name to show breach of promise.[554] The identifying facts—use of plaintiff's real first name and status as the only woman lawyer on a task force to draft a criminal statute on therapist-patient sexual abuse [555] —made her identifiable by readers. The court found the prevention-of-injustice promissory estoppel criterion met and remanded for trial on damages.[556] The court did not discuss but apparently authorized general damages for harm qualitatively different from the economic losses caused Cohen.[557]

---

[549] *Id.* at 1323.
[550] *Id.* at 1320.
[551] Ruzicka v. Conde Nast Publications, 794 F.Supp 303, 307-11 (D Minn. 1992) (rejecting defamation-"of-and-concerning"-the-plaintiff requirement analogy, finding indefiniteness because identifiability involved facts plaintiff's acquaintances were aware of, defendants did not know, and could not know). This inaccurately stated "of-and-concerning" doctrine. *See* ELDER, DEFAMATION, *supra* note 42, at § 1:30.
[552] *Ruzicka*, 999 F.2d at 1321.
[553] *Id.* at 1322.
[554] *Id.,* n. 6 (citing defamation cases).
[555] *Id.* at 1322.
[556] *Id.* at 1320.
[557] *Id.* at 1323. The trial court noted plaintiff claimed damages for severe emotional distress resulting in major medical expenses and deteriorated work performance that cost her a law-firm position. *Ruzicka*, 794 F.Supp. at 305. The parties settled. *See* Barbara W. Ball & John P. Borger, *Broken Promises in the Aftermath of Cohen*, COMM. L., Spring, 1995, at 18. *Compare* a parallel result under public disclosure of private facts, where defendant breached a promise to digitize plaintiff's identity as a precondition to participation in an HIV-AIDS program, devastating plaintiff's life. The court upheld $500,000 in damages for embarrassment, humiliation, aggravation of physical symptoms, and lost income. Multimedia WMAZ, Inc. v. Kubach, 443 S.E.2d 491, 493–96 (Ga. App. 1994) (citing *Cohen* and finding plaintiff's identity lacked public interest). A pre-*Cohen* case upheld breach-of-contract and negligent-infliction-of-emotional-distress claims where defendant promised non-identifiability to rape victims interviewed for defendant's television program. A dissenter would have allowed an IIED-"outrage" claim since severe distress resulted. Doe v. ABC, 543 N.Y.S.2d 455,456 (N.Y. App. Div. 1989), *app. dism'd and denied*, 549 N.E.2d 480

A Kentucky decision exemplifies the damage that can result from breach of confidentiality and the compelling justification for *Cohen*'s approach in denying First Amendment protection to publications resulting from breach thereof. A reporter reassured the program director of a preparation-for-motherhood-program under-aged participants' privacy would be protected. The reporter guaranteed plaintiff-12-year-old she would not be identified. Judge Tom Emberton upheld IIED-"outrage" and public-disclosure-of-private-facts claims: "Courts cannot allow the media to expose all aspects of a person's private life, regardless of the level of public interest, where there has been a promise of confidentiality. To do so would cause not only the offended to suffer, but

---

(N.Y. 1989). *Compare* Morgan By and Through Chambron v. Celender, 780 F.Supp. 307, 309–11 (W.D. Pa. 1992). The court applied a First Amendment-newsworthiness privilege to plaintiff's public-disclosure-of-private-facts claim despite assurances a photograph of plaintiff and her daughter, a sexual-abuse victim of her former-police officer-father, would not be identified by name and her picture silhouetted. The court held the identifying matter was a matter of public record and of legitimate public concern under *Cox Broadcasting Corp. v. Cohn*. *Id.* at 310. Stunningly, the court held any discussion of the particular facts of the crime, which were *not* of public record and which defendants promised to be off record, were not protected by the promise: "The law provides that anyone who desires to discuss matters of public concern with a reporter does so at his or her peril that the matter may be published." *Id.* This is the antithesis of *Cohen*, which involved core political speech. The court concluded that since their names, picture and personal facts did not meet the elements for public disclosure of private facts, "it matters not… that the information and photograph may have been obtained illegally, unethically or deceptively by the reporter." So, although only the names were of public record, the rest was protected by defendant's lies "bootstrapping" the remainder into newsworthiness. The court found this dictated by the First Amendment—again, the glaring opposite of *Cohen III*. Other claims for IIED-"outrage" and fraud failed under state law. *Id.* at 310–11. For a parallel dubious conclusion where a victim was found to have no right to rely on the veracity of reporters, *see Desnick v. American Broadcasting Cos.*, *supra* text accompanying notes 274-75, 279, 785-86. *Compare* with *Morgan* more persuasive post-*Cohen III* cases: Doe v. Gangland Properties, 730 F.3d 946, 952, 957-60 (9th Cir. 2013) (upholding claims for false promise-fraud, IIED-"outrage" and public disclosure of private facts—concluding his identity was not newsworthy—based on breached promise to conceal plaintiff-informant's identity for *Gangland* episode, resulting in death threats and lost employment); Stratton v. Krywko, No. 248669, 248676 (Mich. App. Jan. 6, 2005) (upholding intrusion upon seclusion for breached duty of confidentiality requiring digitization of treatment of plaintiff-accident victim at hospital and finding jury issue whether legitimate-public-interest standard met regarding claim for public disclosure of private facts of plaintiff, "bloodied and hysterical" and drunk at accident scene and receiving hospital treatment), *app. denied*, 703 N.W.2d 817 (Mich. 2005); Doe v. Univision Television Group, Inc., 717 So.2d 63, 64–65 (Dt. Ct. App. Fla. 1998) (upholding breach of contract/promissory estoppel and public disclosure of private facts where defendant breached promise to conceal her face and voice by electronic means, resulting in distress and humiliation, including ridicule by plaintiff's ex-husband). It is difficult for defendants to attack with a straight face non-digitization breach-of-confidentiality-damages claims as *barred* by *Cohen/Hustler Magazine* as to "publication" or "enhanced" damages, but that a claim for public disclosure of private facts in such cases remains permissible.

in the long term the press as well; ultimately… the public becomes the greater victim. No individual would confide in and speak to the press if she were aware that its promise of confidentiality is meaningless."[558] He identified what the Court's opinions did not expressly recognize–*Cohen* protects, rather than inhibits "the free flow of information" and "the integrity of journalism."[559]

V. NEWSGATHERING, WIRETAP STATUTES, CIVIL LIABILITY, AND THE FIRST AMENDMENT'S PASSIVE-RECEIPT VERSUS ACTIVE–PARTICIPATION/ENCOURAGEMENT DOCTRINE IN *BARTNICKI V. VOPPER*

A. Analysis of *Bartnicki v. Vopper*

During negotiations over teacher raises in a contract dispute, an employee of the Pennsylvania state education association, Bartnicki, made a cell-phone call to Kane, a high-school-teacher-president of the local union representing district teachers. Frustrated, Kane made a statement regarding the sides' raise disparity: "If they're not going to move for three percent, we're gonna have to go to their, their homes… to blow of their front porches, we'll have to do some work on some of these guys…"[560] An unidentified third party intercepted the call, recorded it, and left a tape in the mailbox of Yocum, president of a taxpayers' association opposed to the union's proposals. Yocum passed it to Vopper, who repeatedly aired it months later during his radio program.[561]

Bartnicki and Kane sued under substantially identical federal[562] and Pennsylvania[563] statutes imposing civil liability on anyone using recorded matter illegally obtained by others where the defendants had actual knowledge of or reason to know of the alleged interception.[564] A federal trial court declined to dismiss claims against the media or non-media defendants, following *Cohen v. Cowles Media. Co.*'s rules-of-

---

[558] Doe v. Owensboro Publishing Co., No. 93-CA-001497-MR (Ky. Ct. App. Nov. 3, 1995).
[559] Barron, *supra* note 401, at 462–65 (Citing the non-identifying newspapers, the author concludes: "Perhaps the newspapers realized that their influence in the world is limited by the extent to which they can be trusted. If the press forfeits that trust, then the rationale for a free press also crumbles… [W]hat is involved in *Cohen* is more than assuring the free flow of information. It is the integrity of journalism.").
[560] Bartnicki v. Vopper, 200 F.3d 109, 113 (3d Cir. 1999).
[561] *Id.* at 113; *Id.* at 135, n. 6 (Pollak, J., dissenting). This tape was later broadcast on some local television stations and transcripts published in some newspapers. *Id.* at 113.
[562] 18 U.S.C. §2511(1)(a),(c),(d), § 2520(c)(2).
[563] 18 PA. CONS. STAT. § 5703(2A),(3), § 5725(a).
[564] *See Bartnicki,* 200 F.3d at 114–16.

general-applicability-not-targeted-at-speech doctrine. [565] The court denied plaintiff's request for summary judgment, finding questions of fact regarding whether the unknown initial interceptor acted illegally—rather than inadvertently—and as to scienter of the media and non-media defendants.[566] The court certified two issues to the Third Circuit: (1) whether liability imposed on media defendants for disseminating newsworthy information illegally intercepted by unknown individuals who were not agents of the defendants violated the First Amendment; (2) whether civil liability for the non-media defendant's provision of the tape to media co-defendants violated his First Amendment rights.[567]

A Third Circuit panel majority reversed, rejecting the content-neutral argument the tortfeasor should be denied the "fruits of his labor," as there was no allegation these defendants "encouraged or participated" in the interception in a way that would made them tortfeasors. [568] It adopted content-neutral-based intermediate-scrutiny based on the alternative argument confidentiality-of-wire-electronic-and-oral-communications would be furthered by eliminating or deterring third-party demand for wiretap information through imposition of civil liability for recipient use and/or disclosure.[569] The court held, however, any such indirect nexus between acquisition and elimination/deterrence of third-party use and/or disclosure was based in "nothing 'more than assertion and conjecture.'"[570] The asserted interest could be effectuated by existing remedies against responsible tortfeasor-acquirers and those aiding and abetting.[571] Punishing users and/or disclosers would "deter significantly more speech than is necessary" [572] to serve the confidentiality interest in light of questions that might arise about the unknown origins of the proffered matter[573] and whether it had been previously disseminated.[574]

The Third Circuit panel found the serious nature of the threatening statement newsworthy and of public importance [575] and rejected the suggestion the civil remedy provided by half the states to

---

[565] Bartnicki v. Vopper, 1996 U.S.Dist.LEXIS 22517, 10–12 (M.D.Pa. June 14, 1996).
[566] *Id.* at 3, 7–9, 13–14. Defendants' non-involvement in the illegal interception was not controlling. *Id.* at 6–7.
[567] *Bartnicki*, 200 F.3d at 113–14.
[568] *Id.* at 123–25. The panel emphasized repeatedly media and non-media defendants' non-participation in the illegal acquisition. *Id.* at 112, 115, 116, 119, 125, 126, 128, 129.
[569] *Id.* at 123–26.
[570] *Id.* at 126.
[571] *Id.*
[572] *Id.* at 126–27.
[573] *Id.*
[574] *Id.*
[575] *Id.* at 127.

punish use and/or disclosure evidenced an efficient deterrent—this was a "slim reed"[576] to support sanctioning publication of truthful matter. The panel distinguished *Boehner v. McDermott,* [577] involving Congressman-defendant's receipt from an identified source of a recording of a conversation by Congressman Boehner discussing new woes of House Speaker Newt Gingrich. Defendant-McDermott was not a mere passive recipient—he affirmatively pledged immunity to the illegal interceptors.[578]

Judge Pollak's dissent followed *Boehner*'s [579] emphasis on disincentivizing illegal interceptions by sanctioning subsequent uses and disclosures and the close connection[580] between the twin prohibitions. He found the majority's decision puzzling and emphasized the general legislative agreement a prohibition on use and/or disclosure was an important component of a legal regime patterned to protect the privacy of personal conversation. [581] Indeed, legislatively recognized privacy/confidentiality was of "comparable–indeed kindred–dimension" with free-expression rights.[582] Judge Pollak chastised the majority for hyperbole as to supposed problems presented to the media. [583] No reputable journalist would be likely to publish such newsworthy matter without efforts to ensure the conversation had occurred and without verifying the parties' identities.[584] Modern technological developments made it relatively simple to ascertain whether the conversation had been previously published by the media.[585] The Third Circuit denied en banc

---

[576] *Id.* at 128 (The other half did not provide for a civil-damages remedy.). This dispute over civil-liability alignment is exceptionally silly since the federal government and 41 states imposed *criminal* liability. *See infra* text accompanying notes 662–63, 672–73.
[577] For detailed analyses of Boehner v. McDermott, 91 F.3d 463 (D.C. Cir. 1999), *see infra* text accompanying notes 578–79, 616, 696–99, 725–26,733, 741.
[578] *Bartnicki,* 200 F.3d at 128–29 (He intended to embarrass political opposition and was "more than merely an innocent conduit.").
[579] *Id.* at 122 (following *Boehner*, 191 F.3d at 470).
[580] *Bartnick*i, 200 F.3d at 133 (Pollak, J., dissenting).
[581] *Id.* at 134.
[582] *Id.* at 136 (quoting Harper & Row Publishers v. Nation Enterprises, 471 U.S. 539, 560 (1985), quoting Estate of Hemingway v. Random House, Inc. 244 N.E.250, 255 (1968) ("There is necessarily, and within suitably defined areas, a concomitant freedom *not* to speak publicly, one which serves the ultimate end as freedom of speech in its affirmative aspect.")). *All* members of the Court viewed this privacy-protecting speech interest as an important consideration in analyzing the competing interests. *See supra* text accompanying notes 94–103 and *infra* text accompanying notes 692–95, and Elder, *Recordings, supra* note 4, Parts I, II.
[583] *Bartnicki*, 200 F.3d at 135 (Pollak, J., dissenting).
[584] *Id.*
[585] *Id.* Any self-censorship could be assuaged by adopting the clear-and-convincing evidence and independent-appellate-review standards in libel cases. *Id.* at 135–36.

review by a 6-5 vote.[586]

Briefs before the Court, including those by parties with wiretap cases pending or to be imminently filed[587] were exceptional, with media entities well-represented, including by several amicus curiae,[588] with detailed analyses of the Court's precedents,[589] the appropriate level of First Amendment review,[590] and competing broad[591] and narrow[592]

---

[586] Brief for the United States, 2000 WL 1344079 (U.S.), at 9 (hereinafter Brief for United States, 2000 WL 1344079).

[587] Brief Amicus Curiae of Rep. James A McDermott in Support of Respondents, 2000 WL 1597815 (hereinafter Brief Amicus Curiae McDermott, 2000 WL 1597815); Brief of Amicus Curiae WFAA-TV and Robert Riggs in Support of Respondents, 2000 WL 1614452 (hereinafter Brief Amicus Curiae WFAA-TV, 2000 WL 1614452). The latter made a First Amendment claim for protection in scenarios where defendant had a reasonable basis for believing the interception in which it participated was to some extent lawful. *Id.* at 16–19. This was directed at its soon-to-be-filed appeal.

[588] *See* the footnotes *infra*, particularly the Brief Amici Curiae of Media Entities and Organizations in Support of Respondents, 2000 WL 1617961, 1–2, 5, 20–22 (hereinafter Brief Amici Curiae Media Entities and Organizations, 2000 WL 1617961) (The first counsel listed was Floyd Abrams; two pages included essentially all major American media.).

[589] *See supra* text accompanying notes 1-199.

[590] *Compare* Brief for Unites States, 2000 WL 1344079, at 9–25 (intermediate level), Brief for Petitioners Gloria Bartnicki and Anthony F. Kane, Jr., 2000 WL 1280378, at 10–11,13–17 (same) (hereinafter Brief for Petitioners, 2000 WL 1280378), Reply Brief for United States, 2000 WL 1755243, at 4–6 (same) (hereinafter Reply Brief United States, 2000 WL 1755243), Reply Brief for Petitioners Gloria Bartnicki and Anthony Kane, Jr., 2000 WL 1741965 (U.S.), at 3–14 (same) (hereinafter Reply Brief for Petitioners, 2000 WL 1741965), with Brief for Respondent Jack Yocum, 2000 WL 1617966 (U.S.), at 24–29 (strict scrutiny) (hereinafter Brief for Respondent Yocum, 2000 WL 1617966), Brief Amicus Curiae of McDermott, 2000 WL 1597815, at 4–16 (same), Brief Amici Curiae WFAA-TV, 2000 WL 1614452, at 6, 8–16 (same), Brief of Amicus Curiae of the American Civil Liberties Union and the ACLU of Pennsylvania in Support of Respondents, 2000 WL 1634972 (U.S.), at 4–15 (same) (hereinafter Brief Amicus Curia American Civil Liberties Union, 2000 WL 1634972). One brief conceded Cohen v. Cowles Media Co. involved application of the deferential *rational-basis* test. Brief of Americus Curiae The Liberty Project In Support of Respondents, 2000 WL 1597810 (U.S.), at 6 (hereinafter Amicus Brief The Liberty Project, 2000 WL 1597810) ("The government regulations at issue—contract law—reflected no preference for silence."). Another distinguished *Cohen* as falling "outside the *Daily Mail* principle because the speaker was also the primary wrongdoer." Brief for Yocum, 2000 WL 1617966, at 27 and n. 8.

[591] Brief for Respondents Frederick W. Vopper, Keymarket of Nepa, Inc. and Lackazerne, Inc., 2000 WL 1614392 (U.S.) at 13–18 (hereinafter Brief for Respondents Vopper et. al., 2000 WL1614392); Brief for Respondent Yocum, 2000 WL 1617966, at 8–9, 24–28; Brief Amicus Curiae McDermott, 2000 WL 1597815, at 4–10; Brief Amici Curiae WFAA-TV, 2000 WL 1614452, at 5–8; Brief Amicus Curiae American Civil Liberties Union, 2000 WL 1634972, at 5–9, 13; Brief Amici Curiae of Media Entities and Organizations, 2000 WL 1617961, at 8–20.

[592] Brief for United States, 2000 WL 1344079, at 18–20; Brief for Petitioners, 2000 WL 1280378, at 16–17, 25–26; Reply Brief United States, 2000 WL 1755243, at 6–15;

constructions of the Court's *Smith v. Daily Mail* doctrine.[593] Petitioners pushed analogies to child pornography,[594] stolen mail,[595] and stolen property,[596] and the need to "dry up the market"[597] by punishing the thief-fence, [598] contending there is "no First Amendment right to distribute someone else's pilfered speech."[599] To them such "tainted"[600] or "laundered" [601] information was not and could not be viewed as *lawfully obtained*. Respondents argued such frequently passively

---

Reply Brief for Petitioners, 2000 WL 1741965, at 8–14; Brief Amicus Curiae Boehner, 2000 WL 1280467, at 4, 8–17; Brief Amicus Curiae of the Cellular Telecommunications Industry Association in Support of Petitioners, 2000 WL 1280461 (U.S.), at 10–11.

[593] *See supra* text accompanying notes 34–41, 78–84, 471–73, 480, 484, 524, 528, 590, 593 and *infra* 603, 611, 624, 657, 670.

[594] Brief for United States, 2000 WL 1344079, at 24–25; Brief for Petitioners, 2000 WL 1280378, at 11–12; Reply Brief for United States, 2000 WL 1755243, at 9–10.

[595] *Compare* Reply Brief for United States, 2000 WL 1755243, at 8–9 and n. 6, 11–12 (discussing "venerable antecedent" of common-law copyright protection for stolen letters and mail theft).

[596] Brief for the United States, 2000 WL 1344079, at 12, 24 (The statutes "reflect[] the basic principle that those who knowingly come into possession of stolen goods are not free to exploit them."), 24 ("long been accepted… justification").

[597] Brief for the United States, 2000 WL 1344079, at 24–25; Brief for Petitioners, 2000 WL 1280378, at 11–12, 22; Reply Brief for the United States, 2000 WL 1755243, at 9–10.

[598] Brief for the United States, 2000 WL 1344079, at 25; Brief Amicus Curiae for John Boehner, 2000 WL 1280467, at 4, 14 ("The fact that a book reviewer has a virtually absolute First Amendment right to criticize *The Catcher in the Rye* in no way suggests that he has any right to 'fence' bootleg copies of J.D. Salinger's book."); *id.* at 6 ("There is no coherent [First Amendment] reason to erect separate rules for the thief and fence.").

[599] *Compare* Brief Amicus Curiae of John Boehner, 2000 WL 1280467, at 4, with Brief Amicus Curiae of James McMcDermott,2000 WL 1597815, at 15 ("It is a bedrock First Amendment law… that the dissemination of other people's speech is itself speech.").

[600] *Compare* Brief Amicus Curiae of James McDermott, 2000 WL 1597815, at 5, 9 (characterizing such as "loaded" and "alien to the First Amendment"); Brief Amici Curiae for WFAA-TV, 1614452, at 8 ("… [A] different test to so-called tainted information would have no endpoint. Once tainted, the information could never be used or published, creating an enormous burden on the press to ascertain the precise origin of any truthful information.").

[601] Brief for the United States, 2000 WL 1344079, at 11, 23 ("If untrammeled disclosure by non-participants were lawful, illegally interception communications could be easily 'laundered' to prevent discovery of the interceptor."), 26; Brief for Petitioners, 2000 WL 1280378, at 22 (Such would leave a "gaping hole" in the statutory scheme.); Reply Brief for the United States, 2000 WL1755243, at 11 ("Without individuals and institutions willing to participate in that dissemination, wiretappers could rarely achieve such ["laundered"] mass dissemination themselves."); Brief Amicus Curiae of John Boehner, 2000 WL 1280467, at 16; Brief Amicus Curiae for Cellular Telecommunications Industry Association, 2000 WL 1280461, at 9.

received information [602] was and is a "paradigmatically 'routine newspaper [and media] reporting techniqu[e].'"[603]

Respondents made effective use of *Landmark Communications, Inc. v. Virginia*[604] and *The Florida Star v. B.M.J.*[605] that the publishing media therein were mere passive recipients of information provided by sources in violation of obligations under state law.[606] They also made some use of *Pearson v. Dodd*'s[607] common-law non-liability-for-passive-receipt-doctrine. [608] On the other hand, petitioners cited [609] strong indications in Court opinions [610] suggesting the mode by which

---

[602] Brief Amicus Curiae for Dow Jones & Company, Inc., in Support of Respondents, 2000 WL 1597803 (U.S.), at 4, 8 ("Journalists regularly come into possession of information of great public interest from individuals who may well have violated a statute, a private contract, or some other legal or ethical duty either in obtaining the information or by disclosing it to the press.") (hereinafter Brief Amicus Curiae for Dow Jones & Company, Inc., 2000 WL 1597803); Brief Amicus Curiae for Media Entities and Organizations, 2000 WL 1617961, at 7 (Journalists "proceed on the understanding that they are entitled to seek information from those that have it and that they may print or broadcast the truthful and newsworthy information that they lawfully gather."); *id.* at 19 ("…[T]he press often encounters sources who may be disabled in some way by the law from passing along the information at issue.").

[603] Brief Amicus Curiae for Dow Jones & Company, Inc., 2000 WL 1597803, at 5, 8 (quoting *The Florida Star-Smith v. Daily Mail*). *See also* Brief Amicus Curiae for The Liberty Project, 2000 WL 1597810, at 4 (Criminalization of truthful speech "because *someone else* misbehaved in obtaining that information, is antithetical to long-standing principles of First Amendment jurisprudence."). The brief conceded liability could be imposed on those who are co-conspirators or accessories to a crime: "Inducing someone to commit a crime by paying him, before or after the fact, is the type of involvement in criminal activity that can be legitimately made subject to sanctions, and often is." *Id.*

[604] *See supra* text accompanying notes 34–41, 79–84.

[605] *Id.*

[606] Brief of Respondent Yocum, 2000 WL 1617966, at 24–25; Brief Amici Curiae for WFAA-TV, 2000 WL 1614452, at 8; Brief Amicus Curiae for American Civil Liberties Union, 2000 WL 1634972, at 8 and n. 5; Brief Amici Curiae for Media Entities & Organizations, 2000 WL 1617961, at 10–12, 19.

[607] Brief for Respondents Vopper et al., 2000 WL 1614392, at 18, n. 15; Brief Amicus Curiae for Dow Jones & Company, Inc., 2000 WL 1597803, at 8, 11–12, 15 and n. 10; Brief Amici Curiae for Media Entities and Organizations, 2000 WL 1617961, at 7 and n. 10. Surprisingly, neither the Stevens opinion nor the Breyer-O'Connor limiting concurrence mentioned *Pearson*.

[608] *Id. And see infra* text accompanying notes 607–08, 714–22.

[609] Brief for Petitioners, 2000 WL 1280378, at 17, n. 10, 22, n. 17; Reply Brief for Petitioners, 2000 WL 1741965, at 7–8 and n. 8.

[610] Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 837 (1978) ("We are not here concerned with the possible applicability of the statute to one who secures the information by illegal means and thereafter divulges it."); *id.* at 837 (Stewart, J., concurring) ("Although government may deny access to information and punish its theft, government may not prohibit or punish the publication of that information once it falls into the hands of the press…"); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469,

information was gathered was an important factor to the Court or some members. Several briefs before the Court conceded—often in dramatic language—the Court's rights to deny First Amendment protection to the acquirer-publisher of newsworthy information where not received solely by purely passive conduct resulting from criminal, tortious, or other wrongful acquisition by the third-party obtainer.[611]

In *Bartnicki v. Vopper,*[612] the Court affirmed the Third Circuit's partial invalidation of the statutes on First Amendment grounds. Purportedly speaking for the Court,[613] Justice Stevens framed a new and narrow[614] question as to whether *lawfully obtained* disclosures by media defendant with scienter of the information's illegal acquisition by unknown third-party non-agents of defendant could be sanctioned where

---

489 (1975) (distinguishing tort doctrines based on "offensive" publicity from a privacy violation involving "a physical or other tangible intrusion into a private area"); Time, Inc. v. Hill, 385 U.S. 375, 384–85, n. 9 (1967) (distinguishing liability based on content from that involving "state power to sanction publication of matter obtained by an intrusion into a protected area, for example, through the use of electronic listening devices").

[611] Brief for Respondent Yocum, 2000 WL 1617966, at 25 (conceding an illegal interceptor may be outside *Daily Mail*'s protection); *id* at 27, n. 28 (*Cohen* "fell outside" *Daily Mail* because the discloser was "also the primary wrongdoer."); Brief Amicus Curiae of James McDermott, 2000 WL 1597815, at 9 ("It goes without saying that anyone complicit in the underlying interception—regardless of whether that person actually participated in the act of interception—did not lawfully obtain the information. The traditional doctrines of aiding-and-abetting exist to address just this situation."); Brief Amicus Curiae of John Boehner, 2000 WL 1280467, at 6 ("…[A]ll agree that the government may constitutionally prohibit the thief from disclosing the call" and discussing the thief's "dual illegalities."); Brief Amicus Curiae for The Liberty Project, 2000 WL 1597810, at 13 and n. 7 ("Petitioners are incorrect that there is no difference between imposing sanctions on those who are actually involved in unlawful interception of conversations and imposing sanctions on innocent third parties. In the former instance, an interceptor sanctioned for revealing taped conversations is being denied the fruits of his criminal conduct—just as bank robbers are justly denied the proceeds of their robberies without triggering any Takings Clause concerns."); *id.* at 15 (The wiretapper-thief-republisher may be liable for general damages: "… [W]hen the government is seeking to prevent similar harms—embarrassment and negative social or business ramifications–speakers should only be subject to punishment if they were directly involved in the unlawful interception."). *Compare* Brief Amici Curiae for WFAA-TV, 1614452, at 5, 7 ("… [I]f a journalist breaks the law to obtain information, she is subject to whatever generally applicable legal penalties may be triggered by the act of appropriation. However the journalist has obtained information, she may be punished only for any impropriety in obtaining it, and not for publishing it, absent a countervailing government interest of the highest order.").

[612] 532 U.S. 514, 518–35 (2001).

[613] *Compare infra* the narrowing views of Justices Breyer and O'Connor in text accompanying notes 643-54.

[614] *Bartnicki,* 532 U.S. at 517.

defendant intentionally publicized matters of public concern[615] based on a "'defect in [the] chain.'" [616] The Court "majority" characterized "interests of the highest order"[617] on each side of the equation—truthful matters of public concern and privacy with its "fostering private speech" corollary.[618] It noted *The Florida Star v. B.J.F.* specifically left open the issue of liability as to illegal-source acquisition[619] and partially relied, somewhat incongruously,[620] on the Court's "Pentagon Papers"-prior-restraint case, *New York Times v. United States*,[621] for its passive-receipt rule.[622] Justice Stevens held the disclosure prohibition, unlike the "use"-conduct provision, to be a content-neutral "regulation of *pure speech*."[623]

---

[615] *Id.* at 517–18, 524–25. Justice Stevens emphasized neither media nor non-media defendants played any part in the initial interception. *Id.*at 522 and n. 5 (implied), 525, 529, 532 and n. 19, 535. This reflected the repeated emphases by the Third Circuit. *See supra* text accompanying notes 577–78.

[616] *Bartnick*i, 532 U.S. at 528 (quoting Boehner v. McDermott, 191 F.3d 463, 484-85 (D.C. Cir. 1999) (Sentelle, J., dissenting)).

[617] *Bartnicki,* 532 U.S. at 528.

[618] *Id.* at 518.

[619] *Id.* at 528 (quoting The Florida Star v. B.J.F., 491 U.S. 524, 535, n. 8 (1989)). *Florida Star* acknowledged the possibility of imposing liability on "the ensuing publication" of information "acquired unlawfully by a newspaper or by a source." *Id.* at 535, n. 8. *Bartnick*i emphasized the information therein was "obtained lawfully, even though the information itself was intercepted unlawfully by someone else." *Id.* at 525 (quoting *Florida Star*, 491 U.S. at 536: "Even assuming the Constitution permitted a State to proscribe receipt of information, Florida has not taken this step.").

[620] *Bartnicki,* 532 U.S. at 528. *See infra* text accompanying notes 659.

[621] 403 U.S. 713 (1971).

[622] *Bartnicki,* 532 U.S. at 528 (The Court "upheld the right of the press to publish information of great concern obtained from documents stolen by a third party.").

[623] *Id.* at 526–27 and n. 11 ("[W]hat gave rise to statutory liability… was the *information communicated* on the tapes.") (emphases supplied). Justice Stevens distinguished the "pure speech" involved in Sec. 2511(1)(c) from the "use" provision in Sec. 2511(1)(d), characterized as "regulation of *conduct*." *Id.* at 526–27 (emphasis added). He quoted the Solicitor General's exemplars of illegal "use[s]": "… use an illegally intercepted communication about a business rival in order to create a competing product… use illegally intercepted communications in trade in securities… use an illegally intercepted communication about management (or vice versa) to prepare strategy for contract negotiations … a supervisor to use information in an illegally recorded conversation to discipline a subordinate… a blackmailer to use an illegally intercepted communication for purposes of extortion.'" *Id.* at 527 and n. 10. All such "conduct" has a "speech component"—either in limited dissemination within defendant's infrastructure and/or in communicating with the targeted person, *e.g.,* disciplining and blackmailing scenarios. This "use"-based-in-part-in-"speech" still remains conduct. *A fortiori*, the *pure conduct* based on defendant's interception or active participation in such would also be conduct unprotected by the First Amendment. Very importantly, Justice Stevens recognized the federal statute has been held to "'bar the use of illegally intercepted communications for important and socially valuable purposes.'" *Id.* (quoting Solicitor General's brief). Justice Stevens

He applied its restrictive, result-determinative *Smith v. Daily Mail* requirement barring sanctioning true speech "absents a need … of the highest order."[624]

Justice Stevens engaged in an elaborate discussion of the statutes' justifications—punishing disclosure as a deterrence to third-party interception and the negative impact of using such matter on both privacy and encouragement of private speech.[625] He found "quite remarkable"[626] the deterrence's focus on the legal possessor rather than the illegal obtainer.[627] He perfunctorily rejected the examples proffered. Suppression of speech to deter criminal conduct had been upheld by the Court in child-pornography cases[628] involving speech of only "minimal value."[629] He tersely rejected mail-theft and stolen-property analogies as not involving *speech* prohibitions and irrelevant to First Amendment concerns.[630]

Surprisingly, Justice Stevens ignored the Court's intellectual-property theft-equivalent precedent, *Zacchini v. Scripps-Howard*.[631] He did quote in a footnote *Harper & Row Publishers, Inc. v. Nation*

---

said, "we assume" the interest relied on–removal of an incentive to tape-intercept private conversations and "minimizing the harm" to victims–"would meet First Amendment requirements." *Id.* at 529–30. He noted Yocum's tape delivery to Vopper could be viewed as conduct, but "given that the purpose of such a delivery is to provide the recipient with the text of recorded statements, it is like the delivery of a pamphlet and as such, is the kind of 'speech' the First Amendment protects." *Id.* at 527. *Compare* the discussion of photocopying discussed *infra* note 719. Consider a scenario where one media defendant illegally or tortiously acquires material and provides it to another media entity to sanitize the material and shield itself from liability. Whether viewed as an unprotected "use" or a limited publication, the tortious acquirer would have no protection under the First Amendment. Under general liability rules for foreseeable republications by third parties, defendant would be liable. *See* ELDER, DEFAMATION, *supra* note 42, at § 1:27. The purely-passive-recipient media republisher would not be liable under *Bartnicki*.

[624] *Bartnicki*, 532 U.S. at 527–28 (quoting Smith v. Daily Mail Publishing Co., 443 U.S. 97, 103 (1979)).

[625] *Id.* 532 U.S. at 529–35.

[626] *Id.* at 529–30.

[627] *Id. See* Smolla, *Contraband, supra* note 124, at 1140 (Focusing on the passive recipient "ran afoul of what the Court appeared to regard as a baseline norm: that as law exists to deter transgression, it should punish actual transgressors.").

[628] *Bartnicki*, 532 U.S. at 530 and n. 13 (citing Court's child-pornography cases). On the dissenters' views, *see infra* text accompanying notes 666–67.

[629] *Bartnicki,* 532 U.S. at 530 and n. 13.

[630] *Id.* at 530.

[631] 433 U.S. 562 (1977) (finding no bar to protecting "right of publicity" where defendant appropriated plaintiff-entertainer's entire performance). *See supra* text accompanying notes 120–34.

Enterprises.,[632] relied on heavily in the briefs.[633] Importantly, that quotation emphasized the "concomitant freedom *not* to speak publicly, [as] one which serves the same ultimate end as freedom of speech in its affirmative aspect."[634] The "unwilling speaker"-information-provider-person-intercepted-by-the-acquiring-media-defendant operates strongly in favor of sustaining statutes in claims against the illegal acquirer-publisher. Ultimately, the Court's opinion held, like the Third Circuit majority,[635] the deterrence justification was non-empirical speculation and plainly inadequate.[636]

Justice Stevens found the privacy and encouragement-of-private-speech arguments "considerably stronger"[637] and recognized disclosure of contents of private conversations could be "an even greater intrusion on privacy than the interception itself," with a concomitant chilling of private speech.[638] These factors constituted a "valid independent justification"[639] supporting a prohibition on disclosures by lawful obtainers even without any significant loss of deterrence.[640] These interests had to give way in cases involving *pure disclosures* "implicat[ing] the core purposes of the First Amendment… publication

---

[632] 471 U.S. 539, 559–60 (1985) (holding public interest in Gerald A. Ford's views in unpublished manuscript not "fair use," rejecting public-figure exception to copyright). *See supra* text accompanying notes 135–54.

[633] *See* Brief for Petitioners, 2000 WL 1280378, at 10–12, 15, 19, 24–25; Reply Brief for the United States, 2000 WL 1755243, at 8; Reply Brief for Petitioners, 2000 WL 1741965, at 4, 12 and n.13; Brief for Congressman John Boehner as *Amicus Curiae*, 2000 WL 1280467, at 4–5, 7–8. No Court opinion dealt with the analogy to the property interest of the author of the letter in preventing subsequent disclosure and use. *See* Brief for the United States at 10–11, 18, 21, 2000 WL 1344079, and Reply Brief for the United States, at 8 and n.6, 2000 WL 1755243 ("Nor can it [Respondents' and their amici's position] be squared with the common law . . . which held that the publication of a private letter without the author's consent–the functional equivalent of respondents' broadcast of Bartnicki and Kane's conversation—to be an actionable wrong from before this Nation was founded. Stolen books and letters may be truthful in content, but the government may punish their dissemination, reproduction, or use, so long as it does not discriminate regarding topic or viewpoint. Title III does precisely that with respect to stolen conversations, like the one at issue here."). *See* the Justice Gorsuch's discussion of using common-law sources in 1791 in Fourth Amendment cases in Carpenter v. United States, 138 S. Ct. 2206, 2264-72 (2018) (Gorsuch, J., dissenting). *See also supra* notes 244, 320.

[634] *Bartnicki*, 532 U.S. at 532 (quoting *Harper & Row, Inc.*, 471 U.S. at 559 (internal citation omitted) (emphasis added)). *See* the analysis of "unwilling speaker"-information-providers in Elder, *Recordings, supra* note 4. pts. I, II.

[635] *See supra* text accompanying notes 568–74.

[636] *Bartnicki,* 532 U.S. at 530–32 (2001) ("Unusual cases fall short of a showing that there is a 'need . . . of the highest order' for a rule supplementing the traditional means of deterring anti-social conduct.").

[637] *Id.* at 532.

[638] *Id.* at 533.

[639] *Id.*

[640] *Id.*

of truthful information of public concern" [641] —the matter involved therein—by media or non-media defendants.[642]

Although joining Justice Stevens's opinion,[643] Justice Breyer and Justice O'Connor concurred, considerably narrowing the Court's holding under the special factors therein. [644] They found the Court's strict-scrutiny standard generally inappropriate [645] in a case involving "important competing constitutional interests"[646] of *equal stature*. Like criminal-trespass statutes, wiretap statutes directly enhance individual or private speech.[647] Yet, as applied, they "restrict public speech directly, deliberately, and of necessity," both as a means and an end.[648] In such scenarios, the First Amendment requires reasonable legislative tailoring that does not "disproportionately interfere with media freedom."[649] In

---

[641] *Id.* at 533–35 (Teacher-compensation negotiations were "unquestionably a matter of public concern.").

[642] *Id.* at 525 and n.8 (rejecting distinction between media and non-media defendants, citing *New York Times Co. v. Sullivan,* which involved both—*see* ELDER, DEFAMATION, *supra* note 42, Secs. 6:3, 7:4. No Court member disagreed. *See* Jean v. Massachusetts, 492 F.3d 24, 29-33 (1st Cir. 2007) (upholding injunction against defendant to stop interference with posting audio and video from a home inside-surveillance camera of warrantless police entry and search, finding poster-political-activist-commentator-passive recipient of information of public concern indistinguishable from *Bartnicki*, despite scienter of tape's illegal heritage and status as active conspiracy participant under state law). Any media-non-media distinction is indefensible in the cell-phone era. *See* Elder, *Recordings, supra* note 4, Parts I & II.

[643] *Bartnicki,* 532 U.S. 514, 516, 535 (Breyer, J., concurring).

[644] *Id.* at 535–36 (agreeing with "narrow holding" restricted to "special circumstances" therein and Court's holding did not "imply a significantly broader constitutional immunity for the media"); *id.* at 541 (emphasizing "particular circumstances" therein, abjuring "overly broad or rigid constitutional rules" "unnecessarily restrict[ing] legislative flexibility" intended "to encourage, for example, more effective privacy-protecting technologies"). The concurrence "quite sharply and dramatically constrained" the majority. *See* Smolla, *Contraband, supra* note 124, at 1114, a "pyrrhic" victory "more simpatico with the values" of the dissenters. *Id.* at 1116–17.

[645] *Bartnicki,* 532 U.S. at 536–38 (Breyer, J., dissenting).

[646] *Id.* at 536–37. Justice Breyer stated neither statute criminalized receipt of illegally obtained third-party source material. *Id.* at 538. Professor Smolla suggests this "particularly intriguing" analysis may have "identified a sizeable constitutional loophole, and all but invited legislatures to amend their statutes and drive through." Smolla, *Contraband*, *supra* note 124, at 1144.

[647] *Bartnicki*, 532 U.S. at 537 (Wiretap-surveillance statutes "ensure the privacy of telephone conversations much as a trespass statute ensures privacy within the home.").

[648] *Id.*

[649] *Id.* at 538; *id.* at 540 (The publication sanctions would "disproportionately harm media freedom."). Justice Breyer noted emerging technologies and the importance of legislative involvement: "Legislatures also may decide to revisit statutes such as those before us, creating better-tailored provisions designed to encourage more effective

this case, the speaker's privacy interests were "unusually low" and the public interest "unusually high"[650]—public figures[651] and a threat of potential physical harm[652] considered wrongful under the common law, with a privilege for disclosure in cases of threats to public security.[653] The concurrers emphasized the Court's holding was limited—it "does not create a 'public interest' exception that swallows up the statutes' privacy-protecting general rule."[654]

Chief Justice Rehnquist, with Justices Scalia and Thomas joining, dissented.[655] They persuasively distinguished the *Smith v. Daily Mail*[656]

---

privacy-protecting technologies . . . [W]e should avoid adopting overly broad or rigid constitutional rules, which would unnecessarily restrict legislative flexibility." *Id.* at 541. Professor Smolla interprets this as envisioning a Court conclusion "the appropriate First Amendment balance might well be different" in such scenarios. Smolla, *Contraband*, *supra* note 124, at 1147. He makes a compelling case that this analysis and the dissenters' express analysis of intermediate-level scrutiny make this the majority view. *Id.* at 1118–19, 1126.

[650] *Bartnicki,* 532 U.S. at 540 (Breyer, J., concurring).

[651] *Id.* at 539–40. This public-figure analysis was in the context of the case's "special circumstances," *id.* at 535–36, 539–40, involving speech, not conduct. The concurrence was not issuing a general invitation to illegal interceptors to "bootstrap" themselves from liability by publicizing information of public concern achieved by their illegal conduct. This interpretation would be wholly at odds with the concurrence, and, indeed, with the other opinions, which treat illegal interceptions as unprotected conduct. *See* the dissenters' potent critique of the public-figure analysis *infra* in the text accompanying notes 676-78.

[652] *Bartnicki*, 532 U.S. at 539 (Breyer, J., concurring) (The speakers had "little or no legitimate interest" in the privacy of such.). The supposed threat was disputed. Kane said it was rhetorical in nature. Brief for Petitioners, 2000 WL 1280378, at 6. *Compare* Brief for Respondents Vopper et al., 2000 WL 1614392, at 10 (detailing concerns by them and school-board request for criminal investigation). One commentator suggests the threat of violence might have been pivotal. Reportage of other matters of public concern not implicating violence might have precipitated the concurrers to join the dissenters and transform the holding into liability of the media defendant. Jennifer Nicholas Hunt, Bartnicki v. Vopper: *Another Media Victory or Ominous Warning of a Potential Change in Supreme Court First Amendment Jurisprudence*, 30 PEPP. L. REV. 367, 386 (2003) (hereinafter "Hunt"). For a parallel conclusion, *see* Smolla, *Contraband*, *supra* note 124, at 1106–07, n. 32 (These "swing votes" "seem to turn on their perception" the conversation engaged in a discussion of "possible criminal activity."); *id.* at 1144 ("The *Soprano*'s talk . . . trumped the privacy interest of the parties to the conversation.").

[653] *Bartnicki*, 532 U.S. at 539–40 (Breyer, J., concurring). Even where danger to individuals had passed by time of publication, this did not "legitimize the speaker's earlier privacy expectation." *Id.* at 539. Editors faced with time pressures should not have to resolve the imminence of danger before publishing such threats. *Id.* There was a delay of several months between receipt by Vopper and his use of the information. *Id.* at 518–19. On adoption of a qualified privilege in recording-police-in-public cases, *see* Elder, *Recordings, supra* note 4, Part I (discussing significance of Justice Breyer's references to qualified privileges).

[654] *Bartnicki,* 532 U.S. 540 (Breyer, J., concurring).

[655] *Id.* at 541 (Rehnquist, C. J., dissenting).

[656] *See supra* text accompanying notes 34–41, 78–84, 471–73, 480, 484, 524, 528, 590, 593, 603, 611, 624 and *infra* notes 657, 670.

cases,[657] rejected any suggestion strict scrutiny applied,[658] refuted reliance on the Court's "Pentagon Papers"-prior-restraint decision as even "[m]ore mystifying,"[659] and adopted a content-neutral[660] intermediate level of scrutiny.[661] The dissent relied on the legislative judgment of Congress and the great majority[662] of states (41) imposing criminal sanctions for disclosures with scienter-regarding-illegal-third-party-interceptions[663] as prohibitions closely tailored[664] to the collective federal and state legislative determination third-party interception is "extremely difficult to detect."[665] The dissent relied on the time-honored, "neither novel nor implausible" dry-up-the-market[666] rationale and excoriated the Court for requiring Congress to meet a high threshold of

---

[657] All the cases supporting the "*Daily Mail* string" (*see supra* text accompanying notes 34–41, 78–84) involved regulations of the subject matter or content of speech, all but one involved matter lawfully acquired from government, all involved otherwise "'publicly available'" information, where any sanctioning of further publicization would not have enhanced the governments' confidentiality concerns, and all involved situations involving media self-censorship and timidity in publishing truth. By contrast, here induced self-censorship was justification for upholding the non-disclosure provisions. Otherwise, the First Amendment would "allow private conversations to transpire without inhibition." Moreover, the *Daily Mail* cases involved interviews by consent or public documents, not information disclosed with defendants' scienter of its illegal acquisition by a third party. Lastly, unlike *Florida Star*, there was a clear scienter requirement imposing no duty to inquire and immunity for negligent disclosure of matter illegally-intercepted-by-third-party disseminators. *Bartnicki,* 532 U.S. at 545–48 (Rehnquist, C.J., dissenting).

[658] *Id.* at 544–50 (finding "scant support, either in precedent or in reason, for the Court's tacit application of strict scrutiny" and adopting a view upholding such statutes since they "further a substantial government interest unrelated to the suppression of speech" and accord "'substantial deference to the predictive judgments'" of state legislatures and Congress) (internal citation omitted). Thus, a Court majority adopted a lower standard of intermediate-level scrutiny only as to this *passive-receipt-pure-speech* case. *Id.* at 536–41 (Breyer, J., concurring); *id.* at 544–50 (Rehnquist, C.J., dissenting). The clear-and-unequivocal implication is that a lower standard—mere rationality—would apply in cases involving unlawful-conduct-active participation by defendant.

[659] *Id.* at 555 (Rehnquist, C.J., dissenting).

[660] *Id.* at 544–45 (The anti-disclosure provision was "based solely upon the manner" of acquisition and "not the subject matter of the conversation or the viewpoints of the speakers.").

[661] *Id.* at 545 (referencing *Seattle Times Co. v. Rhinehart*). *See supra* text accompanying notes 26–33. 454, 661.

[662] *Bartnicki,* 532 U.S. at 543 (Rehnquist, C.J., dissenting).

[663] *Id.* at 549 (Congress and "overwhelming majority" of states).

[664] *Id.* at 548–49.

[665] *Id.* at 549.

[666] *Id.* at 549-53 (citing rule on knowing receipt of stolen property, noting no requirement for empirical verification had been imposed in child-pornography cases, deferring to 36 state legislatures' experience in drying-up-the-market therefore). The Court's attempt to differentiate child pornography on "low-value-speech" grounds was irrelevant to the reasonableness of Congress's reliance on the "dry-up-the-market" theory. *Id.* at 552 n. 8.

empirical data it had not required of itself in adopting the Fourth Amendment exclusionary rule.[667]

To the dissent, the disclosure prohibition's "incidental restriction" on First Amendment freedoms was no greater than necessary to promote[668] the "venerable right"[669] of privacy, which, "at its narrowest, must embrace the right to be free from surreptitious eavesdropping on, and involuntary broadcast of, our cellular telephone conversations."[670] The Court's "bald substitutions of its own prognostications" [671] for Congress's and 41 states' reasoned contrary judgments left interception prohibitions "utterly ineffectual,"[672] allowing unidentifiable interceptors to "anonymously launder" [673] the results of their crimes and enhance demand for intercepted private information under a "boot-strapping,"[674] amorphous public-concern standard.[675] The dissent found perverted the concurrers' reliance on the Court's public-figure precedent since petitioners had no intention of contributing to public discourse: [676] "Although public persons may have foregone the right to live their lives screened from public scrutiny in some areas, it does not and should not follow that they also have abandoned their right to have a private conversation without fear of it being intentionally intercepted and knowingly disclosed."[677]

Bartnicki's opinions provide extremely important insights into the Court's First Amendment jurisprudence. The true Court consensus–

---

[667] *Id. a*t 549-51 & n.7 ("When it comes to this Court's awesome power to strike down an Act of Congress as unconstitutional, it should not be 'do as we say, not as we do.").'
[668] *Id.* at 551.
[669] *Id.* at 553.
[670] *Id.* at 555. The scenario here was quite different from the *Smith v. Daily Mail* cases, where reporters "*lawfully obtained* their information through consensual interviews or public documents." *Id*. at 548. The latter are quintessential examples of "paradigmatically 'routine'" newsgathering practices protected by the First Amendment. *See supra* text accompanying notes 34-41 and 78-84 and *infra* text accompanying notes 746-62.
[671] *Bartnicki*, 532 U.S. at 552 (Rehnquist, C.J., dissenting).
[672] *Id.* at 551.
[673] *Id.*
[674] *Id.* ("Indeed, demand for illegally obtained private information would only increase if it could be disclosed without repercussion.").
[675] *Bartnicki,* 532 U.S. at 542 (Rehnquist, C.J., dissenting) (The Court made no attempt to define its "public-concern" "amorphous concept."). On the extraordinary difficulties in defining and constraining this concept, *see* ELDER, PRIVACY TORTS, *supra* note 203, at § 3:16-3:17, ELDER, DEFAMATION, *supra* note 42, at § 4:3-4:4, 5:11, 6:9-6:11; Elder, *Recordings, supra* note 4, at Parts I, II, and Elder, *Rehnquist's Attempts, supra* note 159 at 190-215.
[676] *Id.* at 554.
[677] *Id.* at 555. The author argues Breyer-O'Conner's attribution of public-figure status contradicts the Court's public-figure precedent, see ELDER, DEFAMATION, *supra* note 42, at § 5:7-5:8, introducing a perverse type of involuntary-public figure concept.

Stevens's opinion[678] limited by the Breyer-O'Connor concurrence,[679] with the latter then implicitly affirmed by the Rehnquist-Scalia-Thomas dissent[680]—effectively the resuscitated public-disclosure-of-private-facts tort.[681] These five Justices made it clear the First Amendment privilege

---

[678] *See supra* text accompanying notes 612-42.

[679] *See supra* text accompanying notes 643-54.

[680] *See supra* text accompanying notes 655-78. It seems incontestable that dissenters who rejected the broad passive-receipt doctrine would, at minimum, have *concurred* in *all* the Breyer-O'Connor limitations.

[681] In addition to finding that the Court had not "create[d] a 'public interest' exception swallow[ing]… up the statutes' privacy-protecting general rule," *id.* at 540 (Breyer, J., concurring), the concurrence concluded even public figures did not forfeit conversational-privacy rights. The matter at issue was "far removed" from publicization of "truly private matters," as in Michaels v. Internet Entertainment Group, Inc., 5 F.Supp.2d 832, 841-42 (C.D. Cal. 1998) (finding nothing of legitimate public interest in video-recording sex between two entertainment figures). *See* Professor Smolla's analysis, *supra* note 124, at 1149-56, finding a "backhanded victory" for privacy in the Breyer concurrence plus the Rehnquist dissent, with five Justices reinvigorating the public-disclosure-of-private-facts tort, with the issue of "privacy contraband largely in play" based on whether the matter published falls on the newsworthiness or non-newsworthiness side of the divide and is actionable as "privacy contraband" under the latter. *Id.* at 1149-50. For them, "there is nothing at all constitutionally offensive about empowering judges and juries" to decide a particular publicized fact is non-newsworthy. *Id.* at 1150-551. Professor Smolla suggests this approach is "not only internally coherent" but "externally harmonious with comparable devices"–copyright, common-law appropriation, and the public-controversy limitation in defamation jurisprudence. *Id.* at 1152. He finds *Bartnicki* "sits quite comfortably" with intellectual-property law, *id.* at 1162, including *Zacchini v. Scripps-Howard Broadcasting Co*. *See supra* text accompanying notes 120-34, 452, 486. He concludes: "… [W]hen contraband laws vindicating high social interests that are themselves of constitutional stature incorporate a structural balance sensitive to freedom of expression, such laws are constitutionally sustainable." *Id.* at 10641. Professor Smolla appears to be speaking of "contraband laws" previously discussed, including liability for non-newsworthy publications involving pure speech–the scenario the five Justices discussed above. If, however, he means that "contraband" published by the illegal acquirer or with its active participation is entitled to First Amendment protection if newsworthy, this is inconsistent with the views of all Court members, *see infra* text accompanying notes 688-99, and would permit unlawful media-acquirer-republishers to "boot-strap" from liability via a newsworthiness privilege. Indeed, Professor Smolla's "structural balance" is best exemplified in *Bartnicki*'s unlawful-interception-republisher versus passive-recipient-republisher dichotomy. At one point, he seems to concede this in discussing official-secrets cases, drawing the appropriate distinction: "If the journalist is handed information, the journalist may handle it and publish it. The journalist is protected whether or not the information is labeled 'confidential,' 'classified,' or 'filed under seal' to be opened only by the court." *Id.* at 1169. Professor Smolla suggests "the calculus significantly changes" when government is not on the other side and where an "individual's privacy rights are trammeled"–a "right of constitutional dimension" all nine Justices recognized. In "this posture a law calculated to vindicate those interests, provided it contains the type of newsworthiness safety valve *Bartnicki* contemplated, is on a

recognized in *Bartnicki* did not adopt an expansive public-interest exception "swallow[ing] up" the statutory—and impliedly the common-law's—"privacy-protecting general rule."[682] This narrow privilege is limited to cases of a "special kind"–where privacy expectations are "unusually low" and the public interest "unusually high."[683] All Court members also seemed receptive to[684] or actually endorsed[685] rejection of the First Amendment passive-receipt doctrine in matters of purely private concern.[686]

---

different footing." *Id*. at 1169-70. The "one caveat" is where the media or its agent is a party. In such a case, the *Seattle Times co. v. Rhinehart* no-First Amendment-protection rule applies. *Id*. at 1170 n.308. Ultimately, in discussing the analogy of Rice v. Paladin Enterprises, Inc., 128 F.3d 233 (4th Cir. 1997), where he was plaintiff's counsel, Professor Smolla hints "scanning to eavesdrop" on a private conversation or "digital hacking" is "not entitled to any profound respect." Cases like *Rice*'s "Hit Man Manual" or use of high-technology software to purloin movies is like an act of civil disobedience: "More fundamentally, whatever moral sensibilities may compel a person to break the law as a gesture of protest, the breaking of the law is not thereby excused. Classic disobedience in its classic form is undertaken with an expectation that punishment will follow." *Id*. at 1174-75. So, Professor Smolla comes close to–but ambiguously–treating illegal-acquirer-republication cases comparably to *Cohen v. Cowles Media Co., see supra* text accompanying notes 385-599, which he interprets as the Court "refus[ing] to apply *any* heightened First Amendment scrutiny" despite "numerous intersections with expressive activity." Smolla, *Contraband, supra* note 124, at 1120. *Compare* Amy Gajda, *Judging Journalism: The Turn Toward Privacy and Judicial Regulation of the Press*, 97 CALIF. L. REV. 1039, 1080 (2009) ("The narrowness of the media's victory in *Bartnicki*–notably a 5-4 coalition recognizing a privacy trump to media's First Amendment newsworthiness arguments–is both striking and, for journalists, potentially ominous. It could signal a turn of the Supreme Court in favor of personal privacy and against press freedoms.") (hereinafter "Gajda"). Surprisingly, Professor Gajda does not discuss at all *Bartnicki*'s clear intimations a newsworthiness-public-interest privilege is unavailable where the user-publisher is an active participant in illegally acquiring that material—also the clear corollary of *Cohen v. Cowles Media Co*. and the extensive precedent referenced herein.

[682] *Bartnicki*, 532 U.S. at 540 (Breyer, J., concurring).

[683] *Id*. at 540 (emphasizing these factors and the "lawful nature" of respondents' behavior).

[684] *Bartnicki*, 532 U.S. at 533 (not deciding whether privacy-encouragement-of-the-speech-interest would be "strong enough" to justify "disclosures of trade secrets or domestic gossip or other information of purely private concern") (citing *Time, Inc. v. Hill*, 385 U.S. 374, 397-98 (1967), and comparing the cases before the Court).

[685] *Bartnicki,* 532 U.S. at 539-40 (Breyer, J., concurring) (distinguishing public figures in matters of public concern from those "engaged in purely private affairs"); *id*. at 542 (Rehnquist, C.J., dissenting) (disparaging the Court's refusal to define its public-concern criterion). For critiques of this nebulous concept, *see supra* note 675.

[686] Professor McClurg concludes *Bartnicki*'s focus on the public-concern nature of the information passively received was critical. Andrew J. McClurg, *Kiss and Tell: Protecting Intimate Relationship Privacy Through Implied Contracts of Confidentiality*, 74 U. CIN. L. Rev. 887, 912 (2006). Justice Breyer's discussion is "extremely significant" and revives protection under the public-disclosure-of-private-

A unanimous Court provided strong indications the interceptor, media or non-media,[687] would *not* be protected by the First Amendment as to such interceptions or other criminal, tortious, or other wrongful *conduct*[688] and that a very deferential-to-the-involuntary-information-

---

facts tort regarding purely private parts of a celebrity-public figure's life. Smolla, *Contraband, supra* note 124, at 1146 & n. 215. *See supra* note 682. An unpublished California appellate decision denied the mother of an alleged rapist *Bartnicki* protection when the court provided the videotapes of the rape to the media, which published excerpts. *Bartnicki* provided no support for defendant's claim, as provision of tapes of Doe-rape victim's "unconscious naked body" during repeated rapes "bears no resemblance" to *Bartnicki*. Doe v. Luster, 2007 Cal. App. Unpub. LEXIS 6042, at 15-16 (Cal. App. 2007). Such were purely private. *Id*. at 17. The court indicated "accessing and disseminating" information in her son's house subject to a court-sealing mandate deprived her of *Bartnicki*'s protection. *Id*. *And see* Bowens v. Ary, Inc., 2009 WL 3049580, at 7 (Mich. App. 2009), *rev'd other grds,* 794 N.W.2d 842 (Mich. 2011) (distinguishing *Bartnicki* in part on ground defendants recorded and used recorded conversations together with concert DVD "for profit" and "purposes other than informing listeners about matters of public interest"). This was a case of intellectual-property theft. A pre-*Bartnicki* case consistent therewith allowed a claim against defendants for violating the federal wiretap law in publishing information lawfully obtained with knowledge of the tainted source thereof where the conversations were "purely private and no public interest is served by their revelation." Natoli v. Sullivan, 606 N.Y.S.2d 504, 509-10 (Sup. Ct. 1993).

[687] *See infra* text accompanying notes 689-706.

[688] *Bartnicki*, 532 U.S. at 521 (The district court found the interceptors were "not agents" of defendants.); *id*. at 522, n. 5 (distinguishing *Peavy v. WFAA-TV, Inc.,* where the defendant "in fact participated" in the interception); *id*. at 525 (Defendants "played no part in the illegal interception"—their access was "obtained lawfully."); *id*. at 515 (The Court distinguished "use" of illegal interception–*see supra* note 623.); *id*. at 529-30 (The Court emphasized the "normal method of deterring unlawful conduct is to impose an appropriate punishment" on the interceptor; if sanctions "do not provide sufficient deterrence, perhaps those sanctions should be more severe;" ". . . it would be 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."); *id.,* 532 U.S. at 532 n.19 (The Court's holding was inapplicable to "punishing parties for obtaining the relevant information unlawfully" and quoting *Branzburg v. Hayes*, s*ee supra* text accompanying notes 1-2, 7, 43, 70, 72, 89, 353-55, 451, 455, 457, 459, 482, 485–"It would be frivolous to assert–and no one does in these cases–that the First Amendment, in the interest of securing news or otherwise, confers a license on either a reporter or his news sources to violate valid criminal laws. Although stealing documents or private wiretapping, could provide newsworthy information, neither reporter nor source is immune from conviction for such conduct… whatever the impact on the flow of news."); *id*. at 535 ("[A] stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern."); *id* at 537, 541 (Breyer, J., concurring) (Justice Breyer emphasized "[c]landestine and pervasive invasions of privacy" by advancing technology may be of greater significance than criminal-trespass statutes and treated them as "resembl[ing] laws that would award damages caused through publication of information obtained by theft from a private bedroom."); *id*. at 538, citing to 532 U.S. at 532 n.19 (noting majority's holding caveat above). Add the dissenters, who would have allowed liability

provider-victim mere-rationality standard would be applied [689] in balancing the victims' "highest-order" [690] -"important interests." [691] *Bartnicki*'s importance cannot be overstated. A privacy victim's interests, including speech and autonomy, are equivalent to First Amendment interests of media and non-media publishers.[692] This privacy-based free-

---

for even passive receipt, and the *entire Court* apparently endorsed a wholly different rule in *illegal-acquisition* cases. *See* the dissenters' criticism of the majority on its fear-intimidation argument as grounds for upholding the statutes. *Id*. at 547. *And see* their detailed listing of Court statements on the illegal-acquisition issue, *id*. at 547-48, and to the illegality of the interceptors' publication to the third parties. *Id*. at 548. *And see* Gajda, *supra* note 682, at 1080 (Dissenters "would have gone further still … First Amendment values plainly favored the 'venerable right of privacy and legal sanctions against disclosure in order to safeguard the intimacy of private communications.'"); Hunt, *supra* note 652, at 389 (The Court suggests it would hold defendant liable for an ensuing publication if it had participated in the illegal interception, regardless of the type of information involved or the circumstances surrounding the interception.). The Wisconsin Supreme Court upheld a felony statute based on identity theft of true information intended to harm the public official-victim, correctly interpreting *Bartnicki* as inapplicable–"the government's interest justified prohibiting the 'interceptor' from using the illegally obtained information." State v. Baron, 769 N.W.2d 34, 48 (Wis. 2009). *Baron* provides a powerful example of the need for protection against illegal or tortious acquirers-republishers that decimate their victims and cause them distress, humiliation, and reputational damage. On "enhanced" or "publication" damages, *see* 193-94, 481, 484, 495, 537-40, 556-59, 611. For other important *Bartnicki* discussions, *see* Pierre-Paul v. ESPN, Inc., 2016 U.S. Dist. LEXIS 119597, at 2-3 (S.D. Fla. 2016) (Published medical records were of legitimate public concern; however, the facts were disputed as to legality of acquisition under *Bartnicki*.); Bowens v. Ary, Inc., 2009 WL 3049580, at 7 (Mich. Ct. App. 2009) (The court rejected a *Bartnicki* defense–the illegal-recorder-entertainment company "did not qualify as 'strangers' to the disclosure" but "used the recordings for profit."), *rev'd on other grounds*, 794 N.W.2d 842 (Mich. 2011); Council on American-Islamic Relations Action Network, Inc., *v*. Gaubatz 793 F.Supp.2d 311, 331-32 & n.7 (D.D.C. 2011) (Reliance on *Bartnicki* was "misplaced"–defendants' coordinated, active efforts to embed an intern-saboteur in plaintiff's operation denied them status as lawful acquirers of information of public significance.).

[689] *Bartnicki*, 532 U.S. at 523, 526-27 & n.10 (majority distinguishing the § 2511(1)(d) "use" provision as a "regulation of conduct," citing examples of prohibited "uses," including those for "important and socially valuable purposes.") (*see supra* note 623); *id*. at 529 (The Court "assume[d] both asserted government interests–drying-up-the-market and minimization of harm to the victim"–"adequately justify" the § 2511(1)(d) bar on "use" by the interceptor that he or she had illegally obtained; it emphasized the "normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it." If insufficient deterrence arises under such statutes, sanctions, "perhaps those sanctions should be made more severe.").

[690] *Every* opinion endorses privacy's fostering or enhancing private speech as a value of the "highest order." *Id*. at 518; *id*. at 536 (Breyer, J., concurring); *id*. at 544 (Rehnquist, C.J., dissenting).

[691] *Bartnicki*, 532 U.S. at 532-33; *id*. at 536-37 (Breyer, J., concurring); *id*. at 543, 553 (Rehnquist, C.J., dissenting).

[692] Professors Solove and Lidsky provide elegant analyses of privacy's importance in a

expression right includes the victim's interest in not being required to become an involuntary information-provider.

Every member of the *Bartnicki* Court cited approvingly the "unwilling-speaker" doctrine.[693] These privacy-based free-expression interests of equal stature were to be balanced against any First Amendment free-expression interests on the other side in such cases.[694]

---

vibrant democracy. Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE LAW J. 967, 991-94 (2002); Lyrissa Barnett Lidsky, *Prying, Spying, and Lying: Intrusive Newsgathering and What the Law Should Do About It,* 73 TUL. L. REV. 173, 228-29 (1998) (Absence of privacy may negatively impact public discourse by persuading citizens "to forego participation in public debate in hopes of preserving a sphere of privacy by virtue of media disinterest;" those "dragged into public debate by media intrusions become forced participants" and may be "effectively silenced and unable to make meaningful contributions because the terms of the debate have already been framed by others."). Professors Solove and Lidsky provide compelling rationales for the position taken by many courts—recording-wiretapping of conversations is *qualitatively different* from repetition or note-taking, particularly in the cell-phone/Internet age. Denying the right of the party intercepted or recorded to control the second-hand distribution-dissemination of them. For example, see *supra* text accompanying notes 356-62; *infra* text accompanying notes 801-03, 805; and Elder, *Recordings, supra* note 4, Parts I-II.

[693] *See Bartnicki*, 532 U.S. at 532-34 53& n.20 (detailing cases and quoting *Harper & Row Publishers, Inc. v. Nation Enterprises—see supra* text accompanying notes 135-54, about the "First Amendment 'right' 'not to speak publicly'"); *id.* at 536, 537 (Breyer, J., concurring) ("The statutes ensure the privacy of telephone conversations much as a trespass statute ensures privacy within the home" and "helps to overcome our natural reluctance to discuss private matters when we fear that our private conversations may become public. And the statutory restrictions consequently encourage conversations that otherwise might not take place."); *id.* at 542-43 (The Court "diminishes rather than enhances, the purposes of the First Amendment, thereby chilling the speech of millions of Americans who rely upon electronic technology to communicate each day;" the statutes were "inseparably bound up with the desire that personal conversations be frank and uninhibited, not cramped by fears of clandestine surveillance and purposeful disclosure."); *id.* at 548, 553-56 (Rehnquist, C.J., dissenting) (quoting *Harper & Row* and concluding First Amendment "should not protect the involuntary broadcast of personal conversations"). Two opinions quoted lengthily from President's Commission on Law Enforcement and Administration of Justice, THE CHALLENGE OF CRIME IN A FREE SOCIETY 202 (1967), which heavily influenced the 1968 federal wiretap act: "In a democratic society, privacy of communication is essential if citizens are to think and act creatively and constructively. Fear or suspicion that one's speech is being monitored by a stranger, even without the reality of such activity, can have a seriously inhibiting effect upon the willingness to voice critical and constructive ideas." *Bartnicki*, 532 U.S. at 533; *id* at 543-44 (Rehnquist, C.J., dissenting). Petitioners' and amicus curiae's briefs impressively demonstrated the free-expression values underlying conversational privacy. *See, e.g.*, Brief of the United States at 6, 10-12, 17-18, 21.

[694] *Bartnicki*, 532 U.S. 514, 527-35; *id.* 536-41 (Breyer, J., concurring); *id.* at 542-43, 553-56 (Rehnquist, C.J., dissenting) (Unlike the *Smith v. Daily Mail* cases, protecting "only a select group of individuals," the statutes before it protected "daily use" by millions.). This reflects the long-held common-law view. *See* Afro-American Publishing Co. v. Jaffe, 366 F.2d 649, 654 and n. 8 (D.C Cir. 1966) ("The right of privacy stands on a high ground, cognate to the values and concerns protected by constitutional guarantees.").

The Court's distinguishing of pending cases—*Boehner v. McDermott*[695] and *Peavy v. WFAA-TV, Inc.*[696]—and other indications[697] collectively confirm that participation in any way, shape or form, directly or indirectly providing impetus to or encouragement to the criminal interception or its dissemination[698] will have no First Amendment protection.

All members of the Court expressly or implicitly concede or affirmatively assert that subsequent disclosure of illegally intercepted information may have a chilling effect on private speech and constitute a greater privacy violation than the initial interception-intrusion.[699] On the

---

[695] 191 F.3d 463, 476 (D.C.Cir.1999), *vacated,* 532 U.S. 1050 (2001). Justice Stevens interpreted *Boehner* as having acted unlawfully in accepting the tape in order to provide it to the media. 532 U.S. at 522, n. 5. *See* the discussions *supra* in the text accompanying notes 82, 577-78 and *infra* notes 725-26, 733, 741.

[696] 21 F.3d 158 (5th Cir. 2000), *cert. denied,* 532 U.S. 1051 (2001). *Bartnicki* interpreted *Peavy* as a case where the media defendant "in fact participated in the interceptions at issue." *Bartnicki,* 532 U.S. at 522, n. 5. *See* the discussion *infra* in text accompanying notes 733-39.

[697] *Bartnicki*, 532 U.S. at 538 (Breyer, J., concurring) ("[N]o unlawful activity" other than dissemination of information previously acquired had occurred; defendants "'neither encouraged nor participated directly or indirectly in the interception'" (quoting petition); no one claimed defendants "ordered, counseled, encouraged, or otherwise aided or abetted the interception, the later delivery of the tape's still later delivery by the intermediary to the media."); *id.* at 538 (citing statutory and scholarly sources for permissibility of aiding/abetting liability).

[698] For a detailed analysis*, see infra* text accompanying notes 701-12. *Compare* Shell Offshore, Inc. v. Greenpeace, Inc., 709 F.3d 1281, 1284-92 (9th Cir. 2013) (upholding preliminary injunction against defendant's acts seriously endangering property and human life–including forcibly boarding ships and activists impeding oil drilling–based on Greenpeace U.S.A.'s "endorsement" of tortious and criminal acts of foreign affiliates within proscribed safety zones, finding "no undue speech restriction"). One judge disagreed, concluding "endorsement" of acts by autonomous affiliates was "clearly protected political speech" under Brandenburg v. Ohio*,* 395 U.S. 444 (1969). *Id.* at 1293-96 (Smith, J., concurring in part, dissenting in part). In sum, the Court has accorded First Amendment protection to material purely passively received by a third-party illegal or tortious acquirer and rejected treatment of such as what Professor Smolla calls "privacy contraband." Rodney A. Smolla, *Privacy and the First Amendment Right to Gather News,* 67 GEO WASH L REV. 1097, 1103-04 (1999). Once any such *active participation* in *acquiring* the material is demonstrated, *Bartnicki* authorizes liability for such "downstream" dissemination. *See supra* text accompanying notes 193-94, 481, 492-98, 537-40, 556-59, 611, 689-93 and *infra* text accompanying notes 701-12.

[699] *Bartnicki*, 532 U.S. at 529-33 (acknowledging "the fear of public disclosure of private conversations might well have a chilling effect on private speech" and assuming "the interest in minimizing harm to persons whose conversations have been illegally intercepted" would "adequately justify" the prohibition against the interceptor's use of information that he or she acquired by violating the statute); *id.* at 533-35 ("acknowledg[ing] that some intrusions on privacy are more offensive than

subsequent-disclosure issue, at least five justices cited and affirmatively endorsed[700] the parallel between disclosure of information with scienter of its illegal interception by the discloser and *Gelbard v. United States,*[701] where the Court interpreted the same scheme, the Omnibus Crime Control and Safe Streets Act of 1968, as allowing a grand-jury witness a just-cause defense[702] from being compelled by contempt citation to make disclosures in grand-jury testimony garnered by the government's illegal interception.[703] This conclusion implemented Congress's "overriding… concern"[704] for privacy and against illegal interception by denying the government the "'fruits of [its] unlawful actions.'"[705] A contrary result "compounds the… proscribed invasion of their privacy by adding to the injury of the interception the insult of compelled disclosure,"[706] making the victim of a federal crime a second-time victim.[707]

Thus, *Bartnicki* recognized the double whammy confronting privacy victims of information criminally, tortiously, or otherwise wrongfully acquired–the illegal acquisition *and* the "compound[ed]" harm of subsequent use/disclosure by the illegal obtainer.[708] Further, *Bartnicki* affirmed Congress's affirmation of an "'all-appropriate-

---

others, and that the disclosure of the contents of a private conversation can be an ever greater intrusion on privacy than the interception itself," and deeming this "a valid independent justification for prohibiting such disclosures by persons who lawfully obtained access to the contents of an illegally intercepted message"–"a stranger's illegal conduct [did] not suffice to remove the First Amendment shield from speech about a matter of public concern."); *id.* at 537 (Breyer, J., concurring) (" Media dissemination of an intimate conversation to an entire community will often cause the speakers serious harm over and above the harm caused by an initial disclosure to the person who intercepted the phone call," citing *Gelbard, infra*). Justice Breyer emphasized the "far more powerful disincentive" against speaking privately "widespread dissemination" causes, as juxtaposed to disclosure to the interceptor and a few others. Such paralleled laws awarding damages from publication of "information obtained by theft from a private bedroom." *Id.* at 537. *And see id.* at 541-53 (Rehnquist, C.J., dissenting) (The dissent would have imposed liability on both defendants for publication of information passively received from the initial illegal interception, synthesizing *Gelbard*'s holding, *infra*).

[700] Bartnick v. Vopper, 532 U.S. 514, 537 (Breyer, J., concurring); *Bartnicki,* 532 U.S. at 553 (Rehnquist, C.J., dissenting). Even Justice Stevens cited *Gelbard*'s authoritativeness on the statute's legislative history. *Bartnicki,* 532 U.S. at 523.

[701] 408 U.S. 41 (1972). It is noteworthy that *Gelbard* was issued June 26, 1972, three days before Branzburg v. Hayes, 408 U.S. 665 (1972).

[702] *Gelbard*, 408 U.S. at 45-61.

[703] *Id.*

[704] *Id.* at 48.

[705] *Id.* at 50 (internal citation omitted).

[706] *Id.* at 52.

[707] *Id.*

[708] *Id.*

sanctions'" [709] mandate in fulfilling its "fundamental policy." [710] The Court's consensus discussion of subsequent use/disclosure and the majority's reliance on *Gelbard* have huge ramifications for available damages and other remedies in illegal-acquisition-subsequent-use/publication-by-the same-defendant cases. This is particularly true in cases like *Bartnicki* involving ultimate publication by media. *Bartnicki* provides compelling support for "enhanced" or "publication" damages, implicitly repudiates the grandiose, indefensible dicta in *Cohen v. Cowles Co*. strongly criticized above, and is consistent with many older and more recent cases that do not—and logically could not—limit state law from protecting victims for injuries suffered that are not limited to the artificially constrained damages contemplated by *Cohen*'s capricious dicta.[711] Cases to the contrary that follow *Cohen,* including *Food Lion, Inc. v. ABC*,[712] are no longer authoritative.

B. Bartnicki's Active-Participation-Versus-Passive-Receipt/Mere-Conduit Dichotomy

Although not cited in *Bartnicki*, [713] the leading common-law decision, *Pearson v. Dodd,*[714] held passive receipt of copied documents by defendant-columnist with the awareness they came from disgruntled present and former employees of the plaintiff-Senator–but without his authorization–did not constitute an actionable intrusion upon seclusion.[715] In this "untried and developing" realm, the court refused to find such constituted aiding and abetting of whatever torts may have

---

[709] *Gelbard*, 408 U.S. at 50 (internal citation omitted). *See id.* at 65 (Douglas, J., concurring) (Witnesses are often allowed "exclusive custody of information" to avoid "jeopardiz[ing] important liberties such as First Amendment guarantees"— "[I]t is only necessary to adhere to the basic principle that *victims of unconstitutional practices are themselves entitled to effective remedies*.") (emphases supplied).

[710] *Gelbard*, 408 U.S. at 41.

[711] *See* ELDER, PRIVACY TORTS, *supra* note 203, at § 2:18.

713 194 F.3d 505, 522-23 (4th Cir. 1999) (following *Cohen,* refusing all "publication"-based "defamation-type damages," as attempted "end-run-around" of *Hustler Magazine*'s First Amendment rule).

[712] Planned Parenthood Fed'n of Am. v. Newman, 51 F.4th 1125, 1134 (9th Cir. 2022) (affirming economic losses for infiltration and security as consistent with *Cohen*.). For a sampling *see supra* text accompanying notes 193-94, 48, 484, 495, 537-40, 556-59, 611, 685, 689. It is exceptionally dubious to claim a state can *criminally sanction and imprison* someone for identity theft—as *State v. Baron* clearly demonstrates—*see supra* note 689—or wiretapping and other crimes—*see supra* notes 1-2, 42, 70, 72, 89, 353-55, 455, 457, 459, 482, 485—and make a non-frivolous argument generally appropriate damages under *civil-liability* rules violate the First Amendment.

[713] *See supra* text accompanying notes 95, 201, 607-08, 715-21.

[714] 410 F.2d 701 (D.C. Cir. 1969), *cert. denied*, 395 U.S. 947 (1969).

[715] *Pearson*, 410 F.2d at 703-06.

been committed.[716] Recipient "would perhaps play the nobler part" by declining, but it "would put too great a strain on human weakness" to impose tort liability on the listener-recipient.[717] Defendant's secretary's secret Xeroxing did not suffice–this was an "immaterial detail."[718] Other cases [719] have followed *Pearson*'s mere-receipt-versus-active-participation[720] dichotomy.

Bartnicki adopted a very limited First Amendment version of *Pearson* in its limited holding [721] involving only passive receipt with scienter of the tape's illegal acquisition by a third-party-stranger-non-agent[722] of defendant-republishers. As discussed above, the Court clearly would have allowed liability without any First Amendment protection if active participation by either republisher had been demonstrated,[723] but only as to that active participant. Justice Stevens's opinion for the Court provided significant guidance in discerning the parameters of active participation. He distinguished *Boehner v. McDermott,* [724] where defendant-Congressman "acted unlawfully in accepting the tape in order to provide it to the media."[725] He found defendants in *Peavy v. WFAA-TV, Inc.* [726] "in fact participated in the interception at issue." [727] By

---

[716] *Id.* at 705.
[717] *Id.*
[718] *Id.* at 705*,* n. 20.
[719] *See* Liberty Lobby, Inc. v. Pearson, 390 F.2d 489, 490-91 (D.C. Cir. 1968) (refusing injunction where plaintiff's employee breached duty to it, reproduced documents, and presented them to defendants, as they played no part in "any act other than receiving them"). *See infra* note 722.
[720] *Pearson*, 410 F.2d at 705, n. 20.
[721] *Bartnicki*, 532 U.S. at 517, 535 (Breyer, J., concurring) ("novel and narrow" holding). The concurrence is the true holding of the Court. *See supra* text accompanying notes 643-713. Some pre-*Bartnicki*, courts interpreted *Florida Star* and forbears as according First Amendment protection for media passive-recipient/conduits. *See e.g.*, Reuber v. Food Chemical News*, Inc.*, 925 F.2d 703, 718-19 (4th Cir. 1991) (The "positive-act" requirement precluded liability where defendant "simply published" a leaked government letter and "played no role" in the leak.), *cert. denied,* 501 U.S. 1212 (1991); Cape Publications, Inc. v. Hitchner, 549 So.2d 1374, 1375-79 (Fla. 1989) (A story based on a reporter's permitted access to a confidential juvenile-court file in an unsuccessful child-abuse proceeding could not support a public-disclosure-of-private-facts claim because the information was "lawfully obtained" and of "legitimate public interest."); McNally v. Pulitzer Publishing Co., 532 F.2d 69, 79, n. 14 (8th Cir. 1976) ("… [A] newspaper does not commit intrusion by the mere receipt of tortiously obtained private facts, even when the newspaper has actual knowledge of such impropriety."), *cert. denied,* 429 U.S. 855 (1976).
[722] *Bartnicki*, 532 U.S. at 521.
[723] *See supra* text accompanying notes 688-89.
[724] *See supra* text accompanying note 696.
[725] *Bartnicki*, 532 U.S. at 522, n. 5.
[726] 221 F.3d 158 (5th Cir. 2000). *See supra* text accompanying note 697 and *infra* text accompanying notes 734-39.
[727] *Bartnicki,* 532 U.S. at 522, n. 5.

contrast, *Bartniki*'s media and non-media defendants "played no part"[728] in the tape's unlawful interception. Justice Breyer's pivotal concurrence emphasized defendant-broadcaster "'neither encouraged nor participated directly or indirectly in the interception'"[729] nor "ordered, counseled, encouraged, or otherwise aided or abetted" (a) third-party interception, (b) tape's delivery to the non-media intermediary, or (c) intermediary's redelivery to the media defendant.[730] Mere receipt of information by defendants the third-party-stranger illegally intercepted did not constitute an illegal obtaining.[731]

As *Bartnicki* distinguished *Boehner* and *Peavy*, the latter are worth analyzing, as they indicate what the Court meant in differentiating active participation from passive receipt. *Boehner* involved dual foci– both defendant's intent via media dissemination to embarrass the political opposition and defendant's pledge of immunity to the criminal interceptors.[732] *Peavy* involved an illegal interception of named co-plaintiff-school-district-trustee's cordless telephone conversation with others by neighbors–the Harmans.[733] The Fifth Circuit found co-defendant-reporter Riggs had "some participation concerning the interceptions, at least as to their extent."[734] After meeting the Harmans and listening to tapes previously recorded, Riggs said he wanted copies of them and intended future recordings–as to those 17, he directed the Harmans to neither selectively record nor edit them, to maintain unquestioned authenticity.[735]

The *Peavy* court found an "obtained"/"procured" interception "[a]t the very least," "to the extent" Riggs' instructions caused the Harmans to intercept and tape conversations or portions thereof they

---

[728] *Id.* at 525. The mailbox recipient headed a taxpayers' association. *Id.* at 519. The Court refused to distinguish him and the media defendant, *id.* at 525, n. 8, and concluded delivering the tape to the media defendant might be conduct but was protected First Amendment conduct—like delivery of a pamphlet, handbill, or equivalent. *Id.* at 527.

[729] *Bartnicki,* 532 U.S. at 538 (Breyer, J., concurring) (quoting certiorari petition).

[730] *Id.* (citing statutory and scholarly support for applying classic aiding/abetting concepts). *And see* Bowens v. Ary, Inc., 2009 WL 3049580, 7 (Mich. App. 2009) (*Bartnicki* was inapplicable where defendants "directed" the camera personnel and "thus did not qualify as 'strangers' to the disclosure."), *rev'd other grds.*, 794 N.W.2d 842 (Mich. 2011). Professor Smolla agrees the concurrence evidences "any such involvement by the media, would have disqualified it from the protection the Court granted in *Bartnicki*." *See* Smolla, *Contraband, supra* note 124, at 1144.

[731] *See supra* text accompanying notes 385-559, 612-731 and *infra* text accompanying notes 733-89.

[732] 221 F.3d 158, 188 (5th Cir. 2000) (interpreting *Boehner* as case where Congressman McDermott "entered into a transaction" with interceptors in accepting the tape).

[733] *Id.* at 163-65.

[734] *Id.* at 163.

[735] *Id.* at 164-65, 171-72.

would not have otherwise made.[736] In addition, Riggs' and his employer's willingness to investigate and publicize Peavy's purported wrongdoing–why Harmans contacted the media defendant–"encouraged" them to continue their interceptions and recordings, even if "not the sole motivation.[737] It's worth repeating the court found this unquestioned participation to "some extent" in the interceptions had no First Amendment protection.[738]

The Court's opinions in *Cohen v. Cowles Media Co.* and *Bartnicki v. Vopper* provide guidance to what types of action by defendants suffice to remove them from the passive-receipt-non-liability realm and subject them to liability under the active-participation-conduct doctrine's threshold minimum. Remember *Cohen* involved legal receipt of information that became actionable only when defendants later repudiated their source-anonymity promise.[739] *Bartnicki* distinguished cases like *Boehner* and *Peavy* involving relatively modest wrongful conduct.[740] As stated above, *Bartnicki* indicated no First Amendment protection would have existed had media-defendant participated in any significant way, shape, or form, directly or indirectly providing impetus to the criminal interception.[741]

---

[736] *Id.* at 172. This sufficed for civil conspiracy. *Id.* at 172-74. The court primarily focused on interceptions *after* Harmans contacted WFAA and Riggs to the point Riggs told them WFAA would no longer accept tapes. *Id.* The "procures" language appeared in the federal statute—but only as to criminal liability, not civil. The "obtains" language appeared in the Texas code. *Id.* at 172, 179-80. They were relevant to the legality-of-receipt issue. *Id.* at 179-80. Defendants conceded there was no First Amendment-based privilege protecting defendants' direct interception and obtaining it through third-party interceptors. *Id.* Given their involvement therein, no First Amendment protection existed. *Id.* at 172-74, 180-94.

[737] *Id.* at 172. 173, 180.

[738] *Id.* at 181; *id.* at 188 ("some participation" in illegal interceptions with awareness thereof); *id.* at 189 ("some participation concerning the interceptions"); *id.* at 193 (intermediate-scrutiny standard met).

[739] *See supra* text accompanying notes 476-590.

[740] *See supra* text accompanying notes 632-741.

[741] *See* the controversy generated by Obama Administration warrants to search emails of Fox News reporter James Risen in probing a national-security leak. An anonymous defense claimed Risen "actively asked people with access to classified information to break the law by providing him classified information he could publish… he wasn't someone to whom a whistleblower came to disclose information, he was actively asking people to violate the law and enabling them to do it." A *Wall Street Journal* opinion piece correctly said Risen would have been fine had he "merely sat passively and received the information… But because he coaxed and wheedled and flattered his sources, he was 'a reporter soliciting and aiding and abetting criminal activity'" under the Administration's position. The column viewed this as "astounding" and reflecting "dangerous ignorance" about journalism and the First Amendment—soliciting sources

Justices Breyer-Alito's *Snyder v. Phelps* hypothetical about the physical assault calculated to generate public interest no Court member disagreed with,[742] indeed, could not disagree with, based on the Court's views on "true threats" as unprotected[743]—provides an exemplar of constitutionally indefensible conduct. Undoubtedly, *Cohen/Bartnicki/Snyder* would treat as similarly unprotected by the First Amendment any ends-justify-the-means illegalities—crimes, torts, breaches of contract, other wrongful conduct, and so on—arising from the panoply of variations of active-participation/conduct.[744]

Two important recent decisions exemplify *Cohen-Bartnicki-Snyder*'s active-participation-versus-passive-receipt dichotomy and its ramifications for global democracy. In *Democratic National Committee v. Russian Federation, et al.*[745] plaintiff sued the second-level participants—WikiLeaks, Julian Assange, the Trump Campaign, and certain campaign participants[746]—for WikiLeaks's vast email dumps pursuant to its solicitation of an agreement with the Russian Federation to strategically release emails harmful to the Clinton campaign just prior to the Democratic Convention and 2016 election.[747] The emails had been previously acquired illegally by the Russian Federation[748] through pervasive "hacking" and theft.[749] Neither WikiLeaks nor the campaign defendants had agreed to participate in the illegal acquisition or had

---

to provide documents was perfectly legitimate. It viewed this position as "Nixonian" and "cavalier about the rule of law in the service of advancing its political agenda." *Obama Mea Culpa,* WALL ST. J., May 28, 2013, at A14. The Court denied review of a divided Fourth Circuit panel opinion despite an amicus curiae argument it should provide clarity in a "confusing legal landscape" where protection varied from state to state and in federal and state courts in the same city. Adam Liptak, *Supreme Court Rejects Appeal From Times Reporter Over Refusal to Identify Sources*. June 2, 2014.N.Y. TIMES. Another commentator suggested this privilege had received "nearly universal recognition by the states and other established democracies." Theodore J. Boutros, J., *A First Amendment Blue Spot,* WALL ST. J. May 28, 2014. The case is U.S. v. Sterling, 724 F.3d 482, 492-99 (4th Cir. 2013) (reaffirming Risen had no First Amendment privilege under *Branzburg* to refuse to testify in a federal criminal trial involving disclosure of classified information, including confidential sources), *cert. denied,* 134 S.Ct. 2696 (2014). The Administration's position was fully consistent with *Barnicki*, which the column does not mention. *Compare infra* the discussion of *Democratic National Committee v. Russian Federation* and the British extradition litigation involving Julian Assange in the text accompanying notes 763-73.

[742] *See supra* text accompanying notes 134, 180-85, 191-92 and *infra* text accompanying notes 746-73.

[743] *Id. And see supra* note 187.

[744] *See* ELDER, PRIVACY TORTS, *supra* note 203, at § 2:18.

[745] 392 F.Supp.2d 410, 432 (S.D.N.Y. 2019).

[746] *Id.* at 417-18.

[747] *Id.* at 423-24.

[748] *Id.* at 433-36.

[749] *Id.* at 419-23.

advance notice thereof[750] but had actual knowledge the Russian Federation had illegally acquired the information.[751] All parties conceded the second-level participants had not participated in the illegal acquisition.[752]

Judge John G. Koetl found no actionable "after-the-fact-conspiracy" in WikiLeaks's making the post-completed-theft solicitation and agreement[753] or in other second-level defendants' "welcom[ing]" the dumps as "helpful."[754] WikiLeaks's scienter of the information's illegal acquisition by the Russian Federation was "constitutionally insignificant" under *Bartnicki*.[755] Its post-theft solicitation and agreement were "constitutionally meaningless,"[756] as the plaintiff conceded such "meetings with information thieves" are "common journalistic practices."[757] Adoption of the plaintiff's "after-the-fact-conspiracy" doctrine would "eviscerate *Bartnicki*."[758] Trump campaign co-defendants were no different.[759] Judge Koetl rejected the plaintiff's argument that the campaign's encouragement and coordination efforts with WikiLeaks defendants and the Russian Federation for strategic release constituted an actionable aiding and abetting under the First Amendment. These efforts were indistinguishable from direct provision to and publication by them.[760] He refuted a trade-secrets exception under *Bartnicki*, finding the materials solicited—financial, political, and voter registration and strategies—in a Presidential race were "plainly… entitled to the strongest protection.[761]

The Government of the United States v. Assange[762] involved Assange's fight to evade extradition. In applying the dual-criminality doctrine, Magistrate Judge Vanessa Baraitser rejected Assange's argument the Human Rights Act—incorporating the European Convention on Human Rights and Article 10—would be violated were Assange to be extradited.[763] She repudiated Assange's claim his efforts were "merely a bold and more inquisitive form" of newsgathering

---

[750] *Id.* at 433-34.
[751] *Id.* at 434-37.
[752] *Id.* at 418, 421, 430, 432-33.
[753] *Id.* at 435-36.
[754] *Id.* at 433-34.
[755] *Id.* at 434-35.
[756] *Id.* at 435.
[757] *Id.*
[758] *Id.* at 435-36.
[759] *Id.* 436.
[760] *Id.*
[761] *Id.* at 437-38.
[762] Westminster Mag. Ct. (Jan. 4, 2021).
[763] *Id.,* paras. 77, 96-102, 115-18, 131-32, 140, 147, 190, 269-75, 277, 355-63.

encouragement [764] indistinguishable from solicitations journalists ordinarily make. She detailed Assange's alleged nefarious activities[765]—citing the clear example of Assange agreeing to use his expertise to try to "hack" the U.S. Department of Defense code supplied by Chelsea Manning.[766]

Magistrate Judge Baraitser held Assange to the ordinary duties of criminal law.[767] She applied the European Court of Justice's decision in *Brambill and others v. Italy,*[768] upholding journalists' convictions for intercepting radio communications of *carabinieri* to obtain notice of crime scenes. These illegalities involved not legally *gathering* information but illegally *taking* it. [769] Reflecting on *Bartnicki*'s dichotomy, she indicated that had Assange merely passively received the information, his claim would have been viewed differently under Article 10.[770] Citing First Amendment doctrine, Judge Baraitser found no basis for barring extradition on free-expression grounds under *Bartnicki.*[771] She rejected the ends-justifies-the-means[772] justification of Assange that Justices Breyer and Alito—and impliedly the entire Court—repudiated in *Snyder v. Phelps.*[773]

The Supreme Court and other courts have repeatedly acknowledged that the media "remain free to seek news from any source by means within the law."[774] This includes "paradigmatically 'routine newspaper reporting technique[s]'"[775] such as questioning those with

---

[764] *Id.*, paras. 77-92.
[765] *Id.*, paras. 96-102 (willingness to effectuate such through computer hacking by himself and recruiting others, providing Chelsea Manning with drop-box link in directory designated for her, to which she uploaded quarter-million documents).
[766] *Id.*, para. 102.
[767] *Id.*
[768] Application 22567/09, 23 June 2016.
[769] *Assange*, para. 117.
[770] *Id.*, paras. 118, 140, 147.
[771] *Id.*, paras. 190. 269-78.
[772] *Id.*, paras. 355-63. Judge Baraitser denied extradition on other grounds. This decision was reversed on appeal based on new submissions by the U.S. and remanded for further proceedings. High Ct. Gov't of the United States of Am. v. Assange, [2021] EWHC 3313 (Admin), [2021] All ER (D) 67 (Dec). Assange's extradition remained under legal challenge in British courts until resolved diplomatically. Under the negotiated agreement, Assange pled guilty in a U.S. district court in Saipan to conspiring to obtain and disclose classified U.S. documents and was sentenced to time served in a UK prison. He later appeared before the Parliamentary Assembly of the Council of Europe and claimed he had "pled guilty to journalism" to resolve the case. Patrick Reeveel, ABC News, Oct. 1, 2024.
[773] *See Snyder*, 562 U.S. at 461–63.
[774] *See* Branzburg v. Hayes, 408 US. 665, 681–82 (1972).
[775] The Florida Star v. B.J.F., 491 U.S. 524, 538 (1989 (citing Smith v. Daily Mail Publishing Co., 443 U.S. 97, 103 (1979).

confidential or restricted information.[776] However, crimes, torts, contract breaches, and the "media play[ing] tyrant to the people," [777] are unprotected under the *Cohen-Bartnicki-Snyder* limitations on the *Daily Mail Florida Star* rule. Yet, questions have arisen about lies inducing reliance made to potential news sources, either by active misrepresentation or calculated omission, and whether these are ever "routine," and, if so, when and where courts should draw the line.

In *Taus v. Loftus,*[778] the California Supreme Court delved into the asserted, highly problematic "right" of newsgatherers to prevaricate in interpreting its rule that "[a]t most, the [First Amendment] may preclude tort liability that would 'place an impermissible burden on newsgatherers… by depriving them of their 'indispensable tools…'"[779] *Taus* involved a professional-newsgatherer who deliberately misrepresented herself as associated with the plaintiff's psychiatrists in an interview with the plaintiff's foster mother.[780] The court differentiated ruses "ordinarily" engaged in from those of "an especially egregious and offensive nature," like a call to close family or friends under the guise of emergency medical personnel seeking information about medication or a mental condition in order to treat a patient.[781] Between these poles was the scenario before the court in *Taus***,** which the court held to be a tortious acquisition–an "especially troublesome" and "special and unusual" acquisition of information–involving comparably private information a parental surrogate would not be expected to reveal.[782]

Courts will continue to struggle with the parameters and varieties of material falsehoods and prevarications inducing reliance during the newsgathering process. Courts should carefully assess what is undoubtedly affirmative conduct-active-participation-inducing-reliance that would otherwise be unprotected under the above criteria in determining whether First Amendment doctrine should countenance and encourage such. Clearly, innocuous "little white lies" might be considered "routine." Yet, courts should be supremely wary of protecting calculated misrepresentations relied on by duped and trusting source victims to record their comments, which are not unlike breached promises of source anonymity held actionable in *Cohen v. Cowles Media*

---

[776] Taus v. Loftus, 151 P.3d 1185, 1220-21 (Cal. 2007).
[777] Shulman v. Group W Prods, Inc., 955 P.2d 469, 497 (Cal. 1998).
[778] *Taus,* 151 P.3d 1185.
[779] *Shulman*, 955 P.2d at 946-49 (internal citations omitted).
[780] *Taus*, 151 P.3d at 1214–17.
[781] *Id.* at 1222. This newsgathering practice is called "blagging" in the United Kingdom. *See* ELDER, PRIVACY TORTS, supra note 203, at § 2:18.
[782] *Taus*, 151 P.3d at 1223.

Co.[783]

Courts should not cynically assume, as Judge Richard A. Posner alluded to in *Desnick v. American Broadcasting Companies, Inc.*,[784] that reporters lie like the proverbial rug, such that no one can reasonably rely on their veracity, and anyone who does so is a damn fool. This conclusion shows disrespect for the law and legal system, collectively defames the citizenry as collectively naïve, gullible and unsophisticated rubes, devalues and disparages the professionalism of reporters as presumptive, unprincipled liars, and diminishes the integrity of the "Fourth Estate" and its products by telling sources media promises are not to be believed and sources must be overtly suspicious and exceptionally self-protective. Judge Posner's suggestion negatively impacts the availability of and willingness of sources of information to share, and greatly enhances the profit-driven ends-justifies-the-means manic chase for or engineering of the "story."[785] These types of lies are not in the interest of a responsible media and a free democratic society-and are likely not required by the First Amendment, as even Judge Posner seems to concede.

CONCLUSION

As indicated above and elsewhere,[786] the Court's *Cohen-Bartnicki-Snyder* trilogy collectively stands for the position that the Court rejects heightened review where a defendant violates generally applicable laws having only an "incidental effect" on newsgathering. The Ninth Circuit recently acknowledged this line of cases in *Planned Parenthood Fed'n of Am. v. Newman*,[787] where the court reaffirmed that "journalism and investigative reporting do not require illegal conduct"—"the established principle that the pursuit of journalism does not give a license to break

---

[783] *See Cohen*, 501 U.S. at 663–64.

[784] 44 F.3d 1345, 1348-54 (7th Cir. 1995). Judge Posner stated: "Investigative journalists well known for ruthlessness promise to wear kid gloves. They break their promises, as any one of normal sophistication would expect. If that is 'fraud,' it is the kind against which potential victims can easily arm themselves by maintaining a minimum of skepticism about journalistic goals and methods." *Id.* Plaintiff was a successful entrepreneur and professional. No "elaborate scheme of fraud" was involved, "only… a scheme to expose publicly any bad practices that the investigative team discovered"—not itself a "fraudulent scheme"—so plaintiff had no basis for complaint. *Id.* at 1353-54. Judge Posner conceded no First Amendment basis existed for defendant's actions: "[T]here is no journalists' privilege to trespass." *Id.* at1351. He suggested, however, that no "established rights" were violated, "with the possible and possibly abandoned exception of contract law." *Id.* at 1354.

[785] *See* LEVESON INQUIRY REPORT discussed in ELDER, PRIVACY TORTS, *supra* note 203, at § 2:20.

[786] *See* Elder, *Recordings, supra* note 4, Parts I, II.

[787] Planned Parenthood Fed'n of Am. v. Newman, 51 F.4th 1125 (9th Cir. 2022).

laws of general applicability."[788] Yet, the same Ninth Circuit in a panel majority decision found *Cohen* inapplicable in-the-recording-of-police-in-a-public setting, holding that such recordings in violation of state law violate the First Amendment rights of the recorder—in other words, special protection applies to "the act of recording."[789]

So, prototypical *conduct* magically and surreally becomes fully protected *speech*. The author deals with this incoherence elsewhere, in cases of recordings at ground level and from drone "eyes in the sky," and suggests newsgatherers of all kinds—including now the omnipresent citizen-journalist-hunter-gatherer who can record and disseminate almost immediately anything the recorder wishes, which involves law enforcement, public officials, and almost inevitably, all matters of public interest—should be subject to the *Cohen-Bartnicki-Snyder* rational-basis standard for illegal or wrongful conduct in acquisition. The author suggests these incoherent rules may not be limited to public property. If, as argued by photojournalists in the Texas drone-statute litigation, constitutional rights of image capture had extended to private property,[790] the Orwellian implications of these developments would be clear.

Two recent cases demonstrate vividly the threats to privacy emanating from aggressive attempts to artificially limit the Court's very restrictive protection for newsgathering by adopting heightened review to invalidate legislative distinctions, even those replicating common-law decisions. In *Project Veritas v. Schmidt*, [791] the Ninth Circuit panel majority held that what it deemed Oregon's content-based speech-restriction statute, was unconstitutional.[792] Relying on its precedents, the court found recordings are "an inherently expressive activity." [793] Oregon's quagmire arose from adopting two exceptions. Intense lobbying for one exception was championed by the ACLU,[794] incorporating the recording-police-in-public "growing-consensus"[795] decisions. The other involved police recordings of felonies endangering life.[796]

By so doing, Oregon thereby impermissibly created content-based distinctions between police and other public officials and matters of

---

[788] *Id.* at 1135.
[789] Project Veritas v. Schmidt, 72 F.4th 1043, 1055 (9th Cir. 2023), *vacated, for reh'g en banc*, 95 F.4th 1152 (9th Cir. 2024).
[790] Elder, *Recordings, supra* note 4, Parts I, II.
[791] *Project Veritas*, 72 F.4th at 1043.
[792] *Id.* at 1068.
[793] *Id.* at 1055.
[794] *Id.* at 17052.
[795] Elder, *Recordings, supra* note 4, Part I.
[796] *Project Veritas*, 72 F.4th at 1051.

public interest, and between felonies and misdemeanors, distinctions based on the *activities* being recorded.[797] Talk of being caught between the proverbial rock and a hard place! The panel majority found the statutory requirement of notice—not consent—before recording would "effectively destroy" Project Veritas's recording of "candid responses."[798] Announced recordings were not an adequate alternative under strict-scrutiny standards.[799] The majority held that its time-honored decision in *Dietemann v. Time, Inc.*was irrelevant in cases involving public-rather-than-private places,[800] giving exceptionally broad sway to the "unique medium" of recordings with vast dissemination capabilities.[801]

Judge Christen's excellent and important dissent emphasized Project Veritas only conceded "most" of its activities would occur in public—which the majority ignored.[802] She emphasized the majority "gravely misstep[ped]" in ignoring the First Amendment interests of those who do not want their thoughts recorded and appropriated.[803] She identified the "catch 22"[804] presented by the two "carve outs."[805] By incorporating them, Oregon's statute became subject to strict scrutiny and the court's "topsy-turvy approach" to First Amendment analysis.[806] Judge Christen emphasized the unique aspects of surreptitious recordings are the same features "particularly damaging to privacy."[807] The majority's "alternative-channels analysis" was "particularly concerning" because it lacked "obvious limits."[808]

If it sufficed for free-expression protection that recording acquired newsworthy information, this might likewise apply to Oregon's eavesdropping statute and narrower privacy provision in 40 other jurisdictions. After all, such recordings "in non-public locations" would

---

[797] *Id.* (emphasis supplied).
[798] *Id.* at 1065.
[799] *Id.* at 1065–66.
[800] *Project Veritas*, 72 F.4th at 1065-66.
[801] *Id.*
[802] *Id.* at 1074-75 (Christen, J., dissenting) (Project Veritas did not intend to restrict its recordings without announcement to public settings "despite the majority's statements to the contrary.").
[803] *Id.* at 1075. Judge Christen emphasized "[t]he importance of the right to have notice before one's oral communications are recorded cannot be overstated because technology allows recordings to be selectively edited, manipulated, and shared across the internet in a matter of seconds." *Id. Dietemann*'s protection of speaker autonomy was not limited to private homes. *Id.* ("Secret recording is far more destructive to one's privacy than merely having oral communications heard and repeated."). Modern technology made *Dietemann* "more important than ever." *Id.* at 1070.
[804] *Id.* at 1081.
[805] *Id.*
[806] *Id.*
[807] *Id.* at 1083.
[808] *Id.*

also be "effective methods to gather information of public concern that cannot be otherwise obtained."[809] The majority's disavowal of this vulnerability was not persuasive.[810] Judge Christen would have severed the two exceptions[811] and upheld the statute under *Cohen*'s generally appliable laws-"incidental effects"-on-newsgathering doctrine.[812] This approach left an expansive plethora of traditional investigative options available.[813]

The Fourth Circuit issued another recent troublesome example of federal appellate courts' zealous circumvention of *Cohen-Bartnicki-Snyder* in *People For The Ethical Treatment of Animals, Inc. v. North Carolina Farm Bureau Fed'n, Inc.*[814] The state adopted a detailed statutory scheme to ensure false-fraudulent employees could not gather information, including via recording to sabotage the employer.[815] The Fourth Circuit panel majority viewed these restrictions as "burden[ing] newsgathering and publishing activities"[816] in violation of earlier recognition that *creating* speech is of coequal stature to *publishing* newsworthy information.[817] Collectively, these limitations on false-fraudulent-employee actions would "halt all meaningful undercover investigations."[818] The majority limited its injunction to recording efforts in nonpublic areas of employer premises which it deemed protected

---

[809] *Id.*

[810] *Id.* (noting eavesdropping statutes and party-to-conversation statutes involve an identical privacy interest—"a person's oral communications are shared with an unintended audience and the speaker loses the ability to knowingly choose to speak or not to speak, based on that audience").

[811] *Id.* at 1073.

[812] *Id.* at 1083.

[813] *Id.* at 1078 (detailing "all the tools of traditional investigative reporting").

[814] 60 F.4th 815 (4th Cir. 2023), *cert. denied,* 144 S.Ct. 325 (2023).

[815] *Id.* at 821. The statute was intended to incorporate the rules adopted in *Food Lion, Inc. v. Capital Cities/ABC*. *See infra* text accompanying notes 7, 712-13 and *infra* notes 823-24.

[816] *Id.* at 828. Sanctioning disloyal capture of data prevented false employees from publishing critiques using notes taken of documents or policies left in a breakroom, forbade photographing the same, prohibited undercover employees from positioning a camera in the factory area where employed, and might even proscribe conversations with other employees if such caused the state to close the facility. *Id.*

[817] *Id.* at 829. The provisions "single out speech," as all barred activities are not sanctioned if the false employee "keeps them to herself." If used, heavy sanctions are imposed. *Id.* Only speech criticizing employers is covered, failing strict and intermediate scrutiny. *Id.* at 829-32.

[818] *Id.* at 831 (by "outlaw[ing]" all recordings and capturing of document contents, even by note-taking). The Fourth Circuit seemed incensed by a provision extending liability to anyone "'who intentionally directs, assists, compensates, or induces another person to violate'" the act. *Id.* (internal citation omitted). That conduct is exactly what *Bartnicki* indicated was active-participation outside the protection of the First Amendment. *See supra* text accompanying notes 689-90, 696-99, 732-42.

newsgathering speech.[819] In holding the statute unconstitutional as applied, the majority conceded this "likely means the same result must follow for most (if not all) who engage in conduct analogous to PETA's"[820]—in other words, *any* citizen-journalist-hunter-gatherer.

Judge Rushing dissented, emphasizing the statute incorporated newsgathering limitations enforced in *Food Lion, Inc. Capital Cities/ABC,*[821] which found the torts at issue—breach of loyalty and trespass to land—"'fit neatly'" into *Cohen*'s framework, as "'[n]ether tort targets or singles out the press.'"[822] No heightened scrutiny was required. Citing *Planned Parenthood Fed'n of Am.*, Judge Rushing found this legislative tort scheme did not "necessarily involve expression or impose a unique burden on the press."[823] She identified "foundational problems" with the majority. An interest in gathering newsworthy information provided no right of entry onto private property or to exceed limitations thereon in order to engage in secret recording.[824]

While agreeing "the mere act of recording by itself is not categorically protected speech," [825] she emphasized other circuits extended First Amendment protection of matters of public concern recorded *only* in *public places*. The majority failed to "grapple" with this public space-private property distinction.[826] Judge Rushing would have followed the Court's leading decisions on newsgathering.[827] Under the majority's analysis, the leading North Carolina case on intrusion upon seclusion, *Miller v. Brooks,*[828] might have entailed a different result had it involved not an estranged spouse positioning a hidden camera in a bedroom but instead involved a household employee "looking for a juicy news story to sell (and, perhaps, placed the camera in the parlor rather than the bedroom)."[829] Under the majority's view, the First Amendment would likely have protected this false-fraudulent employee.[830]

Judge Rushing emphasized another fundamental defect—the majority's erroneous construction of the statute as involving *speech*

---

[819] *PETA*, 60 F.4th at 821, 836.
[820] *Id.* at 838.
[821] *Id.* at 843-44.
[822] *Id.* at 843 (quoting Food Lion Inc. v. Cap. Cities/ABC Inc.,194 F.3d 505, 521 (4th Cir. 1999) (following *Cohen*).
[823] *Id.* at 844-45.
[824] *Id.* at 845.
[825] *Id.*
[826] *Id.*
[827] *Id.*
[828] 472 S.E.2d 350 (N.C. App. 1996).
[829] *PETA*, 60 F.4th at 846.
[830] *Id.* ("Why tort law should bend to the trespasser in one instance and not for the other is, at best, unclear.").

regulation.[831] Citing an important aspect of *Bartnicki v. Vopper,*[832] she emphasized "*using information* is not the same as *speaking*"—using information to harm another person or entity in breach of an obligation owed that person or entity does not raise First Amendment concerns.[833] The North Carolina statute prohibited *use* of misappropriated information or surreptitious recordings to *facilitate* the tort of breaching a duty of loyalty. [834] The majority's content-based analysis—distinguishing between those who trespass and those who do not, documents appropriated with permission and those without, and employees breaching loyalty and those who do not—did not involve content-based distinctions. They provided "an enhanced tort remedy for a heightened privacy invasion—one that is intentionally harmful by breaching an employee's duty of loyalty and causing actual damages to an employer."[835]

Consider the Orwellian implications of the majority. Anyone who self-appoints-anoints as an investigative reporter-hunter-gatherer-"employee" has a largely unfettered right in non-public places—except *maybe* a bedroom—to install a camera and record conversations and activities, copy documents, examine records and private correspondence, access and print from a personal computer or cell phone, interrogate co-employees or potential victims—including a spouse and children—and spread this information, complete with photographs, on the Internet in the interest of "outing" an employer viewed by the investigative reporter-hunter-gatherer-"employee" as engaging in actions perceived to be antisocial or unlawful. The author writes elsewhere of the Orwellian privacy implications of an illustration involving a public official—law-enforcement officer or other public official—or private person subjected to external surveillance at ground level or by drone by a person or entity endeavoring to undermine home-schooling advocates opting for alternatives to public education, whether secular or religious.[836]

Under the Fourth Circuit's decision, parent-employers now must worry a false-"employee"-saboteur unwittingly hired to provide assistance or specialized skill or knowledge or special-education expertise might have a First Amendment *right* to falsely and fraudulently self-embed into an employer's home and family to gather all manner of private information of "public concern" concerning whether the home-

---

[831] *Id.* at 846.
[832] 532 U.S. 514, 526-27 (2001). *See supra* text accompanying note 623.
[833] *PETA*, 60 F.4th at 846.
[834] *Id.*
[835] *Id.* at 847.
[836] *See* Elder, *Recordings*, *supra* note 4, Parts I, II.

schooler may be violating state requirements for home-schooling or is otherwise engaged in what the self-embedded "employee" views as arguably abusive, neglectful, or otherwise antisocial, as defined by an "employee's" self-interested, my-truth perspective. Parallel protection would presumably be accorded a false-fraudulent in-house personal or business assistant, baby-sitter, dog-walker, house cleaner, handyman, house painter, window-washer, landscaper, and so on. The mind boggles.

Yet, this is the environment America faces if the First Amendment's traditional, very restrictive realm of protected newsgathering is replaced by a heightened—and, by definition, almost always fatal—scrutiny applying a slice-and-dice, scissor-and-splice approach to legislative decision-making, focusing intense scrutiny in search of perceived legislative microaggressions in what are otherwise reasoned, reasonable statutory distinctions reflecting and incorporating common-law doctrine, common sense, common decency, and common expectations—illustrated by *Food Lion*. If the Supreme Court refuses to repudiate this scary approach and fails to reaffirm its rejection of heightened scrutiny in its *Cohen-Bartnicki-Snyder* and earlier jurisprudence, it will incentivize self-perceived citizen-journalist-hunter-gatherer-"employees" to go where they please, maybe even as "volunteer" "employees," gather and record whatever information they deem of public interest, and wreak havoc by disseminating it widely—perhaps, permanently—on the Internet.

Is this America's Orwellian future? It is one wholly at odds with the vision of America's Founding Fathers: A no-holds-barred, information-gathering-disseminating legal environment energizing all manner of partisan, holier-than-thou, breast-beating, and other actors. The Court should grant review of a state legislation-eviscerating debacle at an early opportunity and adopt the Irish ballad—*no, nay, never! No, nay, never, no more*[837]—to eviscerate the idea of First Amendment exceptionalism for newsgathering and reaffirm the first principles found in the Court's well-defined, extensive, and very restrictive newsgathering jurisprudence discussed in detail above and elsewhere.

Two 2024 appellate developments provide hope that this privacy-intrusive trend discussed above may be in stall mode or undergoing a modest rethinking. First, the Ninth Circuit vacated for rehearing en banc *Project Veritas v. Schmidt*.[838] Second, a powerful Fifth Circuit opinion by Judge Willett in *National Press Photographers Association v.*

[837] *The Wild Rover*.
[838] 95 F.4th 1152 (9th Cir. 2024).

McCraw[839] reversed the trial court and upheld the Texas drone statute's "No-Fly" provisions, prohibiting overflight under 400' over critical infrastructure facilities, correctional/detention facilities, and sports-venue locations, finding such overflights had "*nothing to do* with speech or even expressive activity" and did *not* "implicate the First Amendment."[840]

Noting the "ongoing and vigorous debate" as to photojournalism, the Fifth Circuit. "[i]n an abundance of caution," did find "some level" of scrutiny applied to the drone statute's "Surveillance" provisions, where "non-expressive aspects" predominated.[841] The court concluded that the prohibitions on filming—with a lengthy list of exceptions (but not one for press newsgathering)[842]—met the flexible standard applicable in cases involving surveillance of private persons and private land, holding that "[*a*]*t most*" the intermediate level of scrutiny applied, as the statutory prohibitions focused not on the image's *message/content* but solely on *where* the filming occurred and *how*—filming from a drone, without consent, and with the intent to engage in surveillance.[843]

The Supreme Court denied the petition to review the Fifth Circuit's decision on October 7, 2024, without dissent.

As a final thought, it is worth emphasizing that the Supreme Court's unanimous decision in *TikTok, Inc. v. Garland*[844] assumed (but did not decide)[845] that some level of heightened scrutiny applied in upholding the federal statute that mandated TikTok's divestiture on the preemptive ground that TikTok was required to "'distribute, maintain, or update' a foreign adversary"[846] (the PRC) with "vast swaths of personal data" collected from TikTok's 170 U.S. users,[847] that enabled the PRC to

---

[839] 90 F.770 (5th Cir. 2024). *See* the detailed analysis of the Texas drone-statute litigation in Elder, *Recordings, Part II, supra* note 4.

[840] *Id,* at 787-88 ("These are flight restrictions, not speech restrictions.") (emphasis supplied).

[841] *Id.* at 789-91 (The court cited the dissents of Judge Rushing and Judge Christen discussed above, together with many of the Court's cases discussed herein and then concluded: "… [R]ecording from the sky—something the average private person cannot avoid and from where the average photographer would not be able to reach—is *simply not the same thing as expressing one's views*.") (emphases supplied). Of course, that is the very point made throughout this article and *see* Elder, *Recordings,* Parts I, II*, supra* note 4.

[842] *National Press Photographers Association*, 90 F.4th *at* 789.

[843] *Id.* at 792-93 (emphasis added).

[844] 604 U.S. __ , Slip Op., 1 (Jan. 17, 2025) ("[C]onscious that the cases before us involve new technologies with transformative capabilities," the Court found that this "challenging new context counsels caution on our part.") .

[845] *Id.* at 9.

[846] *Id.* at 4.

[847] *Id.* at 12.

"leverag[e] its control" to violate fundamental privacy and related First Amendment interests of Americans—including freedom of movement and pervasive surveillance, location-tracking (including federal employees and contractors), dossier construction for blackmail use, engagement in corporate espionage, advancing PRC intelligence operations. [848] All Court members found the Government's data-gathering and use concerns compelling in the national-security context under the intermediate-scrutiny review standard the Court noncommittally relied on for the purpose of resolving the case before it.[849] It's worth emphasizing that the Court could have justifiably applied the detailed analysis above and resolved the case under the lowest tier of review—rational basis—by treating the federal act as requiring divestiture as a reasonable, preemptive, preventative measure to forestall the identified types of not-protected-by-the-First-Amendment conduct identified at length in the Court's jurisprudence.

As indicated herein, the Court has refused to protect illegal or wrongful conduct in news- and data-gathering by media and others—whether criminal, tortious, contract, or other broad varieties of wrongful conduct—including breaches of promised anonymity and confidentiality, misappropriation-theft of intellectual property, theft of documents, illegal entry/intrusion, wiretapping, physical threats. Indeed, as emphasized above, *Bartnicki v. Vopper* has been interpreted as barring defendants' from making wrongful-surveillance victims unauthorized information-providers. Extensive recent case law has likewise utilized a plethora of tort, contract, statutory and other theories and remedies to ensure against wrongful use of medical and other sensitive data by high-tech data gatherers and their enabler-abettors, with nary a hint that such remedial causes of action and remedies for data-gathering victims raise First Amendment free-expression issues.[850] When one adds to the broad legislative power of Congress over data-gathering the undoubted national-security threat identified by Congress and the Court, the case for applying no or very minimal First Amendment scrutiny as to empirically documented, likely nefarious PRC uses [851] of such data presents the prototypical slam-dunk in favor of upholding the federal act

---

[848] *Id.* at 13-19. The Court found the "overriding congressional concern" over data collection sufficed to sustain the act against First Amendment attack and did not dealt with the alternative congressional concern over a foreign adversary's "having control over the recommendation algorithm" and "wield[ing] that control to alter the content on the platform in an undetectable manner." *Id.* at 18-20.
[849] I*d.* at 13-20.
[850] ELDER, PRIVACY TORTS, *supra* note 203, at § 2:2, 2:6, 2:7, 2:10, 2:22, 3:7, 5:2.
[851] *TikTok, Inc.,* at 13-19.

under this deferential rational-basis standard.

If, as one originalist has recently suggested, one applies the Framers' intent as of 1791, it is hugely improbable that they would have countenanced a newspaper to direct its employees' conduct while collecting information and distributing the employer's newspapers "to peek in windows, look down from roofs, listen in on conversations, and otherwise spy on many people as possible" while under contract with a foreign adversary to share all the data collected.[852] The same would doubtlessly be true if the originalist focus is on 1868, the effective data of the Fourteenth Amendment and its incorporation of fundamental guarantees of citizenship.[853] Several trenchant comments by Justice Gorsuch in his brief concurrence support my rational-basis-review conclusion. Justice Gorsuch expressed concerns regarding whether litigation over "tiers of scrutiny" "can sometimes take on a life of its own and do more to obscure rather than to clarify the constitutional questions."[854] He emphasized the Government's compelling interest based on the record before the Court on TikTok's "harvesting" or "min[ing] of data both from TikTok users and others who do not consent to share their information."[855] Moreover, the petitioners' proposed alternatives "would do little to deter the PRC from exploiting TikTok to steal Americans' data."[856] Lastly, Justice Gorsuch underlined emphatically how this case differed from the free-speech doctrines of Justices Brandeis and Holmes: "Speaking with and in favor of a foreign adversary is one thing. Allowing a foreign adversary to spy on Americans is another."[857] In other words, he appears to reaffirm the speech-versus-conduct dichotomy underlying the Court's adoption of the rational-basis standard in wrongful-and-illegal-acquisition settings.

---

[852] See Robert G. Natelson, *TikTok and the First Amendment*, LAW & LIBERTY (Jan. 23, 2025), lawliberty.org-tiktok-and-the-first-amendment/?mc_cid=b23382017708/knc_eud=66cbf3e987 (suggesting the Court "asked the wrong questions, relied on highly subjective inquiries, and led the court into needless difficulty" rather than adopting the Framers' pivotal press-versus-speech dichotomy).

[853] See David Elder, *Sullivan's Treat to American Democracy,* LAW & LIBERTY (Dec. 30, 2024), lawliberty.org/sullivans-threat-to-american-democracy?mc_cid=d8ca68dd548lmc_eid+6babf3e987 (responding to an essay by Professor John O. McGinnis suggesting that the appropriate originalist focus in attacking *New York Times Co. v. Sullivan* is 1868 and analyzing state constitutional provisions on or near that date ratifying the common law's protection of reputation as a fundamental right).

[854] *TikTok, Inc.*, at 3 (Gorsuch, J., concurring in judgment).

[855] *Id.* (emphases supplied).

[856] *Id.* at 4 (emphases supplied).

[857] *Id.* (emphases supplied).