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THE "ULTIMATE QUESTION": A LIMITED ARGUMENT FOR TRAFFICKING IN STOLEN SPEECH

MATTHEW J. COLEMAN*

Introduction

Although it recently came close, the Supreme Court has never answered the "ultimate question" of First Amendment law: should First Amendment protection extend to the publication of truthful information obtained by a publisher through unlawful means? In the case of Bartnicki v. Vopper, the Court took its boldest steps to date in this area and extended the First Amendment shield to a "punished publisher of information [that] obtained the information in question in a manner lawful in itself but from a source

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1. Throughout this Article, I will use the words "publish" and "publication" to refer to the dissemination of information via both print and electronic media, including radio, television, and the Internet.

2. In Florida Star v. B.J.F., 491 U.S. 524, 532 (1989), the majority noted that the Court has "carefully eschewed reaching this ultimate question, mindful that the future may bring scenarios which prudence counsels . . . not resolving anticipatorily."
who . . . obtained it unlawfully."\^3 In this Article, I argue that the Court should extend Bartnicki\(^4\) to its logical conclusion that, when certain conditions are met, the media should be afforded First Amendment protection for the publication of truthful information, even if the publisher itself acted unlawfully in obtaining that information.

Understandably, I suspect that many people cringe at the idea that the Constitution would give special protection to news gathered in an illegal and possibly immoral manner. Similarly, those people and others must wonder what kind of incentives such a rule would create. Wouldn't CNN, The New York Times, Hard Copy, and every other news (and soft-news) outlet in the country wiretap the phones of public officials, celebrities, athletes, and potentially even ordinary citizens? Wouldn't other spying techniques be put in place so that e-mail, cordless and cellular telephone conversations, and every other imaginable method of communication would be subject to interception and publication? Wouldn't such a scenario chill private conversation to an unacceptable degree? After all, why should ordinary citizens' rights to privacy take a back seat to the free speech rights of deep-pocket media companies? All of these are legitimate concerns, but ones I will suggest are worst-case scenarios that are more than adequately addressed by continuing to hold the press liable for the unlawful acquisition of information, as opposed to the subsequent publication of that information.\(^5\)

Furthermore, I will argue for only a limited extension of First Amendment protection to the publication of unlawfully acquired information. The Supreme Court has wisely declined "to answer categorically whether truthful publication may ever be punished consistent with the First

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Bartnicki is not the first case of its kind, but rather the first such case to make its way to the Supreme Court. Other cases presenting similar facts include Boehner v. McDermott, 191 F.3d 463, 470 (D.C. Cir. 1999), discussed infra note 86; Pearson v. Dodd, 410 F.2d 701 (D.C. Cir. 1969), discussed infra note 86; Nicholson v. McClatchy Newspapers, 177 Cal. App. 3d 509 (1986).

4. More specifically, it is the result reached in Bartnicki, as opposed to the Court's logic, that I argue should be extended to the "ultimate question." See infra Part I.C for a critique of the majority's reasoning.

5. It is well established that the First Amendment does not prohibit the application of laws of general applicability to the media. See infra note 130. However, existing Supreme Court doctrine suggests that there may be constitutional limitations on government regulation of news-gathering activities. See infra note 130.
Amendment," and I will be true to that advice. Instead of advocating such a broad categorical rule, I will propose in this Article a more nuanced approach based on (1) a recognition that there are competing rights on both sides of the equation — the privacy and speech rights of those whose conversations are misappropriated, on the one hand, and the First Amendment rights of the publisher and its audience, on the other hand — and (2) "[our] profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." Following these guiding principles, which I will refer to as the "competing rights principle" and the "New York Times principle," respectively, will sometimes dictate that courts give precedence to the privacy and speech interests of individual speakers engaged in private conversations over the publishing interests of the press and vice versa. Developing a methodology for how to make this decision in any particular case is the major objective of this Article.

I will argue that the two guiding principles set forth above are fundamentally linked and that both the competing rights principle and the New York Times principle are best served in any particular case by weighing (1) the harm to the individual speaker of having otherwise private communications disclosed against (2) the benefit to the public of having misappropriated information published — a methodology that I will call the "harm/benefit paradigm." I will also suggest that although these factors may seem like wildly variable considerations that could lead to a lack of predictability in the outcome of cases, the public/private nature of the speaker and the public/private nature of the speech at issue serve as useful, though not perfect, proxies for both the harm and benefit sides of the calculus.9 Because existing First Amendment doctrine already incorporates the concepts of public/private figures and determinations of whether information concerns a "matter of public significance," courts will find themselves well equipped to engage in this type of constitutional balancing.10

7. See infra Part II.A.1 for a discussion of why the rights on the individual speaker side of the equation do not rise to the constitutional level. In Part III, I argue that the mere imbalance between the nonconstitutional rights of the individual speaker and the constitutional rights of the media does not necessarily mean that the First Amendment rights of the press should always trump the rights of private speakers.
9. See infra Part III for a graphical representation of the relationships among the public/private nature of the speaker, the public/private nature of the speech, the harm to the speaker resulting from publication, and the benefit to the public resulting from publication.
10. See infra note 171 and accompanying text for a discussion of the Supreme Court
As a general matter, an individual speaker is most likely to feel violated, harmed, and invaded by the publication of unlawfully obtained information if she is a private citizen speaking about private matters. For instance, the average person would probably feel less concerned if her discussion of an upcoming city council election or the state of the global economy was unlawfully intercepted and subsequently published than she would if her discussion of intensely private matters, such as family disputes or personal financial concerns, were illegally intercepted and published for a larger audience. Similarly, on the benefit to the public side of the equation, the public will most likely benefit from, and is likely to find most relevant, discussion of public matters by a public speaker. The utility to the public of the information at issue is likely to decline as the speaker moves down the public/private continuum toward the private citizen endpoint and as the subject matter of the speech slides down the scale toward more purely private matters that have diminishing public relevance. Thus, by considering the public/private nature of the speaker and the public/private nature of the speech, a court will often have performed much of the analysis required by the harm/benefit paradigm.

A question arises at this point. Is the New York Times principle necessarily furthered by weighing the benefit to the public of having misappropriated information published against the harm to the individual speaker of having otherwise private communications disclosed? It is clear that this balancing is based on a recognition that the "ultimate question" presents competing speech interests, but what links the harm/benefit paradigm to an "uninhibited, robust, and wide-open" debate? The fundamental answer is that by honoring the speech rights of the publisher in those instances in which the benefit to the public outweighs the harm to the individual speaker, and by honoring the speech and privacy rights of the individual speaker in those instances in which publication would result in greater harm to the speaker than benefit to the public, the harm/benefit paradigm assures individuals of the requisite privacy needed to foster "uninhibited" private conversation, while simultaneously providing the press with the constitutional protections it is due under the First Amendment. In other words, the course of action that maximizes benefit and minimizes harm tends to favor the speech rights of publishers with respect to the publication of public matters discussed by public figures (which has relatively low privacy costs to the speaker and

jurisprudence that established the public official/public figure/private figure distinctions. See infra notes 173-74 and accompanying text for a discussion of the public/private speech distinction.
relatively large benefits for the public) and to favor privacy rights in the context of the publication of private matters discussed by private speakers (which has relatively high privacy costs to the speaker and relatively small benefits for the public). This means that the information most relevant to an "uninhibited, robust, and wide-open" debate, i.e., matters of public significance discussed by public figures, would be widely disseminated, even if unlawfully obtained by the publisher, and that private citizens could be comfortable that publishers are unlikely to enjoy First Amendment protection for the publication of unlawfully obtained private conversations. Thus, the harm/benefit paradigm avoids the unacceptable chilling of private discussion, while also enhancing the public debate on matters of public significance (consistent with both the competing rights principle and the New York Times principle).

Part I of this Article surveys those aspects of the First Amendment landscape, including the recent Bartnicki decision, that provide insight into the Supreme Court's views on the "ultimate question." Part II lays out the guiding principles, namely the competing rights principle and the New York Times principle, that I propose should guide constitutional analysis of the publication of illegally obtained, truthful information. Part III explores the relationships among the public/private nature of the speaker at issue, the public/private nature of the speech at issue, the relative harm to the individual speaker of publishing private conversations, and the ensuing benefit to the public from publication. Finally, in Part IV, I elaborate on the underlying links among the harm/benefit paradigm, the competing rights principle, and the New York Times principle.

**I. The First Amendment Landscape**

For obvious reasons, news reporters place a premium on information not intended for public view. Nothing sells papers and attracts viewers and listeners like a big scoop, and new technology offers unprecedented access to information that companies and individuals would desperately like to keep private. In an age when twenty-four-hour news is the norm and the quantity of available information is greater than ever, the temptation for reporters to employ unlawful news-gathering techniques to break a big story is also greater than ever. Additionally, media organizations are

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11. See Paul F. Enzinna, Wiretapping and Newsgathering: Criminal and Civil Liability for the Press, COM. LAW., Summer 1999, at 7, 7 ("New technologies for information gathering, storage, and retrieval give reporters access to information that is comprehensive, immediate, and not filtered for public consumption, and that can result in hard-hitting reporting.").
increasingly part of larger corporate conglomerates that ultimately focus on the bottom line and shareholder satisfaction. And, in the news industry, nothing is better for profits than having exclusive access to hard-to-obtain, newsworthy information, even if gaining access to that information requires the use of illegal methods.

For instance, in 1998, the Cincinnati Enquirer published an eighteen-page spread on the fruit company Chiquita Brands International. Among other claims, the stories accused Chiquita of bribing a foreign government


13. I do not mean to suggest that the principal characteristic of today's media environment is an abandonment of traditional journalistic ethics or that reputational considerations do not play a strong role in discouraging the use of unlawful or immoral news-gathering techniques. See infra note 126 and accompanying text (citing journalistic codes of ethics that strictly forbid the unlawful acquisition of information). Instead, my comments are only meant to show that the news industry today, perhaps more so than at any other time in its history, is faced with a number of circumstances that provide incentives for resorting to illegal and invasive news-gathering techniques, including deception, trespass, and the illegal interception of otherwise private communications.

14. Mike Gallagher & Cameron McWhirter, Chiquita Secrets Revealed, CNN. ENQUIRER, May 3, 1998. The Chiquita example is one of many recent, high-profile instances of the media using illegal news-gathering techniques. Others include the highly publicized case involving two Capital Cities/ABC, Inc. television reporters who obtained employment at Food Lion grocery stores to videotape secretly unsanitary food handling practices. The videotape, which included images of Food Lion employees putting Clorox on out-of-date meat before restocking it, aired on ABC's PrimeTime Live on November 5, 1992. See John K. Edwards, Should There Be Journalist's Privilege Against Newsgathering Liability?, COMM. L. W., Spring 2000, at 8, 8 (discussing the Food Lion story). Food Lion brought suit against ABC, alleging fraud, trespass, breach of the duty of loyalty, and unfair trade practices. A jury found that the ABC defendants had committed fraud, trespass, and breach of loyalty and that they had violated the North Carolina Unfair and Deceptive Trade Practices Act. Food Lion, Inc. v. Capital Cities/ABC, Inc., 984 F. Supp. 923, 927 (M.D.N.C. 1997). On appeal, the Fourth Circuit held that the trial court had incorrectly found that the defendants committed fraud and unfair trade practices but affirmed the lower court's judgment that they had breached their duty of loyalty and committed trespass. Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 510 (4th Cir. 1999).
and circumventing Central American laws that limit land ownership.\textsuperscript{15} Chiquita immediately attacked the \textit{Enquirer's} stories as inaccurate, and its lawyers also argued that certain of the paper's news-gathering techniques constituted crimes. With the help of a confidential source at the company, "\textit{Enquirer} reporter Michael Gallagher had accessed Chiquita's voice-mail system and peppered the stories with snippets from messages left for employees."\textsuperscript{16} To avoid a lawsuit, the \textit{Enquirer} renounced its stories, paid Chiquita more than $14 million, and ran front-page apologies for three consecutive days.\textsuperscript{17} Gallagher pleaded guilty to two felony charges of illegal entry into the voice-mail system.\textsuperscript{18}

If Chiquita had sued the \textit{Enquirer}, should the newspaper have been protected under the First Amendment? Should Gallagher have asserted a constitutional defense instead of pleading guilty to illegally accessing the company's voice-mail system? How should a court choose between the Chiquita employees' privacy rights (and speech rights that would likely be chilled by a finding for the newspaper) and the First Amendment rights of the \textit{Enquirer} and its readers? Existing Supreme Court doctrine, including the recent \textit{Bartnicki} case, fails dispositively to answer this question, although the Court has decided a number of cases involving unlawful publication that confront the issues raised by competing speech rights and the tension between free speech and privacy. In the next section, I survey those cases and set the stage for the \textit{Bartnicki} decision.

\textbf{A. Pre-Bartnicki Cases}

As stated above, the Supreme Court has very deliberately declined to answer the "ultimate question." However, it has decided a line of six cases, including \textit{Bartnicki}, that incrementally build up to the inevitable case involving publication of truthful information unlawfully obtained by a publisher. These six cases differ from each other and from the "ultimate question" in the following four principal ways: (1) whether the source of

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\textsuperscript{15} Gallagher & McWhirter, \textit{supra} note 14.


\textsuperscript{17} \textit{Id.}

\textsuperscript{18} Associated Press, \textit{Former Chiquita Lawyer Wants Charges Dismissed: He Says Reporters Illegally Taped Him}, \textit{Plain Dealer} (Cleveland), Jan. 2, 1999, at 10B; Nicholas Bender, \textit{Damage Report}, \textit{COLUM. JOURNALISM REV.}, May-June 2001, at 41. Bender reports that Gallagher "avoided jail by cooperating in the prosecution of George Ventura, the former Chiquita lawyer who had provided the passwords allowing him to hear the voicemail of Chiquita executives." \textit{Id.} at 42. Lawrence Beaupre, the \textit{Enquirer}'s former editor-in-chief, took a job at Gannett, the \textit{Enquirer}'s parent, but was fired after filing a lawsuit against Gannett that argued he had been made a scapegoat. \textit{Id.}
the published information was a private entity/individual or the government; (2) whether publication chilled private conversation or whether publication impacted the plaintiff's privacy rights only; (3) whether or not the information at issue was already publicly available; and (4) whether the information was unlawfully misappropriated or was lawfully obtained through traditional news-gathering techniques. This section analyzes the pre-Bartnicki case law, particularly focusing on these four factors and how they differ from the corresponding considerations presented by the "ultimate question."

1. Cox Broadcasting Corp. v. Cohn

An analysis of the Supreme Court's jurisprudence with respect to the unlawful publication of truthful information begins in 1975 with Cox Broadcasting Corp. v. Cohn. In Cox, a television news reporter covering the trial of six alleged rapists broadcast the name of the victim, who did not survive the rape, in contravention of a Georgia statute. During the course of the trial, the reporter had learned the victim's identity by examining the indictments — public documents which were made available for his inspection in the courtroom — and included her name in a WSB-TV report covering the court proceedings. The victim's father sued the broadcasting company for damages, claiming that his right to privacy had been invaded by the unlawful disclosure of his daughter's name. The media defendants asserted that the broadcast was privileged under both the First and Fourteenth Amendments.

In contrast to the paradigmatic "ultimate question," which necessarily involves a tension between the speech and privacy rights of the individual

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19. Note that this fourth factor may be subdivided to draw a further distinction between whether the unlawful acts, if any, were committed by the publisher or by an unaffiliated third party. This is the defining distinction between Bartnicki and the "ultimate question."

20. See Table 1 infra Part I.B for a summary of Bartnicki, its predecessor cases, and the "ultimate question," in terms of the four factors presented above.


22. Cox, 420 U.S. at 469.

23. Id.
speaker, on the one hand, and the First Amendment rights of the press, on the other, Cox presented a clash solely between the privacy rights of the plaintiff and the speech rights of the press and its audience. There was no potential chilling effect on private conversation likely to result from a finding for the media defendant, because the press obtained the private information at issue from the state, not from private communications. Accordingly, the Court narrowly defined the issue to be decided as whether the state could prohibit the accurate publication of the name of a rape victim obtained from public judicial records.

Justice White, writing for the majority, noted the important role of a free press in democratic society and the great benefit resulting from the publication of "events of legitimate public concern," as compared to the minimal intrusion into the plaintiff's privacy arising from the publication of information that was already publicly available. By placing the victim's name in the public records, the state had effectively decided that the public interest was served by disclosure, and the Court was reluctant to "embark on a course that would make public records generally available to the media but forbid their publication if offensive to the sensibilities of the supposed reasonable man." If there were privacy interests to be protected, the state, by virtue of having direct control over the information at issue, should not have disclosed the victim's name in public court documents. As the Court stated, "Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it."

24. The Cox Court stated:
The version of the privacy tort now before us . . . is that in which the plaintiff claims the right to be free from unwanted publicity about his private affairs, which, although wholly true, would be offensive to a person of ordinary sensibilities. Because the gravamen of the claimed injury is the publication of information, whether true or not, the dissemination of which is embarrassing or otherwise painful to an individual, it is here that claims of privacy most directly confront the constitutional freedoms of speech and press.

Id. at 489.

25. Id. at 491.

26. See id. at 492-95. Justice White stated, "Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally." Id. at 492. Furthermore, "[t]here is no liability when the defendant merely gives further publicity to information about the plaintiff which is already public." Id. at 494 (quoting RESTATEMENT (SECOND) OF TORTS § 625D cmt. c (Tentative Draft No. 13, 1967)).

27. Id. at 496.

28. Id.
Although different from the "ultimate question" in numerous and important ways, Cox was the first in a line of cases to examine the competing rights implicated by the unlawful publication of truthful, but arguably private, information. Nonetheless, the Cox decision falls far short of answering the "ultimate question." First, Cox involved information obtained from the government, not a private citizen. Although confidential information about private persons or organizations revealed by the government can still significantly impact privacy rights, it is much less likely to have a chilling effect on private speech. Additionally, the psychological harm and sense of violation that a plaintiff is likely to feel is arguably greater if his own communications are stolen directly from him than if such communications are revealed by a third party. Moreover, the government freely provided the information to the press; there was no hint that the defendant media company or its reporter committed bad acts. And perhaps most importantly, Cox involved the publication of information that was already public. The majority reasoned that its holding honored the speech rights of the media and enhanced the amount of information available to the public with no consequential effect on the plaintiff's privacy rights. In comparison to the "ultimate question," the Cox fact pattern was quite media friendly and presented a relatively compelling opportunity for the Court to affirm its commitment to uphold vigorously the First Amendment.

2. Oklahoma Publishing Co. v. Oklahoma County

The Court's next opportunity to confront the unlawful publication issue came in 1977 in Oklahoma Publishing Co. v. Oklahoma County, which,

29. Whether or not the Court was right on the privacy point is debatable. Although the victim's name appeared in publicly available documents, it is unlikely that her name would have been widely disseminated absent publication by the press. Rather than measuring the impact on privacy by focusing on whether previously nonpublicly available information was being made public, the Court might have more accurately accounted for the plaintiff's privacy rights by comparing the extent of prepublication and postpublication disclosure.

30. 430 U.S. 308 (1977) (per curiam). In the interim between Cox and Oklahoma Publishing, the Supreme Court decided Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976). In Nebraska Press, a Nebraska state trial judge, in anticipation of a widely publicized multiple murder trial, enjoined the media from publishing or broadcasting accounts of confessions, other than those made directly to the media. Id. at 542. Noting that prior restraints on speech are especially difficult to justify, the Court weighed the First Amendment rights of the press against the criminal defendant's right to trial by an impartial jury. Id. at 551-61. The Court ruled that it was not clear that the trial judge's prior restraint would have protected the accused's rights and that to the extent the order prohibited the reporting of evidence adduced in open court, it violated the principle that the media may report what transpires in the courtroom. Id. at 567-68. Because Nebraska Press presented a conflict
like Cox, arose in the judicial context. In Oklahoma Publishing, Larry Donnell Brewer, an eleven-year-old boy charged in the fatal shooting of a railroad switchman, appeared at a detention hearing in Oklahoma County Juvenile Court on a second-degree murder charge. A pretrial order by the District Court of Oklahoma County enjoined the press from "publishing, broadcasting, or disseminating, in any manner, the name or picture of a minor child" in connection with a juvenile proceeding involving that child then pending in that court. Reporters present in the courtroom during Brewer's hearing learned the accused's name, and photographers snapped his picture as the boy was escorted out of the courthouse to a waiting vehicle. County newspapers then printed a number of stories using Brewer's name and picture.

Relying on Cox and Nebraska Press Ass'n v. Stuart, the Court held that "the First and Fourteenth Amendments will not permit a state court to prohibit the publication of widely disseminated information obtained at court proceedings which were in fact open to the public. . . . There is no evidence that petitioner acquired the information unlawfully or even without the State's implicit approval."

With respect to the four factors identified above, Oklahoma Publishing is indistinguishable from Cox. The unlawfully published information was obtained from the state, publication could not be expected to have a chilling effect on private speech, the information was already publicly available (which the Cox Court equated with a minimal impact on the plaintiff's privacy), and neither the press nor any third party engaged in unlawful news-gathering activities. In terms of a jurisprudential march toward the "ultimate question," Oklahoma Publishing reaffirmed the principles set forth in Cox, but broke little new ground.

3. Landmark Communications, Inc. v. Virginia

Whereas both Cox and Oklahoma Publishing involved the publication of nonconfidential information, Landmark Communications, Inc. v. Virginia addressed the publication of information that was not already

between the First Amendment and the Sixth Amendment, as opposed to competing speech and/or privacy rights, I do not consider it part of the line of cases building up to the "ultimate question."

31. Oklahoma Publ'g, 430 U.S. at 309.
32. Id.
33. Id.
34. See supra note 30 for a discussion of Nebraska Press.
35. Oklahoma Publ'g, 430 U.S. at 310-11.
36. See supra note 29 and accompanying text.
publicly available, thereby taking a giant step in the direction of the "ultimate question." The question presented in Landmark was whether the state could impose criminal sanctions on persons, including the media, for disclosing nonpublic information regarding proceedings before the Virginia Judicial Inquiry and Review Commission, a state board that heard complaints regarding judges' disability and misconduct. The Commission's work was confidential under both the Virginia Constitution and a state statute.

Nevertheless, in October 1975, the Virginian Pilot published an article on a pending inquiry and identified the judge who was the subject of the review. Landmark Communications, the owner of the Pilot, was indicted for, and convicted of, "[u]nlawfully divulg[ing] the identification of a Judge of a Court not of record, which said Judge was the subject of an investigation hearing" by the Commission.

On appeal, Landmark urged the Supreme Court to hold that the First Amendment categorically protects truthful reporting about public officials in their public capacities. Chief Justice Burger, writing for the majority, declined this invitation and took special care to avoid announcing a rule that would go beyond the facts presented and prematurely answer what the Court would later call the "ultimate question."

The narrow and limited question presented, then, is whether the First Amendment permits the criminal punishment of third persons who are strangers to the inquiry, including the news media, for divulging or publishing truthful information regarding confidential proceedings of the Judicial Inquiry and Review Commission. 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. We do not have before us any constitutional challenge to a State's power to keep the Commission's proceedings confidential or to punish participants for breach of this mandate.

The majority conceded that keeping the proceedings of judicial review commissions confidential serves important interests, including encouraging the filing of complaints and facilitating the participation of witnesses in the review process by minimizing their fear of retaliation. Additionally,

38. Id. at 830.
39. Id. at 831.
40. Id. (alteration in original) (quoting VA. CODE ANN. § 2.1-37.13 (Michie 1973)).
41. Id. at 837 (emphasis added) (footnote omitted).
42. Id. at 835.
the legislature had legitimately concluded that confidentiality protects judges from unwarranted negative publicity in the case of frivolous complaints and derivatively helps maintain public confidence in the judiciary by avoiding the announcement of frivolous complaints.\textsuperscript{43} However, the Court ultimately found that such interests did not justify restricting the publication of information that "lies near the core of the First Amendment."\textsuperscript{44}

Because Cox and Oklahoma Publishing only extended to information that was already publicly available, Landmark Communications broke new and significant constitutional ground. Whereas the Court had downplayed the magnitude of the privacy invasion in those earlier cases, there could be no doubt that a judge subject to investigation who woke up one morning to see his name in the headlines had significant privacy and reputational interests at stake. Nevertheless, given the public nature of the speech at issue and its direct relevance to the enterprise of democratic self-government, Chief Justice Burger and the majority found that "injury to official reputation is an insufficient reason for repressing speech that would otherwise be free."\textsuperscript{45} With this holding, the Court linked constitutional protection of the speech at issue to the public nature of that speech and thus moved toward a public-concern requirement that would figure prominently in future decisions, including Bartnicki.


In Smith v. Daily Mail Publishing Co.,\textsuperscript{46} the Supreme Court considered whether a West Virginia statute making it a crime for a newspaper to publish, without court approval, the name of a charged juvenile offender was constitutional under the First and Fourteenth Amendments. The case arose when the Charleston Daily Mail and the Charleston Gazette each learned of a school shooting by routine monitoring of a police scanner.\textsuperscript{47} Both papers sent reporters to the school, and the reporters obtained the name of the accused shooter simply by interviewing bystanders, the police, and an assistant prosecutor who was at the school.\textsuperscript{48} The assailant's name

\textsuperscript{43} Id.
\textsuperscript{44} Id. at 838.
\textsuperscript{45} Id. at 841-42 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 272-73 (1964)).
\textsuperscript{46} 443 U.S. 97 (1979).
\textsuperscript{47} Id. at 99.
\textsuperscript{48} Id.
was ultimately published in the Daily Mail and the Gazette, and a grand jury indicted both papers for violating the statute. 

Reviewing Cox, Oklahoma Publishing, and Landmark Communications, the Court noted that its "recent decisions demonstrate that state action to punish the publication of truthful information seldom can satisfy constitutional standards." The sole interest advanced by the challenged statute in this case was to protect the offender's privacy, which the majority found insufficient to justify imposing criminal liability on the newspapers for publishing a matter of public significance. Moreover, the statute, which applied only to print media and not to electronic media, did not accomplish its stated purpose. Although a newspaper could not lawfully publish the name of a juvenile offender, every television and radio station in the country could broadcast the same information with impunity. Accordingly, the Court held for the newspapers and struck down the West Virginia statute on the grounds that "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." 

The Daily Mail case is significant primarily for its articulation of the "highest order" test. Note that the test predicates First Amendment protection on (1) the use of lawful news-gathering techniques and (2) the publication of (a) truthful information about (b) a matter of public sig-

49. The Daily Mail published the story the day of the attacks; however, knowing of the statutory prohibition on publication, the paper did not publish the attacker's name. The day after the attacks, however, the Gazette published the story in its morning edition and included the name of the attacker. Having already been made public, the Daily Mail published the name of the attacker in its afternoon edition on the day following the attacks. Id. at 99-100.
50. Id. at 102.
51. Id. at 104.
52. One may legitimately question whether the name of a juvenile offender is a matter of public significance. The Court did not devote substantial analysis to this question, noting that it had held in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 492 (1975), that "[t]he commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions . . . are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government." 
54. Id.
55. Id. at 103.
56. The "ultimate question" clearly fails this prong of the test. The Daily Mail Court, however, was careful to note that its "holding in this case is narrow. . . . At issue is simply the power of a state to punish the truthful publication of an alleged juvenile delinquent's name lawfully obtained by a newspaper." Id. at 105-06 (emphasis added).
nificance. Thus, the test follows Landmark Communications down the troublesome path toward a public-concern standard. As numerous commentators have pointed out, and as I will explain in greater detail in Part I.C, a public-concern test raises monumental definitional problems regarding the categories of speech that will be protected under the First Amendment and it infringes on the basic tenants of democratic government by effectively assigning to the judiciary the ability to shape the public agenda.

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

The final case in the pre-Bartnicki line of cases made its way to the Supreme Court on facts reminiscent of Cox. A Florida Star reporter-trainee was dispatched to the Duval County Sheriff's Department pressroom to review police reports that were routinely made available to the media. One of the reports in the pressroom detailed a recent sexual assault, including the victim's name. The reporter-trainee copied the police report verbatim, and a Florida Star reporter prepared an article on the crime, which included the victim's full name. However, a Florida statute made it unlawful to "print, publish or broadcast . . . in any instrument of mass communication' the name of the victim of any sexual offense." The victim filed suit against the Star under the statute, and the paper moved to dismiss, claiming that the statute violated the First Amendment.

Because the state disclosed the victim's name to the press, the Supreme Court again encountered the opportunity to emphasize that the government had ample opportunity to control the information's release. Moreover, because the victim's name was included in a police report that was already publicly available, the Court repeated its familiar conclusion that "punishing the press for its dissemination of information which is already publicly available is relatively unlikely to advance the interests in the service of which the State seeks to act." Following the Daily Mail test and its holding in Cox, the Court found it clear that the newspaper lawfully obtained truthful information about a matter of public significance, and that imposing liability on the Florida Star was unlikely "to

57. See infra notes 118-25 and accompanying text.
59. Id. at 527.
60. Id.
61. Id.
62. Id. at 526 (alteration in original) (quoting Fla. Stat. Ann. § 794.03 (West 1987)).
63. Id. at 535.
further a state interest of the highest order." The state had been in complete control of the confidential information and had numerous alternative ways of preserving its confidentiality. "Where . . . the government has failed to police itself in disseminating information, it is clear under Cox Broadcasting, Oklahoma Publishing, and Landmark Communications that the imposition of damages against the press for its subsequent publication can hardly be said to be a narrowly tailored means of safeguarding anonymity." In many respects, Florida Star did little to advance the Cox line of cases. In fact, it has more in common with the earlier cases than it does with Landmark Communications and Daily Mail. Like Cox and Oklahoma Publishing, Florida Star involved publicly available information lawfully obtained from a government source. Nevertheless, it rounded out a series of cases in which the Supreme Court vigorously and consistently upheld the media's First Amendment rights, even as it moved perilously close to a pure public-concern test. However, the Court had yet to face a case that presented speech on both sides of the equation or that involved the unlawful interception of private conversation. Those facts would be presented in the next, and thus far final, case in the Cox line.

B. Bartnicki v. Vopper

Bartnicki v. Vopper presents the "penultimate question" — the publication of truthful information unlawfully obtained by someone other than the publisher. During 1992 and 1993, the Pennsylvania State Education Association was involved in contentious collective-bargaining

64. Perhaps more than in previous cases, the Court was extremely careful in Florida Star to make clear that it was not deciding the "ultimate question."

The Daily Mail principle does not settle the issue whether, in cases where information has been acquired unlawfully by a newspaper or by a source, government may ever punish not only the unlawful acquisition, but the ensuing publication as well. This issue was raised but not definitively resolved in New York Times Co. v. United States and reserved in Landmark Communications.

We have no occasion to address it here.

Id. at 535 n.8 (citations omitted). Note that the Court's statement also anticipates the facts presented in Bartnicki, in which a source engaged in unlawful activities and disclosed the ill-gotten information to an otherwise innocent third-party publisher.

65. For example, "[t]o the extent sensitive information rests in private hands, the government may under some circumstances forbid its nonconsensual acquisition, thereby bringing outside of the Daily Mail principle the publication of any information so acquired."

Id. at 534.

66. Id. at 538.


negotiations with Pennsylvania's Wyoming Valley West School District. In May 1993, Gloria Bartnicki, the union's chief negotiator, used her cellular telephone to call Anthony F. Kane, Jr., the union's president, to discuss the status of the negotiations. During the call, Kane said:

If they're not going to move for three percent, we're gonna have to go to their, their homes . . . to blow off their front porches, we'll have to do some work on some of those guys. . . . Really, uh, really and truthfully, because this is, you know, this is bad news (undecipherable). The part that bothers me, they could still have kept to their three percent, but they're again negotiating in the paper. This newspaper report knew it was three percent. What they should have said, "we'll meet and discuss this." You don't discuss the items in public.

An unknown person surreptitiously recorded the call and delivered the tape to Jack Yocum, the head of a local taxpayers' organization that had opposed the union throughout the negotiations. Yocum testified that he found the tape in his mailbox and recognized the voices of Bartnicki and Kane. He played the tape for members of the district school board and ultimately passed it along to two local talk-radio hosts, one of whom was Frederick W. Vopper. Vopper, who had criticized the union in the past, repeatedly played the tape on his show, and local television stations began broadcasting it.

Relying on federal and Pennsylvania statutes, Bartnicki and Kane sued Yocum, Vopper, and two radio stations that had aired the tape for actual damages, statutory damages, punitive damages, and attorneys' fees and

69. See Bartnicki v. Vopper, 200 F.3d 109, 112-13 (3d Cir. 1999).
70. Id. at 113.
71. See Bartnicki, 532 U.S. at 519.
72. Id.
73. Id.
74. Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, tit. III, 82 Stat. 197, 211-25 (codified at 18 U.S.C. §§ 2510-2522 (2000)), is the federal wiretap statute. In 1986, § 2511(1) of the Act was expanded to include all "wire, oral, or electronic" communications. See Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, § 101(c)(1)(A), 100 Stat. 1848, 1851. In addition to barring the interception of wire and oral communications, § 2511(1)(c) also applies to any person who "willfully discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection." 18 U.S.C. § 2511(1)(c) (2000); see also 18 PA. CONS. STAT. § 5703 (2000).
Both sides filed for summary judgment, and the district court denied both motions. The defendants asserted two arguments, one statutory and the other constitutional. First, they argued "that they had not violated the [wiretapping] statute because (a) they had nothing to do with interception, and (b) in any event, their actions were not unlawful since the conversation might have been intercepted inadvertently." The district court rejected the first statutory argument on the ground that under the statute, the intentional disclosure of a communication by a person who has reason to know that the information was obtained through an illegal interception is an independent violation of the Act. "Accordingly, actual involvement in the illegal interception is not necessary in order to establish a violation of that statute." As for the second statutory argument, the district court held that there was a genuine issue of fact regarding whether the telephone call had been intentionally intercepted. "Finally, the district court rejected respondents' First Amendment defense because the statutes were content-neutral laws of general applicability that contained 'no indicia of prior restraint or the chilling of free speech.'" The trial court then granted a motion for interlocutory appeal on two issues: (1) whether holding the media defendants liable under the wiretapping statutes for the publication of the intercepted information, when they had not engaged in the illegal interception themselves, violated the First Amendment; and (2) whether holding Yocum, who also had not been personally involved in the interception, liable for providing the tape to the media violated the First Amendment.

On appeal, the Third Circuit panel unanimously agreed that the federal and state wiretapping statutes are content-neutral and therefore subject to intermediate scrutiny. Using this standard, "the majority concluded that the statutes were invalid because they deterred significantly more speech than necessary to protect the privacy interests at stake." In dissent, Senior Judge Pollak agreed with the plaintiffs that the statutory limit on disclosure was necessary for its deterrent effect and for minimizing the

75. See Bartnicki, 532 U.S. at 520.
76. Id. at 520-21.
77. Id. at 520.
78. Id.
79. Id.
80. Id. at 520-21.
81. Id. at 521 (quoting App. to Pet. for Cert. in No. 99-1687, at 55a-56a).
82. Id.
84. Bartnicki, 532 U.S. at 522.
harm suffered by plaintiffs as a result of publication.\textsuperscript{85} The Supreme Court granted certiorari.\textsuperscript{86} Justice Stevens, joined by Justices O'Connor, Kennedy, Souter, Ginsburg, and Breyer, delivered the

\textsuperscript{85} See Bartnicki, 200 F.3d at 133 (Pollack, J., dissenting) (citing Boehner v. McDermott, 191 F.3d 463, 470 (D.C. Cir. 1999)); see also Peavy v. WFAA-TV, Inc., 221 F.3d 158 (5th Cir. 2000) (applying intermediate scrutiny and upholding liability of media defendants under the "use and disclosure" provisions of federal and state law).

\textsuperscript{86} Bartnicki v. Vopper, 530 U.S. 1260 (2000). The Third Circuit's decision created a circuit split. The D.C. Circuit had held in \textit{Boehner v. McDermott} that a journalist who published the contents of an illegally intercepted telephone call could constitutionally be punished for that publication under the Wiretapping Act. \textit{Boehner}, 191 F.3d at 478. As in \textit{Bartnicki}, the journalist defendant in \textit{Boehner} had legally obtained a tape of a conversation from an unrelated third party who had acted illegally. \textit{Id.} at 465. The \textit{Boehner} case involved the illegal taping of a conference call among several Republican leaders of the U.S. House of Representatives, including Dick Armey, Newt Gingrich, and John Boehner. \textit{Id.} Boehner had dialed into the call, the purpose of which was to discuss the House Ethics Committee's probe of Gingrich, while driving through northern Florida. \textit{Id.} Boehner's cellular signal was intercepted and recorded by a Florida couple who delivered the tape to Kay Thurman, a Democratic Representative from Florida. \textit{Id.} The tape eventually made its way to three newspapers, and the \textit{New York Times} broke the story. \textit{Id.} For a full discussion of the \textit{Boehner} decision, see Rex S. Heinke & Seth M.M. Stodder, \textit{Punishing Truthful, Newsworthy Disclosures: The Unconstitutional Application of the Federal Wiretap Statute}, 19 Loy. L.A. Ent. L. Rev. 279, 279-84 (1999).

The facts in \textit{Boehner} are similar to those the D.C. Circuit faced years earlier in \textit{Pearson v. Dodd}, 410 F.2d 701 (D.C. Cir. 1969). In \textit{Pearson}, two former employees of then-Senator Thomas Dodd entered his office without his consent and copied numerous documents that were damaging to Dodd. \textit{Id.} at 703. The former employees delivered the documents to a newspaper reporter who was aware of how the documents were obtained. \textit{Id.} When newspapers published stories based on the documents, Dodd sued the reporter for invasion of privacy and conversion. The D.C. Circuit held for the defendant on the ground that [a] person approached by an eavesdropper with an offer to share in the information gathered through the eavesdropping would perhaps play the nobler part should he spurn the offer and shut his ears. However, it seems to us that at this point it would place too great a strain on human weakness to hold one liable in damages who merely succumbs to temptation and listens.

\textit{Id.} at 705.

More recently, Edmund A. Matricardi III, the executive director of the Virginia Republican Party, was indicted on four felony counts of eavesdropping on Democratic conference calls and disseminating the transcript to third parties. \textit{See R.H. Melton, Eavesdropping Case Leaves GOP Without a Voice, WASH. Post, Apr. 11, 2002, at T4; R.H. Melton, Va. GOP Official Is Indicted, Quits; Director Charged with Eavesdropping, WASH. Post, Apr. 10, 2002, at A1. According to newspaper reports, "[t]he eavesdropping by Matricardi is the latest bizarre episode involving some of the state's best-known politicians, telephone communication and a recording device — which in this case Matricardi used to tape Democrats plotting strategy after a major court ruling on redistricting." Va. GOP Official Is Indicted, \textit{supra}. It is unclear whether Matricardi delivered the transcripts to any members of the press.
opinion of the Court. 87 Justice Breyer wrote a separate concurrence, joined by Justice O'Connor. 88 Chief Justice Rehnquist filed a dissent, in which Justices Scalia and Thomas joined. 89

After discussing the history of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 and noting that "[o]ne of the stated purposes of that title was 'to protect effectively the privacy of wire and oral communications,'" 90 the Court nevertheless affirmed the Third Circuit's holding. Although agreeing that both the federal and state wiretapping statutes at issue are content-neutral laws of general applicability, the majority placed special emphasis on the fact that "the naked prohibition against disclosures is fairly characterized as a regulation of pure speech." 91

Citing the frequently quoted Smith v. Daily Mail Publishing Co., 92 the Court set the stage for its decision by noting that "[a]s a general matter, 'state action to punish the publication of truthful information seldom can satisfy constitutional standards.'" 93 The government identified two interests served by the statute: (1) the interest in deterring the unlawful interception of private communications; and (2) the interest in minimizing the further harm to the plaintiff caused by disclosure. 94 The Court dismissed the first interest by noting that although punishing disclosure by the interceptor would likely have a deterrent effect, "it by no means follows that punishing disclosures of lawfully obtained information of public interest by one not involved in the initial illegality is an acceptable means of serving those ends." 95 Unlike punishing the theft itself, punishing the disclosure of the stolen information runs squarely into the First Amendment. 96

With respect to the second interest — protecting the plaintiffs'

87. Bartnicki, 532 U.S. at 516.
88. Id.
89. Id.
91. Id. at 526.
92. 443 U.S. 97 (1979). Daily Mail falls in a line of cases, including Cox Broadcasting Corp. v. Cohn, Oklahoma Publishing Co. v. District Court, Landmark Communications, Inc. v. Virginia, and Florida Star v. B.I.F., that are examined in detail in supra Part I.A.
94. Id. at 529.
95. Id.
96. See Leading Cases, supra note 68, at 413 ("If Congress wants to deter theft, the Court suggested, it may do so by imposing harsher penalties for that theft; what it may not do, however, is deter theft by punishing speech.").
privacy — the majority found it "considerably stronger."\textsuperscript{97} However, the privacy rights at issue in \textit{Bartnicki} (and any chilling effect on private speech to which such an invasion of privacy might lead) directly conflicted with the freedom of the press. While declining to decide whether privacy and speech rights as they relate to private conversation are "strong enough to justify the application of [the wiretapping statute] to disclosures of trade secrets or domestic gossip or other information of purely private concern," the Court held that "[t]he enforcement of that provision in this case . . . implicates the core purposes of the First Amendment because it imposes sanctions on the publication of truthful information of public concern."\textsuperscript{98} Rather than engaging in a meaningful balancing of interests, the Court based its decision almost entirely on its finding that the intercepted conversation was a matter of public concern.\textsuperscript{99}

In dissent, Chief Justice Rehnquist attacked the majority for relying on the notion of "'public concern,' an amorphous concept that the Court does not even attempt to define" in reaching a "decision that diminishes, rather than enhances, the purposes of the First Amendment, thereby chilling the speech of the millions of Americans who rely upon electronic technology to communicate each day."\textsuperscript{100} The dissenters then distinguished the \textit{Daily

\textsuperscript{97} Bartnicki, 532 U.S. at 532.

\textsuperscript{98} Id. at 533-34. The Court particularly emphasized the importance of its finding that Bartnicki and Kane's conversation centered on a matter of "public concern." Drawing an analogy between the instant case and \textit{New York Times\ v. Sullivan}, Justice Stevens expressed the view that

\begin{quote}
[i]t was the overriding importance [in \textit{New York Times\ v. Sullivan}] of that commitment [to a public debate that is "uninhibited, robust, and wide-open"] that supported our holding that neither factual error nor defamatory content, nor a combination of the two, sufficed to remove the First Amendment shield from criticism of official conduct.

We think it clear that parallel reasoning requires the conclusion that a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern.
\end{quote}

\textit{Id.} at 535 (citations omitted).

\textsuperscript{99} The D.C. Circuit explicitly adopted a public-concern test in \textit{Pearson v. Dodd}, 410 F.2d 701 (D.C. Cir. 1969). \textit{See} discussion supra note 86. In that case, the court declared that "[i]t has always been considered a defense to a claim of invasion of privacy by publication . . . that the published matter complained of is of general public interest." \textit{Pearson}, 410 F.2d at 703.

\textsuperscript{100} Bartnicki, 532 U.S. at 542 (Rehnquist, C.J., dissenting). Note that Chief Justice Rehnquist's argument here dismisses the First Amendment rights on the publisher side of the equation. Not only does the publication itself implicate the Free Press clause of the First Amendment, but it also implicates the constitutional rights of the publisher's audience. As Justice Souter has noted, "freedom of the press is ultimately founded on the value of enhancing . . . discourse for the sake of a citizenry better informed and thus more prudently self-governed. . . . In this context, [i]t is the right of the [public], not the right of the
Mail line of cases on three grounds: (1) that the government had lawfully obtained the information in those cases; (2) that the information at issue in each of the Daily Mail cases was already publicly available; and (3) that those cases were not concerned with the chilling effect that might result from punishing the publication of truthful information.\textsuperscript{101} As for the plaintiffs' deterrence argument, Chief Justice Rehnquist argued that the majority opinion opened the door for a large loophole that would allow an unlawful eavesdropper to "launder" his interception through a third party.\textsuperscript{102} Invoking the famous article by Louis Brandeis and Samuel Warren on the right to privacy,\textsuperscript{103} the dissent concluded by minimizing the interests of the citizenry in the publication of truthful information on matters of public concern and lamenting the majority's disregard for "Congress's effort to balance [the plaintiffs'] claim to privacy against a marginal claim to speak freely."\textsuperscript{104}

Although the Bartnicki decision does not answer the "ultimate question," it provides insight into how the Court might handle such a case. With respect to the key factors identified in Part I.A and summarized on a case-by-case basis in Table 1 below, Bartnicki differs from the "ultimate question" only in that it was a third party, and not the publisher itself, who unlawfully acquired the information. In fact, Bartnicki presents a fact pattern so similar to the "ultimate question," that some commentators have suggested, notwithstanding the Court's specific indications to the contrary, that it answers the "ultimate question" itself (at least with respect to speech that relates to a matter of public concern).\textsuperscript{105}

\begin{itemize}
\item \textsuperscript{101} Bartnicki, 532 U.S. at 546-47 (Rehnquist, C.J., dissenting).
\item \textsuperscript{102} See id. at 551 (Rehnquist, C.J., dissenting).
\item \textsuperscript{103} Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 HARV. L. REV. 193 (1890).
\item \textsuperscript{104} Bartnicki, 532 U.S. at 553-56 (Rehnquist, C.J., dissenting).
\item \textsuperscript{105} See, e.g., Leading Cases, supra note 68, at 412 ("The Court's logic in Bartnicki leads to the (perhaps uncomfortable) conclusion that although the media can be punished for stealing information, they cannot be punished for publishing that information.").
\end{itemize}

[media], which is paramount." Cohen v. Cowles Media Co., 501 U.S. 663, 678 (1991) (Souter, J., dissenting) (alterations in original) (quoting CBS, Inc. v. FCC, 453 U.S. 367, 395 (1981)). Moreover, Chief Justice Rehnquist erroneously suggests that the chilling of private speech violates the First Amendment rights of individuals such as Bartnicki and Kane. Bartnicki, 532 U.S. at 542 (Rehnquist, C.J., dissenting). However, the First Amendment only protects against government restrictions on speech, not restrictions imposed by private entities, such as media companies. See infra Part II.A.1. Nevertheless, I agree with Chief Justice Rehnquist's basic point that the majority's decision gives short shrift to the privacy and speech rights of individual speakers. See infra Part I.C.
C. The Implications of Bartnicki

Bartnicki makes clear that a majority of the Court subscribes to the view, put forth by Alexander Meiklejohn, that speech on matters of public concern merits maximum First Amendment protection. The decision's logic goes so far as to suggest that the public-concern consideration trumps the question of whether the media outlet lawfully acquired the published information. Following this reasoning to its ultimate conclusion, it appears that, even though the media may be punished

106. See ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); see also Cynthia L. Estlund, Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category, 59 GEO. WASH. L. REV. 1, 2 nn.11-12 (1990) (listing commentators who think that the First Amendment should only protect speech relating to self-government). Although my claims in this Article may sometimes yield results that the Meiklejohn School would favor, i.e., the protection of public discourse even at the expense of private conversation, I do not argue that speech on matters of public concern should categorically trump other types of speech. Indeed, I argue that the "ultimate question" presents a situation in which there are societally important speech rights on both sides of the case and that differing circumstances impact which side a court should ultimately favor in any particular situation. See MEIKLEJOHN, supra, at 22-27.

107. See Bartnicki, 532 U.S. at 535 ("We think it clear . . . that a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern.").
consistent with the First Amendment for the unlawful interception of private communications, it may not be punished consistent with the First Amendment for the subsequent publication of that information so long as the information relates to a matter of public concern. In this section, I address the two primary consequences of *Bartnicki*, which correspond to the two interests raised by the plaintiffs — privacy and deterrence. First, I argue that the Supreme Court's effective adoption of the public-concern test in this context is doctrinally troublesome, in large part because it dismisses to an unacceptable degree the plaintiffs' privacy claims. Second, I address the question of what kind of incentives the *Bartnicki* rule creates for the news industry. If the Supreme Court were to extend the *Bartnicki* holding to the "ultimate question," would electronic eavesdropping become so pervasive as to seriously chill private conversation, or are there other considerations that would adequately deter such conduct?

1. The Public-Concern Test

In the cases preceding *Bartnicki*, the Supreme Court clung to the notion that it had adopted a balancing approach in deciding whether to extend constitutional protection to unlawful publication, while at the same time drifting closer and closer to a categorical test based on whether the speech at issue related to a matter of public concern. In *Bartnicki*, which presented the clearest instance of competing interests of any case in the *Cox* line, the Court inexplicably abandoned whatever may have been left of the old balancing approach. With the *Bartnicki* Court's abandonment of this approach, "[t]wo lessons thus emerge from the case: first, the media can publish information that they themselves steal, and second, the lawful-acquisition doctrine is dead, replaced solely by a 'matter of public concern test.'"

As for the first lesson and its implications regarding resolution of the "ultimate question," the demise of the lawful-acquisition doctrine is not particularly troublesome. Presumably, the driving force behind the lawful-acquisition doctrine was the thought that the misappropriation of infor-
mation necessarily means that the media outlet had trampled on the privacy (and possibly the speech) rights of the individual speaker in a way that the Court found categorically unacceptable. However, such an approach is unwieldy at best, and wrong at worst. It uses the threshold finding of unlawful acquisition as a definitive proxy for unacceptable harm to the speaker without considering any of the surrounding circumstances. As Part III.A explains in detail, not all interception is created equal, and there are situations in which the benefit to the public resulting from publishing unlawfully acquired information greatly outweighs the harm to the speaker.110 The most effective and direct method of deciding whether the benefit to the public outweighs the harm to the speaker is to engage in a straightforward balancing of interests, taking account of the competing rights at stake in cases like Bartnicki and the "ultimate question" and allowing for more nuanced results than those likely to be produced by the lawful-acquisition doctrine.

The second lesson from Bartnicki — that the Court effectively adopted a "public-concern test" — is much more troubling than the demise of the lawful-acquisition doctrine. Ironically, the adoption of a public-concern test represents the exact opposite approach to that taken in abandoning the lawful-acquisition doctrine. In abandoning the lawful-acquisition doctrine, the Court was, perhaps unintentionally, jettisoning a test primarily valuable as an imprecise proxy for harm to the speaker. However, the public-concern test is also little more than an imperfect proxy — in this case, for the benefit to the public. The public-concern test implies that publishing unlawfully acquired speech on a matter of public relevance necessarily results in a benefit to the public that outweighs the harm to the individual speaker. However, such a categorical approach gives insufficient weight to the rights of private speakers, even if it usually does yield the correct outcome. Again, a pure balancing approach that is based on more accurate determinants of harm and benefit is a more desirable way to resolve cases like Bartnicki and the "ultimate question." At a minimum, such an approach fully accounts for the interests on both sides of the equation, whereas the public-concern test focuses exclusively on the benefit to the public, and the lawful-acquisition doctrine focuses exclusively on the harm to the speaker.

Moreover, a balancing approach avoids many of the doctrinal problems associated with the public-concern test. First, even though there is near

110. For example, the interception and publication of Rudolph Guiliani's conversation about plans for rebuilding lower Manhattan following the terrorist attacks on the World Trade Center would likely be of consequential public importance, while (depending on the precise nature of that conversation) potentially causing him very little personal harm.
unanimous agreement that speech on matters of public concern lies near the heart of the First Amendment, there remains the difficult definitional question of identifying what constitutes "speech on matters of public concern," "speech concerning public affairs," or "speech on public issues." As Chief Justice Rehnquist pointed out in his dissent in *Bartnicki*, speech concerning public affairs is an "amorphous concept" that does not lend itself to precise contours. "Judges and other decisionmakers will inevitably exclude from [any such] category, and thus from constitutional protection, speech that others would consider to be relevant to public debate."

Beyond the definitional considerations, the public-concern test has other potential pitfalls. Although it is clear that speech on matters of public concern is of central importance to First Amendment jurisprudence, and "speech concerning public affairs is more than self-expression; it is the essence of self-government," as a general matter, the Court has wisely declined to hold that constitutional protection extends exclusively to public speech. In other words, the importance of public speech has traditionally served only to elevate its constitutional stature and not to bring it within the constitutional fold in the first place or to exclude from

111. *See* Estlund, *supra* note 106, at 1 ("The central importance of speech on public issues, or 'matters of public concern,' is long-established First Amendment dogma.").


113. Speech on matters of public concern, as a category of speech, is no different in this respect than most other categories of speech, including obscenity. *Cf.* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). There is always the danger of over- and under-inclusive definitions, the application of which could have perverse effects.


115. *See* Mills v. Alabama, 384 U.S. 214, 218 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs."). In *First National Bank v. Belotti*, 435 U.S. 765, 776 (1978), the Supreme Court declared that speech on matters of public concern is squarely "at the heart of the First Amendment's protection." *See also* Estlund, *supra* note 106, at 2 n.12 ("Despite the variety of interpretations of the Free Speech Clause, modern commentators agree that speech on public issues is at least an important concern of the First Amendment.").


117. *See* Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1095 (2000) ("Political speech, scientific speech, art, entertainment, consumer product reviews, and speech on matters of private concern are thus all doctrinally entitled to the same level of high constitutional protection, restrictable only through laws that pass strict scrutiny.").
First Amendment protection entirely speech that does not constitute public speech.

Nevertheless, the Court has deviated from this approach in two situations in favor of a public-concern test. In Connick v. Myers, \(^{118}\) the Court held that the speech of public employees is entitled to First Amendment protection only if it relates to "matters of public concern." \(^{119}\) and in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,\(^{120}\) the Court held that libelous speech not on a matter of public concern is wholly outside the First Amendment. \(^{121}\) As numerous commentators have pointed out, Connick and Dun & Bradstreet, though they draw on the Court's earlier statements regarding the importance of public speech, take the dangerous approach of excluding private speech from the shield of the First Amendment and limiting the realm of protected speech to a category that is impossible to define precisely. \(^{122}\)

Until Connick there was no area of First Amendment doctrine in which judges were required to make a threshold determination of whether speech was or was not on a matter of public concern. A long tradition of special solicitude for speech on public issues played a crucial role in the growth of First Amendment doctrine, but it did not take the form of an explicit threshold test or category. The content-based categories of speech that did exist before Connick defined not the core of protected speech, but rather classes of excluded or disfavored

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119. Id. at 154.
121. Id. at 758-60.
122. The Supreme Court has done little to define matters of public concern. In Connick, the majority stated that "[w]hether . . . speech addresses a matter of public concern must be determined by [the expression's] content, form, and context . . . as revealed by the whole record." Connick, 461 U.S. at 147-48.

In Dun & Bradstreet, Justice Powell characterized the credit report at issue in that case as "solely in the individual interest of the speaker and its specific business audience," and noted that the report "was made available to only five subscribers, who, under the terms of the subscription agreement, could not disseminate it further." Dun & Bradstreet, 472 U.S. at 762. Justice Powell went on to state, "There is simply no credible argument that this type of credit reporting requires special protection to ensure that 'debate on public issues [will] be uninhibited, robust, and wide-open.'" Id. (alteration in original) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

Professor Post has argued that there is no "principled method of determining what kinds of issues ought to be excluded from the domain of public discourse." Post, supra note 114, at 673.
speech at some remove from speech on public issues. I submit that this feature of First Amendment doctrine protected speech on matters of public concern, largely by insulating it from the vagaries of judicial line-drawing.\footnote{Estlund, supra note 106, at 3.}

The public-concern test arguably puts in constitutional jeopardy First Amendment protection of art, entertainment, scientific speech, and any other category of speech not directly related to self-government. It also, quite undemocratically, leaves the judiciary with the task of deciding what is and is not relevant to public discourse.\footnote{Id. at 30-31 ("[T]he very concept of a circumscribed category of speech on matters of public concern applied on a case-by-case basis by the judiciary is at odds with the basic tenets of democratic self-governance. . . . The normative conception of public concern, insofar as it is used to exclude speech from public discourse, is thus incompatible with the very democratic self-governance it seeks to facilitate. . . . Such a test inevitably charges the judiciary with the task of developing an approved list of legitimate topics for public debate, a prospect that offends basic principles of democracy and freedom of expression.") (quoting Post, supra note 114, at 670).} Given the fundamental problems with the public-concern test,\footnote{See Volokh, supra note 117, at 1097 ("In practice neither [Connick nor Dun & Bradstreet] has been a success story for the public concern test. As many critics have pointed out, the government employee private concern doctrine has proven both vague to the point of indeterminacy and extremely broad. . . . Under Dun & Bradstreet, the concept of 'speech of purely private concern' has ended up similarly vague . . . ".)} I am led to conclude that although the Bartnicki Court may have reached the right decision, it approached the penultimate question in the wrong way and established a dangerous precedent for all of First Amendment law.

2. Deterrence

In addition to the adoption of the public-concern test, one might also question the Bartnicki decision based on the incentives it creates for the news industry. Beyond the dissent’s argument that law-breaking wiretappers could "launder" stolen speech by anonymously delivering it to a third party, Bartnicki raises the larger question of the effect of the Court’s decision on deterring the media themselves. At first blush, it might seem that if the media could publish unlawfully acquired information with impunity, there would be rampant and uncontrolled wiretapping, spying, and other invasions of privacy. However, I believe that although based on flawed reasoning, the Bartnicki Court did not necessarily reach an undesirable outcome from a deterrence perspective. On closer inspection, there are two considerations that adequately address this concern and
provide sufficient safeguards for the extension of First Amendment protection to the publication of unlawfully acquired information.

First, there are reputational and ethical constraints at both the individual reporter level and at the institutional corporate level. On the reporter level, a news professional who engages in unlawful acts, even in pursuit of an otherwise career-making story, risks losing his job, facing criminal charges, and being forced out of the industry if he is caught. For instance, the Cincinnati Enquirer fired lead reporter Michael Gallagher in the wake of the Chiquita debacle. Gallagher also pleaded guilty to two felony counts of illegal entry into the Chiquita voice-mail system, forever tarnishing his reputation and potentially making it difficult for him to re-enter the workforce, whether at another newspaper or elsewhere. Accordingly, it is not unreasonable to think that a significant portion of (and perhaps the vast majority of) reporters would not engage in illegal acts of interception either because of personal ethical considerations, the potentially enormous repercussions with respect to their professional lives, or some combination of the two.

Additionally, similar reputational considerations also exist for the media company itself. In the Chiquita example, the Enquirer and its parent company found themselves subjected to intense public criticism upon revelation of Gallagher's misdeeds and unethical news-gathering methods. Ultimately, the paper was forced to pay tens of millions of dollars to Chiquita and to run numerous front-page apologies. Given that shareholders (and potentially readers and advertisers) are likely to have little tolerance for such consequences, one would expect media companies to provide strong disincentives for their employees to engage in such activities. As with individual reporters, these practical considerations are in addition to any purely ethical motivations that might prompt management to discourage illegal reporting techniques.

Second, if reputational and ethical constraints alone are not sufficient to deter illegal wiretapping and spying, the legislature can always increase

127. See Simonich, supra note 16.
128. See supra note 18 and accompanying text.
129. See supra note 17 and accompanying text.
the penalties for misappropriation of information. Although the First Amendment protects publication, it is less clear that the unlawful acquisition of information to be published is a constitutionally protected activity.\footnote{130} Accordingly, the legislature has potentially enormous influence on the deterrence point, even if the Supreme Court were to protect categorically the publication of truthful information, regardless of how that information was obtained.

By identifying the various deterrence mechanisms that are already in place, I do not mean to suggest that there will never be future cases


However, one must acknowledge that

[n]ewsgathering efforts are obviously directly related to the ability of media entities to publish the results of their investigations. As such, the protection afforded the media to engage in newsgathering activities can be as important as the right to publish the news. Yet, the U.S. Supreme Court has been slow to fully acknowledge the constitutional significance of newsgathering activities. Edwards, supra note 14, at 8.

The Court has touched on this topic in a number of cases, but for the moment, Cohen and the principle that "laws of general application concerning prepublication activities are not subject to the same First Amendment protections afforded publication of stories" hold the day. Id. at 9; accord Cohen, 501 U.S. at 669-70. But see Branzburg v. Hayes, 408 U.S. 665 (1972) (acknowledging that the media has a constitutional right to gather news); Houchins v. KQED, 438 U.S. 1, 11 (1978) (confirming Branzburg and noting the "undoubted right to gather news from any source by means within the law") (emphasis added) (quoting Branzburg, 408 U.S. at 681-82). The question remains open whether the media has a constitutional right to gather news from any source by means outside the law. That question is beyond the scope of this article, which is concerned with post-acquisition activities. For a proposed solution to the acquisition question, see Edwards, supra note 14, at 13 (suggesting that there should be a constitutional news-gathering privilege "if the conduct made the basis of the action (1) constituted an activity routinely associated with traditional . . . newsgathering efforts, (2) was engaged in for the sole purpose of furthering publication of news . . . , and (3) related to a matter of legitimate public concern and interest").

With respect to constitutional protection of news gathering and its interplay with the government's desire to withhold information, see C. Edwin Baker, Press Rights and Government Power To Structure the Press, 34 U. MIAMI L. REV. 819 (1980) (noting a distinction between "offensive" and "defensive" press claims and suggesting that defensive claims against government intrusion deserve greater weight than "offensive" claims to governmental information); Timothy B. Dyk, Newsgathering, Press Access, and the First Amendment, 44 STAN. L. REV. 927 (1992) (arguing for heightened press access to governmental information as an additional check on governmental power).}
involving the illegal interception of private information. Indeed, these deterrents already exist, and still we see instances of unlawful news gathering. 131 Furthermore, the existence of deterrents strong enough to eliminate completely cases such as Bartnicki and the "ultimate question" would raise concerns about their effects on a free press and the desirability


We knew we were right, constitutionally, and the judge's order would be lifted or overturned. . . .

Timeliness was a crucial issue — not because of the 20-year-old material in the story, but because allowing a court to interfere with time of publication would be abdicating our responsibility. If we did not stand on principle, our failure could come back to haunt us in the future, in a case where timeliness was essential.

Id. The district court fined the Journal $100,000 and placed Hauser on probation for eighteen months with an order that he perform 200 hours of community service. Providence Journal, 485 U.S. at 697. Hauser and the Journal were ultimately vindicated when the First Circuit found the temporary restraining order "transparently invalid" under the First Amendment, In re Providence Journal Co., 820 F.2d 1342, 1353 (1st Cir. 1986), and the Supreme Court declined to hear the case on procedural grounds, see Providence Journal, 485 U.S. at 695.

Also of interest is the story of reporter Robert Kapler. See Robert Kapler, Lying for the Story . . . Or Things They Don't Teach in Journalism School, FINELINE: THE NEWSLETTER ON JOURNALISM ETHICS, May 1989, at 5. Kapler, then a reporter for The Guide, a weekly newspaper in Harrisburg, Pennsylvania, tells of using an assumed name to obtain a job at the Three Mile Island nuclear power plant. Id. Recognizing that "[l]ying about [his] identity would not only be illegal, [but] [I] would [also] run contrary to the code of [his] trade," Kapler ultimately decided that "the issue of nuclear plant safety was crucial enough to make an exception." Id.

Similarly, reporter Bill Dedman tells of scaling a fence at the Atlanta Federal Penitentiary (and thus trespassing on federal property) to obtain important information about a prison riot. See Bill Dedman, Over the Fence: A Case of Crossing the Line for a Story, FINELINE: THE NEWSLETTER ON JOURNALISM ETHICS, June 1991, at 4. Dedman states, "It seemed more ethical, more in line with our duties, to go over the fence, if we did it carefully and with respect for what we found, than to sit across the street eating Salvation Army sandwiches, waiting for the morning briefing." Id.
of allowing the media to publish only information that is deliberately and lawfully made available to them. The deterrent factors I have identified, at least as they currently exist, are not so harsh as to eliminate completely aggressive (including occasionally unlawful) news gathering, but they are strong enough to allay any fears of rampant, unchecked spying by the press in the post-Bartnicki world. Even if one rejects the Bartnicki Court's reasoning, one can still support the result, and even its extension to the "ultimate question," without undue concern about perverse effects on news gathering and journalists' behavior generally.

II. Guiding Principles

Although the outcome of the Bartnicki case is not necessarily objectionable, the Court's reasoning is inherently flawed. The majority failed adequately to take into account the rights on both sides of the equation and gave undue weight to the public nature of the speech at issue. In this Part, I propose that the "ultimate question" would be better resolved by a more nuanced approach based on (1) a recognition that there are competing rights on both sides of the calculus and (2) "our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." 132

A. The Competing Rights Principle

As discussed above, Bartnicki and the "ultimate question" stand alone in the Cox line of cases because they pit the privacy and speech rights of individual speakers against the First Amendment rights of the media and its audience. In adopting the public-concern test, the Bartnicki Court gave unacceptably short shrift to these competing rights and adopted an unwieldy categorical approach in a situation that begs for a more delicate balancing of interests.

The problems presented by the conflict between free speech and privacy are as old as the United States itself and are problems with which the Founding Fathers were intimately acquainted — both from the personal perspective of being pilloried in the press at the expense of their own privacy and from the perspective of political theorists charged with the monumental task of designing a new government. As Thomas Jefferson, writing about the press attacks on John Jay, noted:

In truth it is afflicting that a man who has past his life in serving the public . . . should yet be liable to have his peace of

mind so disturbed by any individual who shall think it proper to arraign him in a newspaper. It is however an evil for which there is no remedy. Our liberty depends on the freedom of the press, and that cannot be limited without being lost. 133

Indeed, the very idea of a free press necessarily implies that the media must have the right to publish information that others would like to keep private. 134 Accordingly, resolution of the "ultimate question" must hinge in large part on reconciling these competing rights. "But there is precious little record of what freedom of speech and press really meant to the Framers," 135 and the Founding Fathers provided no guidance on whether and to what extent free speech rights should trump other competing rights. Thus, in deciding which side of the calculus should be given primacy in any particular situation, it is important, as a threshold matter, to identify and categorize precisely the interests at issue. I dedicate the next two sections to this task. In Part III, I propose a methodology for weighing the harm to the individual speaker against the rights of the media and its audience and for concluding which interest should prevail in various circumstances.

1. The Individual Speaker

On the individual speaker side of the equation are the privacy and speech rights of the participants in the intercepted conversation. By its terms, the unlawful interception of a private conversation necessarily infringes on an individual's right to privacy, 136 and it can hardly be

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133. 9 PAPERS OF THOMAS JEFFERSON 239 (J. Boyd ed., 1954).
134. Cf. David Shaw, Two Impulses Drive the Media: Prudence and Self-Preservation; Clinton Story: Afraid of missing the next Watergate, they pretend to look for a crime when sex is all it's about, L.A. TIMES, Feb. 18, 1998, at B7 ("Reporters can't do their jobs properly if they are forbidden to ferret out leaks. Watergate, the Pentagon Papers, My Lai and many other stories of consequence might never have been disclosed — and the public would have been left dangerously ignorant of important information — if journalists were forced to rely solely on official, fully identified sources of information.").
135. RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH 1-10 (1994); accord LEONARD LEVY, LEGACY OF SUPPRESSION 214-15 (1960) ("Freedom of the press was everywhere a grand topic for declamation, but the insistent demand for its protection on parchment was not accompanied by a reasoned analysis of what it meant, how far it extended, and under what circumstances it might be limited.").
136. The harm caused by the press's invasion of privacy rights has been a hot button issue for more than 100 years. Brandeis and Warren, in their famous article on the subject, addressed both the harm to the speaker resulting from the publication of private conversations and the concomitant harm to society. The authors state:
Of the desirability — indeed of the necessity — of some such protection [of the right of privacy], there can, it is believed, be no doubt. The press is overstep-
doubted that the rampant publication of otherwise private communications would chill private conversation. The magnitude of the chilling effect is debatable. If the state could constitutionally punish the unlawful acquisition of private communications so severely that no media entity would ever attempt to intercept such communications, a finding that the publication of such intercepted conversations is protected under the First Amendment would be of negligible significance. Private speakers would rightly conclude that the threat of disclosure is small because the cost of acquisition is prohibitively high, and they would engage in conversation to the same extent as they would even if the First Amendment did not protect such publication. However, if the Constitution does limit the severity of punishment that the state may impose for unlawful acquisition,\(^{137}\) adding constitutional protection to the publication of that information would likely contribute to a chilling effect by impacting either (or both) the quantity or quality of private communication\(^ {138} \) (or by

ping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. . . . The intensity and complexity of life, attendant upon advancing civilization have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury. Nor is the harm wrought by such invasions confined to the suffering of those who may be made the subjects of journalistic or other enterprise. In this, as in other branches of commerce, the supply creates the demand. Each crop of unseemly gossip, thus harvested, becomes the seed of more, and, in direct proportion to its circulation, results in a lowering of social standards and of morality. Even gossip apparently harmless, when widely and presently circulated, is potent for evil. It both belittles and perverts. It belittles by inverting the relative importance of things, thus dwarfing the thoughts and aspirations of a people. When personal gossip attains the dignity of print, and crowds the space available for matters of real interest to the community, what wonder that the ignorant and thoughtless mistake its relative importance. Easy of comprehension, appealing to that weak side of human nature which is never cast down by the misfortunes and frailties of our neighbors, no one can be surprised that it usurps the place of interest in brains capable of other things. Triviality destroys at once robustness of thought and delicacy of feeling. No enthusiasm can flourish, no generous impulse can survive under its blighting influence.

Warren & Brandeis, supra note 103, at 196.

137. See supra note 130.

138. Jeffery Rosen has addressed the chilling effect from another viewpoint, suggesting that in an established democracy where there are constitutional prohibitions on the invasion of privacy by the state, additional restrictions on such invasions by the media may have little
leading to the development of more secure communications tools, which would likely only perpetuate the cycle by encouraging the development of new interception technology).\textsuperscript{139} Additionally, other commentators have pointed out that the erosion of privacy rights negatively affects "ideas of bodily and social autonomy, of self-determination, and of the ability to create zones of intimacy and inclusion that define and shape our relationships with each other."\textsuperscript{140}

Even so, and even though the Constitution protects both privacy and speech, the rights involved on the private speaker side of the equation are not constitutionally protected rights. "The Constitution presumptively prohibits government restrictions on speech and perhaps some government revelation of personal information, but it says nothing about interference with speech or revelation of personal information by nongovernmental speakers."\textsuperscript{141} As Professor Volokh has written, "lots of speech has the effect, and often the purpose of discouraging people from exercising their speech rights in certain ways,"\textsuperscript{142} but the mere chilling of private speech does not necessarily violate the constitutional rights of those discouraged

or no effect on people's expectation of privacy. See Jeffrey Rosen, The Purposes of Privacy: A Response, 89 GEO. L.J. 2117, 2135 (2001). After discussing an instance in which the "police destroyed an important figure in the Prague Spring by recording his private conversations and broadcasting them in a radio serial," Rosen concluded that "in America, where the Fourth Amendment and a web of statutes restrict wiretapping and other undercover information gathering by the state, I am not convinced that additional restrictions on the media would add measurably to the social expectations of privacy that are necessary for free speech to thrive." \textit{Id}. Even so, it strains credulity to think that extending constitutional protection to the publication of unlawfully obtained private information would have no chilling effect on private speech. Rosen's argument suggests that the chilling effect only occurs because of fear of prosecution based on the content of private conversations. See \textit{id}. However, there will also be a chilling effect if private speakers are concerned about the loss of privacy that necessarily results from disclosure.


140. \textit{Id}. at 1466.

141. Volokh, \textit{supra} note 117, at 1107.

142. \textit{Id}. at 1108. Volokh states further:

Political bullies try to silence their opponents not only by revealing embarras-
sing private information about them, but also by calling them nasty (but nonlibelous) names, citing their interracial marriages as evidence that they are traitors to their race, attacking them with bitter and unfair parodies, or saying things aimed at undermining their business affairs. . . . Who among us hasn't at times decided to stay quiet in order to avoid having to deal with our opponents' vituperation?

\textit{Id}. (footnotes omitted).
from speaking.\textsuperscript{143} Thus, the paradigmatic example of the "ultimate question," which involves an invasion of privacy and the chilling of private speech as a direct result of action by privately owned media companies, implicates the nonconstitutional privacy and speech rights of potential plaintiffs.

2. The Media

In comparison to the individual speaker side of the calculus, the media side involves speech rights that do rise to the constitutional level. Obviously, statutory prohibitions on disclosure squarely impact the speech rights of media outlets themselves.\textsuperscript{144} However, for purposes of developing a framework to address the "ultimate question," these rights standing alone are not the most relevant to the analysis. In fact, I am relatively indifferent to disclosure restrictions on an individual media company's right to publish private information solely because of those restrictions' limitations on a particular company's right to speak. I leave that argument for more libertarian-minded commentators. Instead, the more important First Amendment rights at issue are those of the media's audience.\textsuperscript{145} The press is afforded special treatment under our constitutional system because of the unique role it plays in disseminating news, ideas, opinions, and other information to the citizenry.\textsuperscript{146} Without the information provided by the media, very few people, including elected officials, could vote intelligently or form opinions on matters of public importance\textsuperscript{147} — fundamental premises on which the Framers established

\textsuperscript{143} The publication of private information is likely to chill private speech regardless of whether the publisher lawfully or unlawfully obtained that information. Thus, although resolving the "ultimate question" in favor of the press would likely chill private speech, this phenomenon is not limited exclusively to situations involving unlawful acquisition. Clearly, the First Amendment would prohibit a law banning publication of all private information, regardless of its source, solely because such publication would impact the privacy and speech rights of private figures.

\textsuperscript{144} For instance, Title III of the Omnibus Crime Control and Safe Streets Act of 1968 bars not only illegally intercepting information, but also disclosing information that the recipient knows or should have known was acquired illegally. \textit{See supra} note 74.

\textsuperscript{145} \textit{See, e.g.,} Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) ("It is the right of the viewers and listeners . . . which is paramount. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . .") (citations omitted).

\textsuperscript{146} \textit{See} Potter Stewart, \textit{Or of the Press}, 26 HASTINGS L.J. 631, 633 (1975) ("The publishing business is . . . the only organized private business that is given explicit constitutional protection. . . . [If] the Free Press guarantee meant no more than freedom of expression, it would be a constitutional redundancy.").

\textsuperscript{147} \textit{See} Cox Broad. Corp. v. Cohn, 420 U.S. 469, 491 (1975) ("[I]n a society in which
our democracy. As James Madison wrote, "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy: or perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."

Thus, the interests at stake on the media side of the equation necessarily depend on the nature of the intercepted speech. If that speech is purely private and has no relevance in public debate or to an informed citizenry, then the interests at issue are relatively minimal. On the other hand, if the intercepted speech addresses matters that are gravely important to public discussion, the rights presented are of potentially enormous importance and may lie at the very core of the First Amendment. Nevertheless, I still submit that adopting a public-concern test is not the appropriate way to factor the public/private nature of the illegally intercepted speech into resolution of the "ultimate question." Although it is undeniably an important consideration, whether or not the speech at issue relates to a matter of public concern should not be the sole deciding factor. Instead, as described in Part III below, I believe that this consideration is appropriately accounted for by analyzing how the nature of the speech at

each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations.

148. As Justice Brandeis wrote:

Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.


149. Letter from James Madison to W.T. Barry (Aug. 4, 1822), in IX THE WRITINGS OF JAMES MADISON 103 (Gailiard Hunt, ed., G.P. Putnam's Sons 1910); accord 2 THOMAS MCINTYRE COOLEY, CONSTITUTIONAL LIMITATIONS 886 (1927) ("The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.").

150. The public/private nature of the intercepted speech is the key consideration in the second guiding principle that I propose. See discussion infra Part II.B.
issue influences the harm to the speaker and the benefit to the public likely to result from publication.

B. The New York Times Principle

Before proposing a methodology for deciding whether the rights of the individual speaker should trump those of the media and its audience, I would like to suggest a second guiding principle — namely, that "our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open" should drive First Amendment analysis of the "ultimate question." I will refer to this second principle as the "New York Times principle," because of its enunciation by the Supreme Court in the seminal libel case of New York Times Co. v. Sullivan.151

Like the public-concern test favored in Bartnicki, the New York Times principle is premised on the invaluable role that public discourse plays in democratic self-government.152 Although courts have applied the First Amendment to numerous categories of speech other than those that foster "debate on public issues,"153 it is clear that speech on matters of public concern is of central importance to First Amendment jurisprudence.154 As discussed above in Part II.A, it is also at the heart of the First Amendment rights of the media and its audience. The press, with its access to information and power to deliver vast quantities of information to large numbers of people, plays an integral role in fulfilling the New York Times principle. In a society characterized by omnipresent news available in print, on the radio, on television, at any computer terminal, and through wireless communication devices, the role of the press in facilitating public debate can hardly be overstated.

Even so, I have previously discussed the potentially monumental problems associated with defining what constitutes public speech. At first glance, one might think that my condemnation of the public-concern test adopted by the Bartnicki Court and subsequent endorsement of the New

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152. See New York Times, 376 U.S. at 269 ("The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.") (quoting Stromberg v. California, 283 U.S. 359, 369 (1931)).

153. See supra note 117.

154. See supra notes 115-16.
York Times principle are inherently inconsistent. However, I would like to propose that although definitional problems are fatal to the public-concern test, these problems should not be used as an excuse to abandon the goal of fostering an "uninhibited, robust, and wide-open" national debate. Definitional considerations certainly argue against extending First Amendment protection only to speech on matters of public concern, but they do not rise to such a level as to be an excuse for the Court to abandon its long-held view that public speech is entitled to enhanced constitutional protection.\textsuperscript{155} Deserting such an important commitment on definitional grounds alone would be an unfortunate case of the tail wagging the dog.

The methodology proposed in Part III to address the "ultimate question" largely avoids this problem because it is not premised on the idea that public speech on the media side of the equation should necessarily trump the private speech on the other side of the scale simply because a court can categorize the former category as speech on a matter of public concern. Accordingly, this methodology does not require a court to make an \textit{absolute} yes/no decision on whether the published information is speech concerning a public affair, and thus it avoids the problematic first step of precisely defining the public speech category. Admittedly, as further explained in Part III, the test does require courts to evaluate the \textit{relative} public value of different types of speech so that courts can compare the public benefit of publishing the information at issue to the private harm that would likely result from publication. Even so, this formulation has a distinct advantage over the categorical public-concern test in that a court does not automatically grant or deny First Amendment protection to the speech at issue on the basis of a potentially artificial and incorrect definition. The proposed methodology gives some weight, although not conclusive, to the \textit{New York Times} principle while avoiding the talismanic approach that could be more harmful than helpful to the development of meaningful public debate.

\textit{III. A Methodology for Resolving the "Ultimate Question"}

Having set forth the guiding principles, the final task in presenting an alternative to the Bartnicki Court's public-concern test is to develop a workable methodology that implements those principles. Toward that end, I propose that the "ultimate question" is best answered by weighing the

\textsuperscript{155} After all, "[t]here is . . . a commonsense difference between purely personal gripes and gossip, on the one hand, and proposals for political reform on the other." Estlund, \textit{supra} note 106, at 4.
harm to the individual speaker against the benefit to the public that would result from publication, a calculus that I will refer to as the "harm/benefit paradigm." In those instances in which the harm to the individual speaker is greater than the benefit to the public, the speech and privacy rights of the individual speaker should take precedence over the First Amendment rights of the media and its audience, and in those instances in which the benefit to the public outweighs the harm to the individual speaker, courts should extend First Amendment protection to the media and its audience at the expense of the rights of the individual speaker.

Before elaborating on the harm/benefit paradigm, I first want to address the argument that balancing is an inappropriate way to decide "ultimate question" cases. Because Professor Volokh is undoubtedly right in his observation that the individual speaker's rights are not of constitutional proportion and because there clearly are constitutional rights at stake on the media side of the scale, one might argue that the media should always win and that the First Amendment should categorically protect the publication of truthful information. However, the mere imbalance between non-constitutional and constitutional rights does not necessarily mean that courts should always give primacy to the constitutional rights of the media. Courts could only base such an approach on the premise that the First Amendment is an absolute that can never be trumped by non-constitutional interests. As Alexander Meiklejohn stated the position,

156. See Briscoe v. Reader's Digest Ass'n, 483 P.2d 34, 42 (Cal. 1971) (noting that "the rights guaranteed by the First Amendment do not require total abrogation of the right to privacy. The goals sought by each may be achieved with a minimum of intrusion upon the other").

157. The most famous proponent of an absolutist First Amendment theory was Justice Hugo Black. He stated,

I do not subscribe to [the balancing approach] for I believe that the First Amendment's unequivocal command that there shall be no abridgment of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the "balancing" that was to be done. . . .

I fear that the creation of "tests" by which speech is left unprotected under certain circumstances is a standing invitation to abridge it. Konigsberg v. State Bar of California, 366 U.S. 36, 61, 63 (1961) (Black, J., dissenting); accord HUGO L. BLACK, A CONSTITUTIONAL FAITH (1968); Hugo L. Black, The Bill of Rights, 35 N.Y.U. L. REV. 865 (1960); Edmond Cahn, Justice Black and First Amendment "Absolutes": A Public Interview, 37 N.Y.U. L. REV. 549, 553, 559 (1962) (reporting that Black viewed the command that Congress shall make "no law" abridging the freedom of speech as literally meaning "no law," "without any ifs, buts, or whereases").
"The phrase, 'Congress shall make no law . . . abridging the freedom of speech,' is unqualified. It admits of no exceptions. To say that no laws of a given type shall be made means that no laws of that type shall, under any circumstances, be made."\textsuperscript{158} For obvious reasons, absolutism has serious drawbacks,\textsuperscript{159} including society's interest in reigning in speech that incites violence,\textsuperscript{160} speech that wrongfully injures the public standing of others,\textsuperscript{161} speech that expresses hatred toward ethnic, racial, or gender

\begin{quote}
Justices Frankfurter and Harlan rejected absolutism in favor of a balancing approach. As Justice Harlan wrote for the majority in \textit{Konigsberg},
\[\text{[W]e reject the view that freedom of speech and association . . . are "absolutes," not only in the undoubted sense that where the constitutional protection exists it must prevail, but also in the sense that the scope of that protection must be gathered solely from a literal reading of the First Amendment. Throughout its history this Court has consistently recognized . . . [that] constitutionally protected freedom of speech is narrower than an unlimited license to talk.}\]
\textit{Konigsberg}, 366 U.S. at 49-50 (footnote omitted).

\end{quote}

\textsuperscript{158} MEIKLEJOHN, \textit{supra} note 106, at 17. Later, Meiklejohn softened his position and acknowledged that
\begin{quote}
[n]o one can doubt that, in any well-governed society, the legislature has both the right and the duty to prohibit certain forms of speech. Libelous assertions may be, and must be, forbidden and punished. So too must slander. Words which incite men to crime are themselves criminal and must be dealt with as such. Sedition and treason may be expressed by speech or writing. And, in those cases, decisive repressive action by the government is imperative for the sake of the general welfare. All these necessities that speech be limited are recognized and provided for under the Constitution.
\end{quote}
\textit{Id.} at 18.

\textsuperscript{159} See SMOLLA, \textit{supra} note 135, at 2-6 ("Although absolutism is attractive for its intense commitment to freedom of speech, it proves to be too brittle and simplistic a methodology, and is simply not viable as a general working approach to speech problems.").

\textsuperscript{160} See, \textit{e.g.}, Brandenburg \textit{v.} Ohio, 395 U.S. 444, 447 (1969) (noting that the First Amendment permits a state to forbid advocacy "where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action"); Schenck \textit{v.} United States, 249 U.S. 47, 52 (1919) ("The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.").

\textsuperscript{161} See, \textit{e.g.}, Philadelphia Newspapers, Inc. \textit{v.} Hepps, 475 U.S. 767, 775 (1986) ("[W]hen the speech is of exclusively private concern and the plaintiff is a private figure . . . the constitutional requirements do not necessarily force any change in at least some of the features of the common-law landscape"); Gertz \textit{v.} Robert Welch, Inc., 418 U.S. 323 (1974)
groups,\textsuperscript{162} and speech that endangers national security.\textsuperscript{163} As Justice Frankfurter put it, "The demands of free speech in a democratic society as well as the interest in national security are better served by candid and informed weighing of the competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidian problems to be solved."\textsuperscript{164}

Accordingly, there are compelling reasons to limit the press's publication rights if not doing so would result in invasions of privacy and the chilling of private speech to a degree that society finds unacceptable. The harm/benefit paradigm is designed to find that point at which publication has unacceptable consequences, and likewise, to identify those cases in which extending First Amendment protection to the publication of unlawfully acquired information is the optimal outcome.\textsuperscript{165} In the next two sections, I discuss the factors that influence the harm and the benefit sides of the calculus, and I suggest how courts should measure the competing interests when applying the harm/benefit paradigm.

\textsuperscript{162} See, e.g., Beauharnais v. Illinois, 343 U.S. 250, 252 (1952) (sustaining defendant's conviction for distributing a leaflet calling for public officials to "halt the further encroachment, harassment and invasion of white people, their property, neighborhoods and persons, by the Negro").

\textsuperscript{163} See, e.g., Dennis v. United States, 341 U.S. 494 (1951) (upholding the convictions of members of the Communist Party for advocating an overthrow of the United States government by force and violence); Schenck v. United States, 249 U.S. 47 (1919) (holding that defendant's conviction for distributing a leaflet urging violation of the draft laws does not violate the First Amendment).

\textsuperscript{164} Dennis, 341 U.S. at 524-25 (Frankfurter, J., concurring).

\textsuperscript{165} Balancing has a long and illustrious history in First Amendment jurisprudence. In American Communications Ass'n v. Douds, 339 U.S. 382, 399 (1950), Chief Justice Vinson wrote that when deciding between claims of free speech and claims of public order, "the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented." Similarly, Justice Harlan was of the view that "[w]here First Amendment rights are asserted to bar governmental interrogation[,] resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown." Barenblatt v. United States, 360 U.S. 109, 126 (1959).
A. Harm to the Individual Speaker

How should a court determine the amount of harm that an individual speaker is likely to experience from the publication of a private conversation? Is this a purely subjective consideration that varies from person to person and conversation to conversation, or are there determinative factors that lend some predictability to the inquiry? If such factors do exist, are they of a type that a court is well suited to evaluate?

Harm to the individual speaker primarily depends on two factors, each of which is already part of First Amendment jurisprudence.166 The first determinant is where the individual speaker falls on the public official/public figure/private speaker continuum. Someone who has no involvement in public life and finds her private conversations the subject of a CNN special is likely to feel more violated and more harmed by that disclosure than is a public official or a public figure who has knowingly chosen a career or lifestyle that may subject her to media scrutiny.167 This is not to suggest that a public official who has the details of her private life revealed does not experience personal harm. Take, for instance, the Bill Clinton-Monica Lewinsky scandal. The President of the United States is perhaps the paradigmatic public official, but this does not eliminate the personal and professional suffering that he and his family experienced as a result of the intense media scrutiny of his private life.168

166. See infra notes 171-74 and accompanying text.
167. In the libel context, the Supreme Court has recognized that private persons are "more vulnerable to injury" than public figures. Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1974). "Private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery." Id. at 345.
168. See, e.g., Helen Dewar, Senators Envision Swift Clinton Trial; Need to Call Witnesses Is Discounted, WASH. POST, Dec. 28, 1998, at A1 (reporting that the Republican senators planned to resist censure as an alternative to impeachment before the completion of a full-blown Senate trial); David Willman, Questioning Resumes in Lewinsky Inquiry Probe: Grand jury hears from three Who had roles supervising ex-intern, L.A. TIMES, Feb. 26, 1998, at A16 (quoting former White House Deputy Chief of Staff Harold M. Ickes on the "Gestapo" tactics adopted by independent counsel Ken Starr). As an aside, the Clinton-Lewinsky scandal, like the paradigmatic "ultimate question," has its origins in the surreptitious recording and subsequent disclosure of private conversations. The Lewinsky saga first came to light "on Jan. 12[, 1998,] after a friend of Lewinsky's from the Pentagon, Linda Tripp, provided secret recordings of numerous conversations in which Lewinsky described having intimate relations with the president." Willman, supra.

Other examples demonstrating the harm that even public officials and public figures experience as a result of invasions of their privacy span the spectrum of political figures, celebrities, and athletes, including, for example, the publication of Senator Robert Packwood's diaries. See, e.g., Cynthia Hanson & Abraham McLaughlin, Citing Senator Packwood's
However, the point is that the relative injury that a public official or public figure experiences as a result of the prying press is likely to be less than that experienced by a private individual. By choosing to enter public life, an individual reveals general information about her risk preferences with respect to potential invasions of her privacy. Moreover, both public officials and public figures are likely to have greater access to the mass media to repair their damaged reputations than is a private figure. Even so, the decision to enter public life is obviously not a perfect proxy for an individual's tolerance for invasions of her privacy. For instance, someone with a deep aversion to having the private details of her life exposed might nevertheless enter public life if the expected benefits are great enough. In such a case, the harm that she would experience from the publication of an illegally intercepted conversation might be no less than the harm that a purely private individual would experience in similar circumstances. However, as a general matter, the decision to enter public life does suggest a relatively high tolerance for public disclosure of private matters. Consequently, the more public the person, the less harm that she is likely to experience as a result of the publication of unlawfully obtained information.

The second determining factor on the harm to the speaker side of the equation is the public/private nature of the intercepted speech. As with the public/private nature of the speaker, there is an inverse correlation between the public nature of the speech at issue and the harm to the speaker, i.e.,

_Diaries as Evidence_, CHRISTIAN SCI. MONITOR, Sept. 18, 1995, at 2 (reporting that the Center for Responsive Politics filed complaints against Senator Packwood with the Federal Election Commission based on evidence from Senator Packwood's diaries cited as evidence of campaign wrongdoing); Associated Press, _Justice Dept. Drops Packwood Inquiry_, N.Y. TIMES, July 24, 1996, at A20 (reporting that the Department of Justice ultimately decided not to prosecute Packwood over accusations that he altered his diaries to obstruct an investigation into sexual and official misconduct).

169. As Chief Justice Warren noted, "[A]s a class these 'public figures' have as ready access as 'public officials' to mass media of communication, both to influence policy and to counter criticism of their views and activities." Curtis Publ'g Co. v. Butts, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring).

170. _See Gertz_, 418 U.S. at 345 ("[T]he communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them. No such assumption is justified with respect to a private individual. He has not accepted public office or assumed an 'influential role in ordering society.' He has relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood. Thus, private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery." (citation omitted).
as a general matter, as the public nature of the intercepted speech increases, the harm to the speaker of having otherwise private communications published likely decreases. Conversely, as the speech moves down the public/private continuum toward the private endpoint, the harm to the speaker likely increases. For example, all else being equal, a purely private person would probably prefer to have her views on an upcoming school board election published in her local newspaper than the intensely personal details of a spat with her husband. And the same generally holds true for public officials and public figures. Those who have chosen to enter public life do so with full knowledge that their views on public issues are likely to become widely known. Indeed, this is often the point of choosing to become a public official or a public figure. However, even public figures generally expect to maintain some degree of privacy with respect to their personal lives. Accordingly, a public official or public figure, just like a private figure, will likely experience greater harm when the published information concerns private, as opposed to public, matters.

As mentioned above, courts are well equipped to evaluate both of the primary determinants of the harm to the speaker, because both are already part of First Amendment jurisprudence. For example, courts have long broken down libel law along public official, public figure, and private figure lines,171 and extensive case law concerning the characteristics of each category has developed.172 Additionally, with respect to the second determinant, the Supreme Court has often indicated in dictum that it distinguishes between speech on matters of public concern and speech on matters of private concern,173 and that speech on matters of public concern is entitled to the highest level of First Amendment protection.174

171. Courts categorize libel plaintiffs as public officials, public figures, or private figures. See id. at 347 (holding that the "States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehoods injurious to a private individual") (emphasis added); Curtis Pub'g Co., 388 U.S. at 134 (applying New York Times to libel actions "instituted by persons who are not public officials, but who are 'public figures' and involved in issues in which the public has a justified and important interest") (emphasis added); New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) ("The constitutional guarantees require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice.'") (emphasis added).


As discussed in Part I.C, the Court has generally declined to categorically exclude speech on matters of private concern from constitutional protection, but through its statements about the important role that "newsworthy" or "public speech" plays in a democratic society, the Court has demonstrated a willingness to differentiate between public and private speech. Accordingly, an analysis of the relative public nature of illegally intercepted information is not a task that is foreign to the judiciary. Moreover, it is not an exercise that necessarily requires courts to define with precision the contours of what constitutes speech on matters of public concern. Instead, a court must make only a relative determination of where the speech likely falls on the public/private continuum.

The harm to the individual speaker resulting from the publication of unlawfully intercepted information can be depicted graphically as set forth in Graph 1 below. In Graph 1, the y-axis represents the public/private nature of the speech, and the x-axis represents the public/private nature of the speaker. As shown by the solid line extending through points 1 and 2, the harm to the individual speaker decreases as (1) the public nature of the speech at issue increases and (2) the public nature of the speaker increases. For instance, in the case of a relatively private speaker and relatively private speech (point A), the corresponding point on the harm to the individual speaker line is very high (point 1), thus indicating a relatively high level of harm that could be expected from publication. Conversely, in the case of a relatively public speaker and relatively public speech (point B), the corresponding point on the harm to the individual speaker line is relatively low (point 2). Again, I am not arguing that a public figure engaged in a private conversation on a matter of public significance has no privacy interests at stake. Indeed, the very fact that the public figure is discussing such matters in private rather than at a press conference, for example, suggests a strong desire to keep the content of that conversation out of public view. Nevertheless, a public official discussing a newsworthy

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175. To add context to an otherwise abstract discussion, think of point A as representing, for example, the librarian in your local public library having a conversation with his wife about their daughter's progress in school.

176. To contextualize point B, think of Kofi Annan, the Secretary General of the United Nations, expressing his views on human rights abuses in China.
topic has much less personal privacy at stake than does the speaker represented by point A.

To determine how courts should resolve the "ultimate question" involving the speech and speakers represented by points A and B, it is necessary to derive the benefit to the public that is likely to result from publication in those situations and then to compare that benefit to the corresponding harm. In the next section, I derive a benefit-to-the-public line that can be overlaid on Graph 1 to solve the "ultimate question."

**B. Benefit to the Public**

The public/private nature of the speaker and the public/private nature of the speech are also the primary determinants of the magnitude of the aggregate benefit that the public is likely to receive from the publication of unlawfully acquired information. With respect to the first determinant — the public/private nature of the speaker — the benefit to the public that is likely to result from publication generally increases as the speaker moves up the public/private continuum toward the public endpoint. For instance, courts can expect that the President of the United States' private statements on a nuclear arms agreement with Russia will have a greater influence on public debate than a purely private citizen's opinions.
on the same issue.\textsuperscript{177} Similarly, even in the case of speech that concerns a purely private matter, the speech of a public official or a public figure is more relevant to fulfillment of the \textit{New York Times} principle than the speech of a private individual.\textsuperscript{178}

With respect to the second determinant — the public/private nature of the speech — as a general matter, the benefit to the public increases as the public nature of the speech increases. As discussed earlier, when the "ultimate question" involves the publication of speech that relates to a matter of public concern, the First Amendment rights of the media and its audience are of greater significance than when the published information relates to a purely private matter. Similarly, the \textit{New York Times} principle is also premised on the importance of speech on matters of public concern. Indeed it is virtually a truism that public speech is more integral to an "uninhibited, robust, and wide-open" public debate than is speech that is not on a matter of public concern.

Accordingly, the benefit to the public and its relationship to the public/private nature of the speaker and the public/private nature of the speech can be depicted graphically as set forth in Graph 2 below.

\textsuperscript{177} This is also likely to be the case with a public figure, as opposed to a public official. As Chief Justice Warren noted, "Our citizenry has a legitimate and substantial interest in the conduct of [public officials and public figures], and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of 'public officials.'" Curtis Pub'lgs Co. v. Butts, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring).

\textsuperscript{178} Although a public official's statements on purely private matters have less impact on achieving a robust public debate than do his statements on more public topics, statements on private matters nevertheless have a greater impact on public debate than similar statements made by a private citizen. For instance, Bill Clinton was constantly subjected to the argument that the decisions made in his private life were relevant to his fitness to serve as President. See, e.g., Aubrey Immelman, \textit{Personality Scrutiny Brings Fewer Presidential Surprises}, \textit{St. Cloud Times}, Mar. 11, 2001, at 7B ("[P]ersonality problems do not materialize from emerging circumstances to afflict presidents. It is a preexisting condition, perhaps undetected, that accompanies a president into office. . . . My psychological profile characterized Bill Clinton as being predisposed to 'self-centeredness, arrogance, and a sense of entitlement,' and prone to leaving 'a trail of broken promises and outrageous acts' and — ultimately — 'a fall from grace.'"). \textit{But see} Shaw, \textit{supra} note 134 ("Sexual infidelity is immoral but it is not illegal, and it has about as much to do with the democratic process as Hillary's hairdo. . . . Regardless of what one thinks of Bill Clinton as a president or as a husband, it would be bad for this country . . . if the media helped bring down a president simply because he couldn't keep his fly zipped.").
As shown by the solid benefit-to-the-public line extending through points A and B, the benefit increases as (1) the public nature of the speech increases and (2) the public nature of the speaker increases. At point A, which represents a relatively private speaker engaged in relatively private speech, the aggregate public benefit of publication is relatively low. For instance, it is clear that your neighbor's private conversations about her personal struggles with drug addiction have relatively little chance of warranting front-page news coverage. Even with respect to national drug policy, which is undoubtedly a matter of public concern, her individual experiences are unlikely to have broad public significance. Conversely, at point B, which represents a highly public speaker engaged in speech that is highly relevant to public debate, the benefit to the public from publication is relatively high.

179. For comparability and continuity, point A and point B on Graph 2 represent the same respective speakers and speech discussed earlier in the context of Graph 1.
180. This assumes, of course, that your neighbor is not a public official or a public figure and that her addiction has not resulted in independently newsworthy events, such as the commission of violent crimes.
C. Implementing the Harm/Benefit Paradigm

Having derived graphical representations of the harm to the speaker and the benefit to the public, the final step in implementing a methodology to resolve the "ultimate question" is to combine Graphs 1 and 2 into a single graph from which courts may derive a solution.

Graph 3 presents the full range of public/private speech and public/private speakers, and thus constitutes a theoretical solution to the range of possible scenarios in which the "ultimate question" could arise. For every potential combination in which the benefit to the public exceeds the harm to the individual speaker, i.e., every point that is to the right of the asterisk on the x-axis, a court should uphold the First Amendment publication rights of the media, regardless of whether the publisher acted unlawfully in obtaining the information. On the other hand, a court should give primacy to the privacy and speech rights of the individual speaker at every point on the graph where the harm to the individual speaker that has resulted from publication exceeds the benefit to the public, i.e., every point that is to the left of the asterisk on the x-axis. For speech with a public/private level indicated by the asterisk on the y-axis and a speaker with a public/private level indicated by the asterisk on the x-axis, the harm to the individual speaker that would result from publication exactly equals the benefit to the public. In this situation, a court
should be indifferent between honoring the rights of the speaker or the rights of the press.

Having previously discussed the expected harm and benefit associated with points A and B, which have been carried forward to Graph 3 from Graphs 1 and 2, it is now possible to synthesize that information to reach the optimal judicial decision for both cases. First, at point A above, which corresponds to private speech (i.e., point Y on the y-axis) and a private speaker (i.e., point W on the x-axis), the expected harm to the speaker from publication exceeds the benefit to the public by the amount of the vertical distance between points 1 and A. In this case, a court maximizes social welfare by concluding that the speech and privacy rights of the individual speaker trump the First Amendment rights of the media and its audience.

At point B above, which corresponds to speech that is highly relevant to public discourse (i.e., point Z on the public/private speech continuum) and a speaker that is a public figure or a public official (i.e., point X on the public/private speaker continuum), publication would result in benefit to the public in excess of the harm to the individual speaker by the amount of the vertical distance between points B and 2. Accordingly, a court should conclude in this instance that the First Amendment protects the publication of unlawfully intercepted information.

Obviously, the real judicial work comes in finding where a particular case falls on Graph 3. In proposing the harm/benefit paradigm as a solution to the "ultimate question," I have not intended to suggest that the "ultimate question" is susceptible to simplistic cost/benefit analysis that is more appropriately carried out by machine than by judicial mind. The real work in resolving a case presenting the "ultimate question" involves the following steps: (1) evaluating the nature of the intercepted speech; (2) evaluating the characteristics of the participants in the conversation at issue; (3) determining whether the general rules regarding the benefit to the public and the harm to the speaker do in fact hold true in the instant case; and (4) comparing the relative harm and benefit by means of the type of analysis that is facilitated by Graph 3. These steps find their origins in existing First Amendment jurisprudence and continue to require the deliberative skills for which courts are particularly well suited. Rather than seeking to reduce resolution of the "ultimate question" to an arithmetic exercise, the harm/benefit paradigm is primarily a tool that rationalizes the interrelationships between the determining factors and offers a coherent framework for analyzing the "ultimate question."
IV. Implications of the Harm/Benefit Paradigm

As a general matter, the harm/benefit paradigm favors extending First Amendment protection to the media in those instances in which the intercepted communication involves a public speaker speaking on matters of public significance. Correlatively, it tends to protect the individual speaker's rights in those instances in which the intercepted communication involves a private speaker speaking on purely private matters that have little public significance. These general trends further the policies advanced by both the competing rights principle and the New York Times principle. By considering the competing rights on both sides of the calculus, the harm/benefit paradigm avoids unacceptably chilling private discussion, while also enhancing debate on matters of public significance. The outcomes reached under this methodology maximize the quantity of both public and private speech by ensuring that the Constitution protects the publication of speech that is relevant to public debate, while assuring that adequate privacy protections will remain in place for the speech that is less relevant to public discourse.181

Perhaps most importantly, the harm/benefit paradigm provides the flexibility that categorical approaches, including the public-concern test adopted by the Bartnicki Court, fail to offer. As suggested by Graph 3, there are some types of speech that if illegally intercepted from a public official or a public figure and subsequently published should be entitled to constitutional protection, but, if intercepted from a private figure and subsequently published, should not be protected. For instance, at point I on Graph 3, which corresponds to speech that is highly relevant to public discourse (i.e., point Z on the public/private speech continuum) and a speaker that is a relatively private individual (i.e., point W on the public/private speaker continuum), publication would result in harm to the individual speaker in excess of the benefit to the public by the amount of the vertical distance between points I and A. In this case, the harm/benefit paradigm suggests that the First Amendment should not protect publication. However, if speech having the same public relevance (i.e., a public/private speech level of Z) was intercepted from a highly public speaker (e.g., a public/private speaker level

181. This is not to say that the First Amendment should never protect the publication of illegally intercepted private speech, but only that the universe of private information the publication of which should be constitutionally protected is relatively small. Private figures should be relatively comfortable that their conversations about private matters could not lawfully be published, although there is a subset of private speech that, if illegally intercepted from highly public figures and subsequently published, might warrant constitutional protection under the harm/benefit paradigm.
of X), the benefit to the public would exceed the harm to the individual speaker by the amount of the vertical distance between points B and 2, and honoring the media's First Amendment rights over the rights of the individual speaker would be the desirable outcome. If the unlawful publication of this same speech were to come before a court that favored the public-concern test, such a court would likely extend constitutional protection to the media defendants in both of the cases described above (regardless of the nature of the speaker). Although the result reached under the public-concern test would be the "correct" result in one of the cases, the public-concern test would yield the suboptimal result in the other. Thus, the public-concern test presents the danger of protecting the publication of marginally relevant public speech at the expense of significantly chilling private speech. Conversely, the harm/benefit paradigm, by considering both the competing rights principle and the New York Times principle, avoids unacceptably chilling private discussion, while also enhancing public debate on matters of public significance.

Conclusion

It is now almost cliché to say that the information age is upon us, but it is true that we live in a world where news and information are more readily available than ever before. Along with the proliferation of twenty-four-hour news, the World Wide Web, cellular telephones, and wireless communication devices, both the press and everyone else have unprecedented access to information in ways that we could not conceive of just a few years ago. As a general matter, this is a good thing. One need not carve out time to watch the nightly news at the risk of being out of touch with the world. One need not leave the comfort of her living room to access information that was once only available in the reference rooms of our best libraries. However, there have been, and will continue to be, unfortunate consequences that come about as a result of the information age, and the invasion of privacy is near, if not at, the top of the list. In some instances, it will be possible to classify such invasions as categorically wrong, for instance, when they facilitate credit card or identity theft. However, there will undoubtedly be more morally ambiguous violations as well. Think, for example, of the reporter who illegally intercepts e-mail messages between a senator and the CEO of Corporation X, who keeps the senator on his payroll in exchange for political favors. What will we do when a media outlet publishes the story of bribery and corruption and the reporter is languishing in prison or struggling to pay hefty fines for having published information that he acquired illegally?

There are compelling reasons that society should favor the limited extension of constitutional protection to the publication of unlawfully
obtained speech. However, courts cannot extend this protection lightly, categorically, or without serious deliberation that takes into account the privacy rights on both sides of the equation. But neither can courts deny this protection on the grounds of privacy rights alone. I have tried to give structure and reason to the inquiry required by this "ultimate question" of First Amendment law, and in the process, I have attempted to demonstrate that the current path of Supreme Court jurisprudence toward a pure public-concern test is doctrinally dangerous and ultimately unworkable. As an alternative, I have proposed the harm/benefit paradigm, which synthesizes existing First Amendment doctrine into a coherent framework that rationalizes resolution of the "ultimate question." In the end, the harm/benefit paradigm honors the freedom of the press and protects public speech, but not at the extraordinary cost of private citizens' legitimate expectations of privacy and an unacceptable chilling of private speech.