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## Handcuffing the Press: First Amendment Limitations on the Reach of Criminal Statutes as Applied to the Media

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## I. INTRODUCTION

In 2005, a federal grand jury indicted Steven Rosen and Keith Weissman, former employees of the American Israel Public Affairs Committee (AIPAC), for allegedly conspiring with a government official to obtain and transmit national defense information in violation of the Espionage Act of 1917.<sup>1</sup> The Department of Justice alleged that Rosen and Weissman had conspired with a third defendant, Lawrence Franklin, to obtain national defense information Franklin had acquired as a Pentagon analyst, and to communicate that information to journalists and foreign officials.<sup>2</sup> The conduct on which the AIPAC prosecution was based—the receipt and transmission of classified information in violation of the Espionage Act—led to renewed concerns among journalists about the reach of this statute and similar laws to their own newsgathering conduct. Although the United States ultimately abandoned the AIPAC prosecution, claiming several rulings in the case had made it difficult for the government to meet its burden, the concerns for journalists raised by the prosecution remain.<sup>3</sup> In the AIPAC prosecution, the government sought to hold private citizens criminally liable for the kind of conduct journalists engage in every day—receiving and transmitting information from persons who themselves may have violated the law in providing it.

This article examines the limitations, if any, placed by the First Amendment on the permissible reach of criminal statutes as applied to journalists, either directly or through principles of secondary liability, in the wake of the publication of information allegedly received from a person who may have accessed or provided such information in violation of a criminal statute. Part II provides an overview of the general First Amendment principles that must inform any analysis of the reach of criminal statutes to the media's newsgathering conduct. Part III examines the interplay between the First Amendment and various theories of criminal liability as applied to the press's unauthorized receipt and publication of information ordinarily protected against public disclosure. Part IV summarizes the authors' conclusions about the constraints imposed by the First Amendment on the prosecution of journalists for engaging in such conduct.

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1. See, e.g., *United States v. Rosen*, 599 F. Supp. 2d 690 (E.D. Va. 2009). Rosen and Weissman were indicted under two subsections of the Espionage Act, 18 U.S.C. § 793(d) and (g), which criminalize the communication of national defense information to persons not authorized to receive it. *Rosen*, 599 F. Supp. 2d at 693.
  2. Franklin pled guilty to several charges as part of a plea bargain and received a twelve-year prison sentence, which was later reduced to ten months' house arrest. *Rosen*, 599 F. Supp. 2d at 693; Jerry Markon, *Sentence Reduced in Pentagon Case*, WASH. POST, June 12, 2009, at A12.
  3. Indeed, a Federal Bureau of Investigation linguist recently pled guilty to providing classified information to a blogger and was sentenced to twenty months in prison, suggesting that unauthorized disclosures of information to the press will continue to raise questions about the press's alleged role in criminal conduct. See Josh Gerstein, *Justice Dept. Cracks Down on Leaks*, POLITICO (May 25, 2010, 4:44 AM), <http://www.politico.com/news/stories/0510/37721.html>.

## II. GOVERNING FIRST AMENDMENT PRINCIPLES

### A. Truthful Speech About Newsworthy Matters

Contemporary interpretation of the First Amendment proceeds from the premise that “[t]he freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without . . . fear of subsequent punishment.”<sup>4</sup> Thus, in a variety of contexts, the Supreme Court has emphasized that “truthful information about a matter of public significance” receives extremely broad constitutional protection from the reach of criminal and civil statutes.<sup>5</sup> The Court has in fact explained that, even when “a matter of public significance” is not involved, “state action to punish the publication of truthful information seldom can satisfy constitutional standards.”<sup>6</sup> In short, there is an “overarching ‘public interest, secured by the Constitution, in the dissemination of truth.’”<sup>7</sup>

In the context of publications addressing newsworthy matters of public concern, moreover, the Supreme Court has held that the protection of truthful speech is at its zenith.<sup>8</sup> Under such circumstances, “[t]ruth may not be the subject of either civil or criminal sanctions.”<sup>9</sup> Indeed, the “general proposition that freedom of expression upon public questions is secured by the First Amendment”<sup>10</sup> is so firmly entrenched in the First Amendment that it forms the foundation for the Supreme Court’s elaborate jurisprudence holding that even *false* and defamatory speech about newsworthy matters must be afforded broad protection from criminal and civil liability in order to provide sufficient “breathing space” for the dissemination of truthful information about such matters.<sup>11</sup> As the Court explained most recently in *Bartnicki v. Vopper*,<sup>12</sup> “[t]hose cases all relied on our ‘profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,’” and “require[] the conclusion” that “if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not

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4. *Thornhill v. Alabama*, 310 U.S. 88, 101–02 (1940).
  5. *Fla. Star v. B.J.F.*, 491 U.S. 524, 533–34 (1989) (quoting *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 103 (1979)).
  6. *Daily Mail*, 443 U.S. at 102–03; see *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 562 (1980) (holding that, even in commercial speech context, “the First Amendment presumes that some accurate information is better than no information at all”).
  7. *Fla. Star*, 491 U.S. at 533 (quoting *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491 (1975)).
  8. See *Connick v. Myers*, 461 U.S. 138, 145 (1983) (stating that accurate information about newsworthy matters “occupies the ‘highest rung of the hierarchy of First Amendment values,’ and is entitled to special protection” (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982))).
  9. *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964); see also *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 778 (1986) (“[S]peech of public concern is at the core of the First Amendment’s protections.” (citing *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758–59 (1985))).
  10. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964).
  11. *Id.* at 279 n.19; see *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974).
  12. 532 U.S. 514 (2001).

constitutionally punish publication of the information, absent a need . . . of the highest order.”<sup>13</sup>

*B. Newsworthy Matters of “Public Concern”*

As the Supreme Court observed in *Time, Inc. v. Hill*, “[t]he guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government.”<sup>14</sup> Rather, the Court has explained that “[f]reedom of discussion, if it [is to] fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.”<sup>15</sup> Thus, in a variety of contexts, courts have determined that “a publication is newsworthy if some reasonable members of the community could entertain a legitimate interest in it.”<sup>16</sup> These holdings are synthesized in the *Restatement (Second) of Torts*:

The scope of a matter of legitimate concern to the public is not limited to “news,” in the sense of reports of current events or activities. It extends also to the use of names, likenesses or facts in giving information to the public for purposes of education, amusement or enlightenment, when the public may reasonably be expected to have a legitimate interest in what is published.<sup>17</sup>

And matters cease to be newsworthy only “when the community has no interest in them beyond the voyeuristic thrill of penetrating the wall of privacy that surrounds a stranger,”<sup>18</sup> or when the interest in the matter constitutes “a morbid and sensational prying into private lives *for its own sake*.”<sup>19</sup>

In this manner, both the First Amendment and the common law distinguish the unprotected publication of putatively private information “for its own sake,” on the one hand, from the protected publication of the same information when it relates to matters of broader public concern, on the other.<sup>20</sup> Thus, for example, in *Florida Star v.*

13. *Id.* at 528, 534–35 (alteration in original) (quoting *Sullivan*, 376 U.S. at 270; *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 103 (1979)) (internal quotation marks omitted).

14. 385 U.S. 374, 388 (1967).

15. *Id.* (quoting *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940)) (internal quotation marks omitted); *see also Shulman v. Group W Prods., Inc.*, 955 P.2d 469, 485 (Cal. 1998) (noting that judicial analysis of whether a publication addresses a newsworthy subject “incorporates considerable deference to reporters and editors, avoiding the likelihood of unconstitutional interference with the freedom of the press to report truthfully on matters of legitimate public interest”).

16. *Shulman*, 955 P.2d at 485.

17. RESTATEMENT (SECOND) OF TORTS § 652D cmt. j (1977).

18. *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1232 (7th Cir. 1993).

19. RESTATEMENT (SECOND) OF TORTS § 652D cmt. h (1977) (emphasis added).

20. *See, e.g., Hill*, 385 U.S. at 383 n.7 (1967) (“[I]t has been agreed that there is a generous privilege to serve the public interest in news” in the face of claims “against the press for public disclosure of truthful but private details about the individual which caused emotional upset to him.” (quoting Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 L. & CONTEMP. PROBS. 326, 355–56 (1966)) (internal quotation mark omitted)); *Gilbert v. Med. Econ. Co.*, 665 F.2d 305, 308 (10th Cir. 1981)

*B.J.F.*, where a newspaper acquired and published the name of a rape victim in violation of state law, the Supreme Court held that, though unquestionably private, the plaintiff's identity constituted "information about a matter of public significance," especially "[a]t a time in which we are daily reminded of the tragic reality of rape."<sup>21</sup> Similarly, in *Shulman v. Group W Productions, Inc.*, the California Supreme Court concluded that a television broadcast depicting an accident victim's "appearance and words during [a] rescue and evacuation" were "of legitimate public interest," both because "[a]utomobile accidents are by their nature of interest to that great portion of the public that travels frequently by automobile" and because the "rescue and medical treatment of accident victims is also of legitimate concern to much of the public, involving as it does a critical service that any member of the public may someday need."<sup>22</sup>

In addition, the U.S. Supreme Court has emphasized that the protection afforded by the First Amendment to newsworthy matters of public concern may not vary based on the identity of the publisher of such information, the perceived "value" of the information reported, or whether the publisher profited from its dissemination. First, as the Court famously explained in *Lovell v. City of Griffin*:

The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets . . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.<sup>23</sup>

Thus, for example, in *Hustler Magazine, Inc. v. Falwell*, the Court extended First Amendment protection to an advertising parody published in *Hustler* magazine, which depicted the Reverend Jerry Falwell engaged in an "incestuous rendezvous with his mother in an outhouse."<sup>24</sup> The Court so held despite its recognition that the parody "published in *Hustler* [was] at best a distant cousin" of the editorial cartoons that for centuries have played a significant role in public discourse, reasoning that "a central tenet of the First Amendment [is] that the government must remain neutral in the marketplace of ideas."<sup>25</sup>

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(holding that the newsworthiness concept "properly restricts liability for public disclosure of private facts to the extreme case, thereby providing the breathing space needed by the press to properly exercise effective editorial judgment").

21. 491 U.S. 524, 536–37 (1989) (quoting *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979)) (internal quotation mark omitted).
22. 955 P.2d 469, 487–88 (Cal. 1998).
23. 303 U.S. 444, 452 (1938); *see also* *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 65 (1981) ("Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works fall within the First Amendment guarantee."); *Mills v. Alabama*, 384 U.S. 214, 219 (1966) ("[T]he press . . . includes not only newspapers, books, and magazines, but also humble leaflets and circulars.").
24. 485 U.S. 46, 48 (1988).
25. *Id.* at 55–56 (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 745–46 (1978)) (internal quotation mark omitted); *see also* *Winters v. New York*, 333 U.S. 507, 510 (1948) ("Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as

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Second, the Supreme Court has expressly disavowed any test of whether particular “speech” falls within the protections of the First Amendment that is premised on *ad hoc* determinations of its “value” in comparison with the “harm” it is alleged to have perpetrated.<sup>26</sup> Instead, the Court has constructed a handful of narrow, precisely defined categories of expression that are not protected by the First Amendment at all, including obscenity, defamation, and “fighting words,”<sup>27</sup> and has rejected the notion that constitutional analysis of otherwise *protected* expression should depend on judicial assessment of its comparative worth.<sup>28</sup> As the Ninth Circuit has explained:

[T]he first amendment is as close to an absolute as we have in our jurisprudence: Speech shielded by the amendment’s protective wing must remain inviolate regardless of its inherent worth. The distaste we may feel as individuals toward the content or message of protected expression cannot, of course, detain us from discharging our duty as guardians of the Constitution.<sup>29</sup>

Finally, the Court has consistently held that whether a publication is sold for profit is of no relevance for First Amendment purposes.<sup>30</sup> Accordingly, the Ninth

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the best of literature.”); *Shulman*, 955 P.2d at 482 (“[T]he constitutional guarantees of freedom of expression apply with equal force to [a] publication whether it be a news report or an entertainment feature . . . .” (omission in original) (quoting *Gill v. Hearst Publ’g Co.*, 253 P.2d 441, 443 (Cal. 1953)) (internal quotation mark omitted)).

26. *See, e.g.*, *United States v. Stevens*, 130 S. Ct. 1577, 1585 (2010) (“The First Amendment’s guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs.”); *id.* at 1586 (rejecting notion that a test may be applied “to permit the Government to imprison any speaker so long as his speech is deemed valueless or unnecessary, or so long as an ad hoc calculus of costs and benefits tilts in a statute’s favor”).
27. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992) (recognizing that the Supreme Court has in recent years “narrowed the scope” of even these “traditional categorical exceptions”); *Stevens*, 130 S. Ct. at 1583–84 (declining to hold that depictions of animal cruelty, as a class, constitute unprotected speech).
28. *See, e.g.*, *Falwell*, 485 U.S. at 55–56 (“The fact that society may find speech offensive is not a sufficient reason for suppressing it.” (quoting *Pacifica*, 438 U.S. at 745) (internal quotation mark omitted)); *Am. Booksellers Ass’n v. Hudnut*, 771 F.2d 323, 331–32 (7th Cir. 1985) (recognizing that the Supreme Court “sometimes balances the value of speech against the cost of its restriction, but it does this by category of speech and not by the content of particular works”), *aff’d*, 475 U.S. 1001 (1986); *United States v. U.S. Dist. Court*, 858 F.2d 534, 541 (9th Cir. 1988) (noting that the Supreme Court has “refused to embrace the notion that the degree of first amendment protection ‘depend[s] on the Court’s judgment as to the value of the protected speech that might be deterred’” (alteration in original) (quoting *Pacifica*, 438 U.S. at 761–62 n.4 (Powell, J., concurring in part and concurring in judgment))).
29. *U.S. Dist. Court*, 858 F.2d at 541; *see also Dible v. Chandler*, 515 F.3d 918, 928 (9th Cir. 2008) (“[T]he degree of protection the first amendment affords speech does not vary with the social value ascribed to that speech by the courts.” (quoting *Kev, Inc. v. Kitsap County*, 793 F.2d 1053, 1058 (9th Cir. 1986)) (internal quotation marks omitted)).
30. *See, e.g.*, *Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657, 667 (1989) (“If a profit motive could somehow strip communications of the otherwise available constitutional protection, our cases from *New York Times* to *Hustler Magazine* would be little more than empty vessels.”); *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 756 n.5 (1988) (“[T]he degree of First Amendment protection is not diminished merely because the newspaper or speech is sold rather than given away.”); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976) (“Speech . . . is



Circuit has explained that “[a] profit motive . . . does not diminish a journalist’s First Amendment rights” and “does not render its newsgathering and reporting activities . . . [as] entitled to less than full First Amendment protection.”<sup>31</sup>

*C. Governmental Interest of the “Highest Order”*

As the Supreme Court noted in *Bartnicki v. Vopper*, the protections afforded by the First Amendment to accurate speech about newsworthy matters may properly give way only in the face of a statutory scheme that is narrowly tailored to vindicate a governmental interest of the “highest order.”<sup>32</sup> In this regard, the Court has explained that the First Amendment’s protections may properly be divested “only in exceptional cases”<sup>33</sup> because imposition of “a penal sanction for publishing lawfully obtained, truthful information . . . requires the highest form of state interest to sustain its validity.”<sup>34</sup> To date, the Court has defined such “exceptional cases” narrowly to include the following circumstances: “[W]hen the country is at war, when a sovereign seeks to protect the primary requirements of decency by prohibiting obscenity, and when the security of community life is threatened by incitements to acts of violence and the overthrow by force of an orderly government.”<sup>35</sup>

On several occasions, the Supreme Court has addressed a perceived “collision between claims of privacy and those of the free press,”<sup>36</sup> and, in each such instance, it has applied the First Amendment to protect truthful speech about newsworthy matters. In *Cox Broadcasting Corp. v. Cohn*, for example, the father of a rape-murder victim brought an invasion of privacy action against a broadcasting company for disclosing in a news report his daughter’s identity in violation of a Georgia statute.<sup>37</sup> The Court held that the First Amendment prohibited such a claim in the face of the “public interest, secured by the Constitution, in the dissemination of truth,”<sup>38</sup> because the broadcast involved a newsworthy matter of public concern, as opposed to revelation of “purely private libels, totally unrelated to public affairs.”<sup>39</sup> In so holding,

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protected [by the First Amendment] even though it is carried in a form that is ‘sold’ for profit . . . .”); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (“That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment.”).

31. *Daily Herald Co. v. Munro*, 747 F.2d 1251, 1259–60 (9th Cir. 1985).
32. 532 U.S. 514, 528 (2001) (quoting *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 103 (1979)).
33. *Worrell Newspapers of Ind., Inc. v. Westhafer*, 739 F.2d 1219, 1223 (7th Cir. 1984), *aff’d*, 469 U.S. 1200 (1985).
34. *Daily Mail*, 443 U.S. at 101–02.
35. *Worrell Newspapers*, 739 F.2d at 1223.
36. *E.g.*, *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491 (1975).
37. *Id.* at 492.
38. *Id.* at 491 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 73 (1964)).
39. *Id.* (quoting *Garrison*, 379 U.S. at 72 n.8).



the Court noted “a strong tide running in favor of the so-called right of privacy,”<sup>40</sup> but concluded that, despite these “impressive credentials,”<sup>41</sup> the government interest in preserving personal privacy must yield to the “First and Fourteenth Amendments and . . . the public interest in a vigorous press.”<sup>42</sup>

Similarly, in *Smith v. Daily Mail Publishing Co.*, the Court confronted the criminal prosecution of a newspaper, which, following a shooting at a junior high school, obtained and published the name of the alleged juvenile assailant in violation of a West Virginia statute.<sup>43</sup> At the outset of its analysis, the Court noted that “[o]ur recent decisions demonstrate that state action to punish the publication of truthful information seldom can satisfy constitutional standards.”<sup>44</sup> Accordingly, the Court held that the state’s interest in protecting the privacy of youthful offenders—an interest that was not only of immediate reputational nature but that also related to the ability of the child to rejoin society after the imposition of any sanction by the juvenile court—was not of sufficient magnitude when confronted by the First Amendment.<sup>45</sup>

In *Florida Star*, the statute at issue made it “unlawful to ‘print, publish, or broadcast . . . in any instrument of mass communication’ the name of the victim of a sexual offense.”<sup>46</sup> In holding that it could not be applied to a newspaper reporter who learned the name of a rape victim and thereafter published it in the newspaper’s “Police Reports” section, the Court explained that, although the governmental interests said to be served by the statute—i.e., the protection of the privacy of victims, the protection of the physical safety of victims, and the encouragement of victims to report such crimes—were “highly significant,” they were nevertheless insufficient to trump the First Amendment.<sup>47</sup>

Most recently, in *Bartnicki v. Vopper*, the Court held that two radio stations and a radio talk show host could not be held liable under the federal and Pennsylvania wiretap statutes for receiving from a third party, and thereafter disclosing to their listeners, a tape recording of a private telephone conversation between the two plaintiffs that had been surreptitiously recorded in violation of those statutes.<sup>48</sup> The Court noted that the case “present[s] a conflict between interests of the highest order—on the one hand, the interest in the full and free dissemination of information concerning public issues, and, on the other hand, the interest in individual privacy” fortified by the right of the plaintiffs, grounded in the First Amendment as well, to

40. *Id.* at 488.

41. *Id.* at 489.

42. *Id.* at 495.

43. 433 U.S. 97, 98–101 (1979).

44. *Id.* at 102.

45. *Id.* at 104.

46. 491 U.S. 524, 526 (1989) (omission in original) (quoting FLA. STAT. § 794.03 (1987)).

47. *See id.* at 537, 541.

48. 532 U.S. 514 (2001).

engage in “private speech.”<sup>49</sup> Nevertheless, even though the “stated purpose[]” of the wiretap statutes was “to protect effectively the privacy of wire and oral communications,”<sup>50</sup> and even though “[p]rivacy of communication[s] is an important interest,”<sup>51</sup> especially given the fact that “the fear of public disclosure of private conversations might well have a chilling effect on private speech,”<sup>52</sup> the Court held that the statutes could not be applied in these circumstances because “[they] impose[] sanctions on the publication of truthful information of public concern.”<sup>53</sup> Specifically, the Court held as follows:

In this case, privacy concerns give way when balanced against the interest in publishing matters of public importance. As Warren and Brandeis stated in their classic law review article: “The right of privacy does not prohibit any publication of matter which is of public or general interest.” One of the costs associated with participation in public affairs is an attendant loss of privacy.<sup>54</sup>

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49. *Id.* at 518. Because the wiretap statutes served to vindicate the First Amendment-based right to engage in “private speech,” the Court distinguished its decisions in *Cox Broadcasting, Daily Mail*, and *Florida Star* on the ground that, while those cases involved assertions of an important—but non-constitutional—interest in protecting personal privacy, in *Bartnicki* there were “important interests to be considered on both sides of the constitutional calculus.” *Id.* at 533. As Justice Breyer explained in his concurring opinion in *Bartnicki*, in cases in which there are constitutional rights “on both sides of the equation, the key question becomes one of proper fit,” *id.* at 536 (Breyer, J., concurring) (quoting *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 227 (1997) (Breyer, J., concurring in part)) (internal quotation marks omitted), and the Court must determine “whether the statutes strike a reasonable balance between their speech-restricting and speech-enhancing consequences,” *id.* In the typical case, however, in which the privacy interest is not grounded in the First Amendment itself, there is a dispositive lack of equivalence between the First Amendment right to disseminate truthful speech, on the one hand, and the governmental interest in protecting personal privacy, on the other—i.e., only the former is protected by the written Constitution.
50. *Id.* at 523 (quoting Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 801(b), 82 Stat. 197, 211 (1968)) (internal quotation marks omitted).
51. *Id.* at 532.
52. *Id.* at 533.
53. *Id.* at 534.
54. *Id.* (citation omitted) (quoting Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 214 (1890)); *see also id.* (“Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press.” (quoting *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967)) (internal quotation marks omitted)). The common law privacy tort, the creation of which was championed by Warren and Brandeis in response to their concern that the late nineteenth-century “press was overstepping its prerogatives by publishing essentially private information and that there should be a remedy for [such] abuses,” *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 487 (1975), has from the outset been cabined by the recognition that “[t]he right to privacy does not prohibit any publication of matter which is of public or general interest.” Warren & Brandeis, *supra*, at 214. This is despite the fact that, as early as 1890, “[g]ossip . . . ha[d] become a trade, which [was] pursued with industry as well as effrontery” to “satisfy a prurient taste.” *Id.* at 196; *see also* William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 411–12 (1960) (“[T]he press has a privilege, guaranteed by the Constitution, to inform the public about those who have become legitimate matters of public interest,” which “arises out of the desire and the right of the public to know what is going on in the world, and the freedom of the press and other agencies of information to tell them.”); *Shulman v. Group W Prods., Inc.*, 955 P.2d 469,

## D. “Unlawfully Acquired” Information

In all of its cases addressing the First Amendment’s protection of truthful information about newsworthy matters, the Court has recognized that such protections necessarily apply when the information has been “lawfully obtain[ed]” by its publisher.<sup>55</sup> In *Bartnicki*, the Court specifically considered whether, “[w]here the punished publisher of information has obtained the information in question in a manner *lawful in itself* but from a source who has obtained it unlawfully, may the government punish the ensuing publication of that information based on the defect in a chain?”<sup>56</sup> The Court answered the question in the negative, holding that “a stranger’s illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern.”<sup>57</sup> This is so, the Court explained, even when the press obtains the information with actual knowledge of the source’s unlawful conduct.<sup>58</sup>

This conclusion followed from the Court’s previous decisions, most notably *Landmark Communications, Inc. v. Virginia*<sup>59</sup> and *Florida Star*. In *Landmark Communications*, unidentified persons—including one described by the resulting article as “a lawyer subpoenaed to appear at the hearing”<sup>60</sup>—provided information in violation of a criminal statute to a newspaper regarding a confidential proceeding before Virginia’s Judicial Inquiry and Review Commission.<sup>61</sup> The Court held that the statute could not constitutionally be applied to the newspaper.<sup>62</sup> Although the Court was silent on this point, it appears that whoever initially disclosed confidential information in *Landmark* did so in violation of a statutory duty imposed on him as a participant in the Commission’s proceedings. Similarly, in *Florida Star*, the police official who provided the rape victim’s name to the newspaper did so in violation of an analogous duty.<sup>63</sup> Nevertheless, in both cases, as in *Bartnicki* itself, the Court held

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478 (Cal. 1998) (holding that “newsworthiness” is a “complete bar to common law liability” under the “publication of private facts” tort); RESTATEMENT (SECOND) OF TORTS § 652D (1977) (stating that to impose liability for publication of private facts, plaintiff must prove that the published material “is not of legitimate concern to the public”).

55. See, e.g., *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 103 (1979); *Bartnicki*, 532 U.S. at 528.
56. *Bartnicki*, 532 U.S. at 528 (emphasis added) (quoting *Boehner v. McDermott (Boehner I)*, 191 F.3d 463, 484–85 (D.C. Cir. 1999) (Sentelle, J., dissenting)) (internal quotation marks omitted), *vacated*, 532 U.S. 1050 (2001).
57. *Id.* at 535.
58. See *id.* at 517–18 (emphasizing that, although the defendants “did not participate in the interception, . . . they did know—or at least had reason to know—that the interception was unlawful”).
59. 435 U.S. 829 (1978).
60. Brief Amici Curiae of Media Entities & Organizations in Support of Respondents at 11, *Bartnicki*, 532 U.S. 514 (Nos. 99-1687 & 99-1728).
61. *Landmark Commc’ns*, 435 U.S. at 837.
62. See *id.* at 838.
63. Name, Address, Etc., of Sex-Crime Victim Exempt From Pub. Records Law, Op. Att’y Gen. Fla. 075-203 (July 14, 1975), available at <http://www.myfloridalegal.com/ago.nsf/Opinions/8C3790DB6191D6>

that such unlawful conduct by a newspaper's source does not vitiate the protection afforded to the newspaper by the First Amendment.

Following *Bartnicki*, the lower courts have explored the extent to which a publisher's interaction with a source who unlawfully acquires information can be said to implicate the publisher itself in illegal conduct that might provide a constitutional basis for civil or criminal liability. In *Boehner v. McDermott*, for example, which the Supreme Court remanded to the D.C. Circuit for further consideration in light of *Bartnicki*, the court of appeals addressed the liability of a Congressman who met personally with a married couple that had illegally recorded a wireless telephone conversation, acquired a recording of the conversation from them, promised them both anonymity and immunity from prosecution in return, and then disseminated the recording to two newspaper reporters.<sup>64</sup> Although the court was sharply divided on the issue, a majority rejected the contention that "[o]ne who obtains information in an illegal transaction, with full knowledge the transaction is illegal, has not 'lawfully obtain[ed]' that information."<sup>65</sup> Rather, the court's majority concluded that "the otherwise-lawful receipt of unlawfully obtained information remains in itself lawful, even where the receiver knows or has reason to know that the source has obtained the information unlawfully."<sup>66</sup> As the majority explained:

The Supreme Court has decided the first issue of this case, that is, whether the United States . . . can constitutionally bar the publication of information originally obtained by unlawful interception but otherwise lawfully received by the communicator, in the negative. We venture to say that an opposite rule would be fraught with danger. Just as Representative McDermott knew that the information had been unlawfully intercepted, so did the newspapers to whom he passed the information. . . . We do not believe the First Amendment permits this interdiction of public information either at the stage of the newspaper-reading public, of the newspaper-publishing communicators, or at the stage of Representative McDermott's disclosure to the news media.<sup>67</sup>

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93852566B70066A4C5 ("A police chief who is the custodian of any such records containing such identifying information is obligated and charged with the duty by operation of law not to allow or permit public inspection or examination of such records.").

64. (*Boehner II*), 484 F.3d 573, 575–76 (D.C. Cir. 2007).

65. *Id.* at 585 (Sentelle, J., dissenting) (second alteration in original) (quoting *Boehner v. McDermott (Boehner III)*, 441 F.3d 1010, 1017 n.6 (D.C. Cir. 2006)) (internal quotation mark omitted). A majority of the court joined in Part I of Judge Sentelle's dissent, which discusses the *Bartnicki* holding as applied to the facts in *Boehner*. *Id.* at 581 (Griffith, J., concurring).

66. *Id.* at 585 (Sentelle, J., dissenting).

67. *Id.* at 586. A different majority of the same court upheld the entry of summary judgment against Representative McDermott because he, unlike the newspapers that subsequently received the same information from him, had violated a legal duty imposed on him as a member of the House Ethics Committee to maintain the confidentiality of information provided to him in that capacity. *See id.* at 581 ("When Representative McDermott became a member of the Ethics Committee, he voluntarily accepted a duty of confidentiality that covered his receipt and handling of the . . . illegal recording. He therefore had no First Amendment right to disclose the tape to the media.").

Similarly, in *Jean v. Massachusetts State Police*, the First Circuit, applying *Bartnicki* and citing the D.C. Circuit's decision in *Boehner*, held that the First Amendment protected the Internet posting of an audio and video recording of an arrest and warrantless search of a private residence, even though the person who posted it had reason to know at the time she received the recording that it had been made illegally.<sup>68</sup> The court rejected the contention that “the essential distinction between this case and *Bartnicki* was that [i]n *Bartnicki*, the interceptor had already disseminated the tape before [the defendant] passively received it and disseminated it further,” while in *Jean*, “it was Jean’s active collaboration” with the interceptor “that made his unlawful dissemination possible in the first instance.”<sup>69</sup> Relying on *Boehner II*, the court reasoned that, “if McDermott had been a private citizen, like Jean, the court would have concluded that his disclosure of the tape was subject to First Amendment protection *regardless of the fact that he received the tape directly*” from the interceptor with knowledge that it had been obtained unlawfully.<sup>70</sup>

These decisions reflect the reality that the press routinely seeks out information from a variety of sources, many of whom may be held to have violated a statute, a private contract, or some other legal or ethical duty either in obtaining the information or by disclosing it to the press. The courts have nevertheless concluded that, when the press induces sources to disclose what they know about newsworthy matters, it is protected by the First Amendment when it proceeds to publish such information, regardless of the legality of its source’s actions.<sup>71</sup>

### III. CRIMINAL LIABILITY AND THE FIRST AMENDMENT

#### *A. Applicable Principles of Statutory Construction*

To satisfy due process, a criminal statute must define the prohibited conduct “with sufficient definiteness that ordinary people can understand what conduct is prohibited” and “in a manner that does not encourage arbitrary and discriminatory

68. 492 F.3d 24, 30–33 (1st Cir. 2007).

69. *Id.* at 31 (alteration in original) (internal quotation marks omitted).

70. *Id.* at 32.

71. *See, e.g., Scheetz v. Morning Call, Inc.*, 747 F. Supp. 1515, 1526 (E.D. Pa. 1990) (rejecting a claim that the press unlawfully received a confidential police report through a conspiracy with unnamed police sources on the grounds that a reporter who copies information contained in such a report “would not be a receiver of . . . stolen goods”), *aff’d*, 946 F.2d 202 (3d Cir. 1991); *Nicholson v. McClatchy Newspapers*, 223 Cal. Rptr. 58, 64 (Ct. App. 1986) (holding that the First Amendment precludes tort claims against the press for “soliciting, inquiring, requesting and persuading agents, employees and members of the State Bar to engage in the unauthorized and unlawful disclosure of information” because “the news gathering component of the freedom of the press—the right to seek out information—is privileged at least to the extent it involves ‘routine . . . reporting techniques’” such as “asking persons questions, including those with confidential or restricted information” (alteration in original) (quoting *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 103 (1979))); *Bilney v. Evening Star Newspaper Co.*, 406 A.2d 652, 656 (Md. Ct. Spec. App. 1979) (finding no tort liability where a newspaper secured confidential student transcripts from a source because “the information, though perhaps emanating *ultimately* from confidential University records, was not obtained by any personal act of invasion or intrusion” by the newspaper).

enforcement.”<sup>72</sup> A criminal statute that fails to satisfy these conditions will be deemed “void-for-vagueness.”<sup>73</sup> But if it can, a court will construe a statute narrowly to avoid such a result.<sup>74</sup>

The Court applied these principles of statutory construction most recently in *Skilling v. United States*, a decision arising from the criminal prosecution of long-time Enron executive Jeffrey Skilling.<sup>75</sup> In *Skilling*, the Court considered whether 18 U.S.C. § 1346, known as the “honest services fraud” provision of the federal mail and wire fraud statutes,<sup>76</sup> was impermissibly vague and therefore violated the Due Process Clause of the Fifth Amendment.<sup>77</sup> The Court construed the statute to reach only bribes and kickbacks, thereby limiting its reach to avoid offending the Fifth Amendment.<sup>78</sup>

Section 1346 establishes that a “scheme or artifice to defraud” for purposes of the federal mail and wire fraud statutes “includes a scheme or artifice to deprive another of the intangible right of honest services.”<sup>79</sup> The legislative history of § 1346 reveals that the predominant purpose of the statute was to “reverse” the Supreme Court’s decision in *McNally v. United States*, in which the Court held that the mail fraud statute was designed to protect money and property rights, not the alleged right of the citizenry to “good government.”<sup>80</sup> Thus, in enacting § 1346, Congress sought nothing more than to enable the wire and mail fraud statutes to be used as vehicles for prosecution of public corruption.<sup>81</sup>

Given its broad language, however, judicial construction of § 1346 before *Skilling* understandably focused on “the need to find limiting principles’ to cabin” its scope because, “[w]ithout some kind of limiting principle, honest services wire fraud could potentially make relatively innocuous conduct subject to criminal sanctions.”<sup>82</sup> Thus,

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72. *Skilling v. United States*, 130 S. Ct. 2896, 2927–28 (2010); *see also* *Black v. United States*, 130 S. Ct. 2963, 2968 (2010) (reiterating the essential holding of *Skilling*).

73. *See Skilling*, 130 S. Ct. at 2928.

74. *See id.* (noting prior case law “which requires us, if we can, to construe, not condemn, Congress’ enactments”).

75. *See id.* at 2907, 2927–28.

76. *See* 18 U.S.C. §§ 1341, 1343, 1346 (2006); *Skilling*, 130 S. Ct. at 2927.

77. *See Skilling*, 130 S. Ct. at 2927–28.

78. *Id.* at 2931.

79. 18 U.S.C. § 1346 (2006).

80. 483 U.S. 350, 356 (1987); *see, e.g.*, 134 CONG. REC. 23,953 (1988) (statement of Sen. Biden) (“This bill will make it possible, once again, to prosecute and send to prison those public officials who corrupt their offices and betray the trust placed in them.”); 134 CONG. REC. 33,296–97 (1988) (statement of Rep. Conyers) (“[A]s a result of the *McNally* decision many significant prosecutions of political corruption brought under the mail and wire fraud statutes have been dismissed or overturned on appeal. . . . This amendment restores the mail fraud provision to where that provision was before the *McNally* decision.”).

81. *See supra* note 80.

82. *United States v. Kincaid-Chauncey*, 556 F.3d 923, 940 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 795 (2009); *see also* *United States v. Cochran*, 109 F.3d 660, 667 (10th Cir. 1997) (observing that without



## HANDCUFFING THE PRESS

although some courts concluded that the statute may reach the conduct of private, non-governmental defendants in at least some circumstances,<sup>83</sup> others extended such liability to private persons only where there was a fiduciary relationship between the victim and the defendant.<sup>84</sup> Still others did so only where the defendant intended or reasonably could have foreseen that the scheme would cause economic or property harm.<sup>85</sup> In any case, under certain circumstances journalists obtaining information from persons who violated a law (or their employer's policies) in accessing or disclosing the information arguably were vulnerable to prosecution under the statute.<sup>86</sup> For its part, the Court noted in *Skilling* that "there was considerable disarray" among the courts of appeals concerning the proper scope of the statute's application.<sup>87</sup> Still, the Court declined to invalidate the statute, choosing instead to construe it, consistent with its legislative history, to reach only bribery and kickback schemes.<sup>88</sup> In doing so, the Court explained: "It has long been our practice, . . . before striking a federal statute as impermissibly vague, to consider whether the prescription is amenable to a limiting construction."<sup>89</sup>

This principle of narrow construction should apply with equal force where the prosecution in question arises from the newsgathering conduct of a journalist or news organization. As the Court has put it, criminal statutes that potentially inhibit the exercise of First Amendment rights "must be scrutinized with particular care."<sup>90</sup> Most significantly, such statutes must be construed narrowly to avoid conflicts with the First Amendment.<sup>91</sup> Narrow construction has been deemed to be particularly

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appropriate limiting principles, honest services fraud amendment could criminalize "every breach of contract or every misstatement made in the course of dealing").

83. *See, e.g.*, *United States v. McGeehan*, 584 F.3d 560, 569–70 (3d Cir. 2009) (discussing examples of cases in which § 1346 was applied to private actors).
84. *See, e.g.*, *United States v. Williams*, 441 F.3d 716, 718, 722–23 (9th Cir. 2006).
85. *See, e.g.*, *United States v. Sun-Diamond Growers of Cal.*, 138 F.3d 961, 973 (D.C. Cir. 1998).
86. For example, if a health worker accessed and disclosed to a journalist private information about a patient in violation of the Health Insurance Portability and Accountability Act (HIPAA), and used any form of electronic communication in doing so, the journalist arguably could have been subject to prosecution for aiding and abetting a violation of the wire fraud statute. In this instance, under a broad reading of § 1346, the worker has deprived his employer of the intangible right of his honest services.
87. 130 S. Ct. 2896, 2929 (2010).
88. *Id.* at 2931.
89. *Id.* at 2929.
90. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 414 (1992) (quoting *City of Houston v. Hill*, 482 U.S. 451, 459 (1987)); *see also Reed Enters. v. Corcoran*, 354 F.2d 519, 521 (D.C. Cir. 1965) ("[P]rosecutions involving possible collision with First Amendment rights are not subject to the routine consideration given prosecutions under ordinary criminal statutes.").
91. *See United States v. CIO*, 335 U.S. 106, 112, 121 (1948) (construing the term "expenditure" in the Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended in scattered sections of 15 U.S.C.), to exclude publication-related expenses because, if the statute "were construed to prohibit the publication, by corporations and unions in the regular course of conducting their affairs, of periodicals advising their members, stockholders or customers of danger or advantage to their interests from the adoption of measures or the election to office of men, espousing such measures,



appropriate when the legislative history of a generally applicable statutory scheme evinces no intention to criminalize the activities of the press and others engaged in the process of collecting and disseminating information to the public.<sup>92</sup>

Let us suppose, for example, that the federal government sought to prosecute a journalist for receiving and publishing non-public health information about a member of Congress under a theory that the journalists aided and abetted a violation of 42 U.S.C. § 1320d-6(a), the provision of the Health Insurance Portability and Accountability Act (HIPAA) authorizing criminal sanctions for the acquisition and disclosure of protected health information.

Neither the face of HIPAA nor its legislative history reveals any suggestion that Congress considered or otherwise sought to impose criminal sanctions on the process by which the press reports to the public about newsworthy matters. Thus, for example, the criminal penalties for the unlawful use, acquisition, and disclosure of health information pursuant to HIPAA apply, on their face, only to the conduct of “covered entities,” which include health plans and health care providers, but contain no reference to the press or to others who disseminate health-related information about newsworthy subjects to the public.<sup>93</sup> HIPAA’s legislative history confirms both that its stated purpose was to promote “the efficiency and effectiveness of the health care system, by encouraging the development of a health information system through the establishment of standards and requirements for the electronic transmission of certain health information,”<sup>94</sup> and that it is devoid of references to any perceived problem—warranting congressional intervention or otherwise—relating to the disclosure to or subsequent dissemination of health-related information by the press.<sup>95</sup>

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the gravest doubt would arise in our minds as to its constitutionality”); *Schwartz v. Romnes*, 495 F.2d 844, 852 (2d Cir. 1974) (“It is difficult to imagine a setting where a narrow interpretation would be more appropriate than when a criminal statute might otherwise impinge on First Amendment rights.”).

92. See, e.g., *Reno v. ACLU*, 521 U.S. 844, 879 (1997) (“Particularly in the light of the absence of any detailed findings by Congress,” it is difficult to conclude that a statute that impacts the First Amendment is “narrowly tailored if that requirement has any meaning at all.”).

93. See 42 U.S.C. §§ 1320d-6(a)–(b), 1320-9(b)(3) (2006 & Supp. III 2009); 45 C.F.R. § 160.103 (2010) (providing the definition of “covered entity”).

94. Health Insurance Portability and Accountability Act of 1996, Pub L. No. 104-191, § 261, 110 Stat. 1936, 2021.

95. In addition, it appears that none of the prosecutions that have been pursued under HIPAA to date contemplate that the statute is designed to reach the press, either directly or through theories of secondary liability such as “aiding and abetting” and “conspiracy.” See, e.g., Press Release, U.S. Att’y for So. Dist. of Fla., Palmetto General Hospital Employee and Accomplice Indicted for Stealing Patient Records As Part of Fraud Scheme (May 26, 2009), <http://www.usdoj.gov/usao/fls/PressReleases/090526-01.html> (describing the indictment of a hospital employee and her accomplice—who allegedly stole patient information to use in an identity and credit-card theft scheme—for, among other things, a conspiracy to violate HIPAA); *United States v. Hollern*, 366 F. App’x 609 (6th Cir. 2010) (analyzing the constitutionality of an indictment for disclosing personal health information in violation of 42 U.S.C. § 1320d-6 when the defendant chiropractor videotaped patients under false pretenses and sold tapes for commercial gain); Ian C. Smith Dewaal, *Successfully Prosecuting Health Insurance Portability and Accountability Act Medical Privacy Violations Against Noncovered Entities*, U.S. ATT’YS’ BULL., July 2007,

Construing HIPAA to authorize the prosecution of the press, under a theory of aiding and abetting, necessarily would implicate the First Amendment, and, in view of HIPAA's legislative history, a court could fairly conclude that the statute never was intended to reach the conduct of the press in gathering information from persons who themselves may have violated the statute.<sup>96</sup>

### B. *Criminal Liability and the Press*

The First Amendment's restrictions on the application of criminal liability theories to members of the press who seek out, receive, and publish information about newsworthy matters are not simply theoretical. Rather, they have informed the relationship between the press and the criminal justice system every time a controversy has arisen in the lower federal courts over the publication of information leaked to journalists by someone under a legal obligation not to disclose it. As we discuss below, many of the most important stories in the history of journalism were based on information provided by sources in violation of a criminal statute.<sup>97</sup> In every such case, moreover, a literal reading of the relevant statutes would support an argument that the journalist illegally received information or conspired with a source to obtain or disclose information for an unauthorized purpose.<sup>98</sup> Nevertheless, it appears that no journalist has ever been prosecuted under such theories. Rather, journalists have only been prosecuted in the rare circumstance where they directly committed an unlawful physical act, such as removing a piece of debris from the wreckage of a sabotaged aircraft,<sup>99</sup> "stealing documents," or engaging in "private wiretapping."<sup>100</sup>

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at 10, 14–15 (discussing *United States v. Williams*, No. 1:06-CR00129-UNA (D. Del. Nov. 16, 2006), in which defendant, a hospital employee, conspired to steal identities of four hundred health care clearinghouse patients and was convicted of, among other things, conspiracy to obtain protected health information with the intent to sell it for personal gain; Indictment, *United States v. Ramirez*, No. M-05-708 (S.D. Tex. Aug. 30, 2005), 2005 WL 5922818, in which defendant sold protected health information to undercover FBI agents and pleaded guilty to violating HIPAA; and Acceptance of Plea Guilty, *United States v. Gibson*, No. CR04-0374RSM (W.D. Wash. Aug. 19, 2004), 2004 WL 2188280, in which defendant charged with violating 42 U.S.C. § 1320d-6(a)(3) and (b)(3) by disclosing patient's name, date of birth, and social security number to obtain credit cards in patient's name); Esther Seitz, *Privacy (or Piracy) or Medical Records: HIPAA and Its Enforcement*, 102 J. NAT'L MED. ASS'N 745, 747 (2010), available at <http://www.nmanet.org/images/uploads/Publications/MLS745.pdf> (discussing a case in which defendant, a licensed nurse, pleaded guilty to disclosing individually identifiable information about a patient to her husband, who then threatened to use it against the patient in an upcoming legal proceeding).

96. See *Skilling v. United States*, 130 S. Ct. 2896, 2929–30 (2010) ("We have . . . instructed 'the federal courts . . . to avoid constitutional difficulties by [adopting a limiting interpretation] if such a construction is fairly possible.'" (second and third alterations in original) (quoting *Boos v. Barry*, 485 U.S. 312, 331 (1988))).
97. See *infra* Part III.C.
98. See *infra* Part III.C.
99. See *United States v. Sanders*, 17 F. Supp. 2d 141 (E.D.N.Y. 1998), *aff'd*, 211 F.3d 711 (2d Cir. 2000).
100. Cf. *Branzburg v. Hayes*, 408 U.S. 665, 691 (1972) ("Although stealing documents or private wiretapping could provide newsworthy information, neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news."). Indeed, we are aware of only one attempt to bring

Several cases in both the criminal and civil context have in fact considered what might happen if a prosecution of the press beyond such circumstances were ever attempted. All have concluded that the First Amendment would likely pose obvious and potentially insurmountable barriers to the use of both direct and secondary liability theories to criminalize the pursuit of information by journalists. In *United States v. Morison*, for example, a government employee was convicted under both the Espionage Act and 18 U.S.C. § 641 of providing classified photographs of Soviet naval installations to *Jane's Defense Weekly* ("*Jane's*"), a publication that reported on security-related matters.<sup>101</sup> The government charged that the employee, Samuel Morison, had been effectively compensated by *Jane's* for his actions.<sup>102</sup> He was a paid consultant to *Jane's* at the time, there was evidence that *Jane's* had affirmatively solicited the transmission of documents from him, and the government alleged that he hoped to improve his chances of permanent employment at *Jane's* by providing the photographs.<sup>103</sup> Not only was *Jane's* never charged, but the prosecution of Morison itself proved controversial in large part due to concern that, in a future case, the government might be tempted to pursue journalists involved in other exchanges of information.<sup>104</sup>

As a result, in affirming Morison's conviction, two members of the Fourth Circuit's three-judge panel wrote separately to emphasize their doubt that the First Amendment would countenance such a prosecution. Judge Wilkinson explained that "Morison as a source would raise newsgathering rights on behalf of press organizations that are not being, and probably could not be, prosecuted under the espionage statute" and stated that "it is important to emphasize what is *not* before us today. This prosecution was not an attempt to apply the espionage statute to the press for either the receipt or publication of classified materials."<sup>105</sup> Judge Phillips likewise expressed his concern that the court's affirmance of Morison's conviction not be construed to "threaten[] the vital newsgathering functions of the press."<sup>106</sup>

A number of federal courts have similarly considered First Amendment-based overbreadth challenges by defendants to the application of § 641 to the oral transmission of government information. In so doing, several have *sua sponte* cautioned that obtaining and disclosing information to the press—which was not at issue in

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a prosecution against a journalist that is even remotely based on the theories discussed herein. In 1973, Les Whitten, "the chief investigative reporter for syndicated columnist Jack Anderson," was charged as a principal with receiving stolen government documents in violation of 18 U.S.C. § 641 (2006). See Mark Feldstein, *The Jailing of a Journalist: Prosecuting the Press for Receiving Stolen Documents*, 10 COMM. L. & POL'Y 137 (2005) (offering detailed account of Whitten's prosecution). However, the charges were subsequently dropped when the grand jury declined to issue an indictment. *Id.* at 161.

101. 844 F.2d 1057, 1060–61 (4th Cir. 1988).

102. *Id.* at 1076.

103. See *id.* at 1060–61, 1076–77.

104. See *id.* at 1084.

105. *Id.* at 1081, 1085 (Wilkinson, J., concurring).

106. *Id.* at 1086 (Phillips, J., concurring).

any of those cases—would raise substantial constitutional questions. Thus, in *United States v. Jeter*, the Sixth Circuit held that, in the “limited circumstances” of that case—which involved leaking grand jury information to the targets of an investigation—no serious First Amendment barrier existed to affirming the conviction.<sup>107</sup> Nevertheless, the court noted that “[w]e do not attempt to determine the constitutionality of Section 641 in a ‘Pentagon Papers’ kind of situation.”<sup>108</sup>

Courts have raised analogous concerns in the civil context. In *Zerilli v. Evening News Ass’n*, for example, the D.C. Circuit considered a *Bivens* claim arising after newspaper reporter unlawfully conspired with federal officials to procure confidential transcripts of illegal wiretaps.<sup>109</sup> The Court rejected the theory because, among other reasons, “finding the newspaper liable in the present case would amount to holding a newspaper liable in damages for uncovering and publishing information that it deems newsworthy. The values served by a free and vigilant press militate against such a result.”<sup>110</sup> For this reason, the press has been held potentially liable for conspiring with federal officials to violate private rights only where some non-speech-related conduct causing tangible injury to person or property, such as a physical trespass, was at issue.<sup>111</sup>

Indeed, the long history of clashes between the government, private parties, and journalists over subpoenas for their confidential sources reinforces the principle that a criminal prosecution of reporters whose sources leak information to them would be beyond the constitutional pale. Such subpoenas have usually arisen in the context of cases in which confidential sources are alleged to have unlawfully provided information to a journalist.<sup>112</sup> Laws proscribing the disclosure of information, such as the Privacy Act of 1974<sup>113</sup> and Federal Rule of Criminal Procedure 6(e),<sup>114</sup> are the most common sources of such disputes.<sup>115</sup> In almost every such case, the facts describe

107. 775 F.2d 670, 682 (6th Cir. 1985).

108. *Id.*; see also *United States v. Girard*, 601 F.2d 69, 71–72 (2d Cir. 1979) (holding that application of § 641 to intangible investigative information was not overbroad as applied to the defendant, even though “the statute might conceivably trespass upon the first amendment rights of others”). The reference to “Pentagon Papers” is to *New York Times Co. v. United States*, 403 U.S. 713 (1971), in which the Supreme Court rebuffed the government’s efforts to secure a prior restraint prohibiting the publication of documents that “were purloined from the Government’s possession” and that the newspaper defendants solicited and received “with knowledge that they had been feloniously acquired.” *Id.* at 754 (Harlan, J., dissenting).

109. 628 F.2d 217 (D.C. Cir. 1980).

110. *Id.* at 224.

111. See, e.g., *Berger v. Hanlon*, 188 F.3d 1155 (9th Cir. 1999); see also *FMC Corp. v. Capital Cities/ABC, Inc.*, 915 F.2d 300, 306 (7th Cir. 1990) (noting that attempting to apply broader theories of liability for misappropriation of intangible information “would certainly raise important First Amendment problems”).

112. See, e.g., *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964, 967 (D.C. Cir. 2005).

113. 5 U.S.C. § 552a (2006 & Supp. IV 2010).

114. FED. R. CRIM. P. 6(e)(2) (limiting the disclosure of a matter before a grand jury).

115. See, e.g., *Lee v. U.S. Dep’t of Justice*, 413 F.3d 53 (D.C. Cir. 2005); *In re Special Proceedings*, 373 F.3d 37 (1st Cir. 2004); *Hatfill v. Gonzales*, 505 F. Supp. 2d 33 (D.D.C. 2007); *In re Grand Jury Subpoenas*,

a “conspiracy” pursuant to which a journalist provided something that may have been of substantial value to a source (such as a promise of confidentiality or publicity which the source may have believed served his or her personal interests) in exchange for which the source provided information that it was legally prohibited from disclosing.<sup>116</sup> Not only have the reporters in these cases never been criminally charged, but most courts have recognized that some form of qualified privilege protecting the source’s identity from compelled disclosure applies in these circumstances,<sup>117</sup> and the legislatures in more than a dozen states have provided for an absolute privilege where analogous disputes arise under state criminal laws.<sup>118</sup>

The role of the First Amendment in this context is perhaps best illustrated by *United States v. Rosen*,<sup>119</sup> also known as the AIPAC prosecution.<sup>120</sup> Prior to *Rosen*, the government had never used the Espionage Act to charge a civilian who was not himself alleged to be a spy,<sup>121</sup> and had also never applied the provisions of the Act at

438 F. Supp. 2d 1111 (N.D. Cal. 2006).

116. See *supra* note 115.

117. See, e.g., *Lee*, 413 F.3d 53; *In re Special Proceedings*, 373 F.3d 37; *Ashcraft v. Conoco, Inc.*, 218 F.3d 282 (4th Cir. 2000); *Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975); *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981); *In re Williams*, 766 F. Supp. 358 (W.D. Pa. 1991), *aff’d by an equally divided court*, 963 F.2d 567 (3d Cir. 1992) (en banc).

118. ALA. CODE § 12-21-142 (West, Westlaw through the end of the 2010 Regular and First Spec. Sess.); ARIZ. REV. STAT. ANN. §§ 12-2214, 12-2237 (West, Westlaw through the First Spec. Sess., and legislation effective Jan. 11, 2011); ARK. CODE ANN. § 16-85-510 (LEXIS through the 2010 Fiscal Sess.); CAL. EVID. CODE § 1070 (West, Westlaw through c. 733 (end) of the 2010 portion of the 2009–2010 Regular Sess., the end of the 2009–2010 First through Eighth Extraordinary Sessions, and all propositions on 2010 ballots); DEL. CODE ANN. tit. 10, §§ 4320–26 (LEXIS through 77 Del. Laws, Ch. 476); D.C. CODE §§ 16-4701 to -4 (West, Westlaw through Oct. 22, 2010); IND. CODE ANN. §§ 34-46-4-1 to -2 (West, Westlaw through 2010 Public Laws approved and effective through the 2010 Second Regular Sess.); KY. REV. STAT. ANN. § 421.100 (LEXIS through the 2010 First Extraordinary Sess.); MD. CODE ANN., CTS. & JUD. PROC. § 9-112 (LEXIS through all chapters of the 2010 Regular Sess. with updates for sections effective through Jan. 1, 2011); MONT. CODE ANN. §§ 26-1-901 to -03 (LEXIS through 2010 Regular and Spec. Sess.); NEB. REV. STAT. §§ 20-144 to -47 (West, Westlaw through the 101st Legislature Second Regular Sess. 2010); NEV. REV. STAT. § 49.275 (LEXIS through the 26th (2010) Spec. Sess.); N.Y. CIV. RIGHTS LAW § 79-h (LEXIS through 2010); N.J. STAT. ANN. §§ 2A:84A-21 to -21.8 (LEXIS through the 214th Legislature First Annual Sess.); OHIO REV. CODE ANN. §§ 2739.04, 2739.12 (West, Westlaw through 2010 File 58 of the 128th General Assembly (2009–2010), approved by 2/2/11 and filed with the Secretary of State by 2/2/11); OR. REV. STAT. ANN. §§ 44.510–40 (West, Westlaw through the laws enacted during the 2010 Spec. Sess. of the 75th Oregon Legis. Assembly); PA. CONS. STAT. ANN. § 5942 (West, Westlaw through Act 92 of the 2010 Regular Sess. of the Pennsylvania General Assembly); WASH. REV. CODE ANN. § 5.68.010 (West, Westlaw through the 2010 2nd Spec. Sess. and Laws 2011, Chapters 1 and 2); WIS. STAT. ANN. § 885.14 (West, Westlaw through 2009 Wisconsin Act 406 (End)). In addition, Utah’s Supreme Court, under authority granted by the state’s constitution, adopted UTAH R. EVID. 509 in 2008, granting near absolute protection for confidential sources. UTAH R. EVID. 509; see UTAH CONST. art. VIII, § 4.

119. 445 F. Supp. 2d 602 (E.D. Va. 2006).

120. See, e.g., *United States v. Rosen*, 447 F. Supp. 2d 538 (E.D. Va. 2006).

121. See *Rosen*, 445 F. Supp. 2d at 628–29.

issue in *Rosen* to the receipt and disclosure of purely oral information.<sup>122</sup> As applied in those circumstances, the district court in *Rosen* rejected the government's argument that no First Amendment issue was raised by the novel indictment.<sup>123</sup> Rather, it resolved the defendants' constitutional arguments by holding that the statute could only survive First Amendment scrutiny as applied to the specific facts alleged if construed narrowly to require the government to prove a heightened intent requirement—i.e., that the defendants acted with a bad-faith purpose to undermine national security.<sup>124</sup>

### C. Potential for Chilling Speech About Newsworthy Matters

Taken as a whole, these disparate strands of law appear to reveal a consistent theme. Courts have both explicitly and implicitly recognized that any attempt to seek criminal (or civil) sanctions against the press for providing what might be deemed to be incentives to sources so that they will provide information about newsworthy matters would face substantial First Amendment hurdles.<sup>125</sup>

A different constitutional rule—one that would permit the imposition of criminal liability on the press when it can broadly be said to have “induced” or “conspired” with a source to secure newsworthy information for publication—would fundamentally alter public discourse. If, for example, the press could be prosecuted for “aiding and abetting” violations of the Privacy Act, it would appear that the *Washington Post*, Bob Woodward, and Carl Bernstein could all have been charged in the wake of their persistent solicitation and receipt of information from FBI Deputy Director Mark Felt about the FBI's then-ongoing investigation of specific, identified persons implicated in the Watergate investigation who had not yet been indicted.<sup>126</sup> Similarly, it would appear that the *San Francisco Chronicle* could have been charged with aiding and abetting a violation of Federal Rule of Criminal Procedure 6(e) when a criminal defense lawyer agreed to provide the *Chronicle* with details of grand jury testimony given by some of the most prominent athletes in professional sports as part of a Pulitzer-Prize winning series of articles about the extent to which performance-enhancing drugs had infiltrated both professional and amateur athletics.<sup>127</sup> And

122. *See id.* at 614.

123. *Id.* at 629–30 (“[T]he conduct at issue—collecting information about United States’ foreign policy and discussing that information with government officials . . . , journalists, and other participants in the foreign policy establishment—is at the core of the First Amendment’s guarantees.”).

124. *See id.* at 625–27; *see also* United States v. Rosen, 240 F.R.D. 204, 209 n.10 (E.D. Va. 2007).

125. *Cf.* Bartnicki v. Vopper, 532 U.S. 514, 531 (2001) (“Although this case demonstrates that there may be an occasional situation in which an anonymous scanner will risk criminal prosecution by passing on information without any expectation of financial reward or public praise, surely this is the exceptional case.”).

126. *See* John D. O’Connor, *I’m the Guy They Called Deep Throat*, VANITY FAIR, July 2005, at 86.

127. *See, e.g.*, Mark Fainaru-Wada & Lance Williams, *Giambi Admitted Taking Steroids*, S.F. CHRON., Dec. 2, 2004, at A1; Mark Fainaru-Wada & Lance Williams, *What Bonds Told BALCO Grand Jury*, S.F. CHRON., Dec. 3, 2004, at A1.



criminal liability could apparently have been imposed on the *Wall Street Journal* for its solicitation and receipt of internal Enron documents from confidential sources within the company that detailed Enron's illegal accounting practices; those documents led to a groundbreaking series of articles, but were provided by disgruntled employees, arguably in breach of their fiduciary obligations to the company.<sup>128</sup>

By the same token, it would appear that analogous theories of liability for violations of HIPAA would have provided the basis for criminal prosecution of the *Orange County Register* as a result of its Pulitzer Prize-winning reporting on the unethical practices of the previously acclaimed fertility clinic at the University of California-Irvine.<sup>129</sup> That reporting was based on the contents of putatively confidential medical records obtained by the newspaper from a source within the clinic—records which documented how eggs retrieved from one patient were implanted in another, without the knowledge or consent of the donor.<sup>130</sup> Under the same theories, one could envision prosecution of a newspaper that reported, based on confidential medical records received from a hospital employee, that the Vice President had developed a serious heart condition, that several hospital patients who had recently traveled abroad had contracted a highly contagious disease and brought it to the United States, or that the serious illness of several hospital patients had been traced to tainted meat circulating in the national food supply.

#### IV. CONCLUSION: FIRST AMENDMENT LIMITATIONS

The preceding discussion illuminates the First Amendment-based principles that likely would govern judicial determination of the constitutionality of a prosecution of

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128. See, e.g., Rebecca Smith & John R. Emshwiller, *Trading Places: Fancy Finances Were Key to Enron's Success, and Now to Its Distress*, WALL ST. J., Nov. 8, 2001, at A1. For other examples of award-winning journalism made possible by the "inducement" of sources to provide newsworthy information to the press in breach of fiduciary duties owed to their employers or otherwise unlawfully, see Seymour M. Hersh, *Torture at Abu Ghraib: American Soldiers Brutalized Iraqis. How Far Up Does the Responsibility Go?*, NEW YORKER, May 10, 2004, at 42 (news report of abuse of Iraqi prisoners based on confidential documents and photographs provided to reporter by unnamed source within U.S. military); Walter Pincus, *Carter Is Weighing Radiation Warhead*, WASH. POST, June 7, 1977, at A5 (news report of government's plans to produce "neutron bomb" based on classified information received by journalist from government informant); Dana Priest, *CIA Holds Terror Suspects in Secret Prisons; Debate Is Growing Within Agency About Legality and Morality of Overseas System Set Up After 9/11*, WASH. POST, Nov. 2, 2005, at A1 (news report disclosing CIA practice of sending suspected terrorists to secret prisons in foreign countries based on classified documents leaked to reporter by government sources); James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1 (news reports discussing classified program of domestic wiretapping based on information provided to reporters by government sources).

129. See Susan Kellerher & Kim Christensen, *Baby Born After Doctor Took Eggs Without Consent*, ORANGE COUNTY REG., May 19, 1995, at A1.

130. See *id.* The newspaper eventually discovered and reported that at least sixty women were victims of such theft by the clinic. See Susan Kellerher, Kim Christensen, David Parrish & Michelle Nicolosi, *Clinic Scandal Widens*, ORANGE COUNTY REG., Nov. 4, 1995, at A16. The facts that the newspaper reported resulted in the criminal prosecution of the physicians involved, "prompted the American Medical Association to rewrite its fertility-industry guidelines," and instigated legislative action. See Kim Christensen, *Fertility Bills Seen as Effective Steps*, ORANGE COUNTY REG., Aug. 30, 1996, at A26.



the press in the wake of its acquisition and publication of information received from a person who accessed or provided such information in violation of a criminal statute. These principles suggest that, at a minimum, the solicitation, receipt, and publication of information by the press can constitutionally be deemed to violate such statutes only if their scope is cabined, by legislative amendment or judicial decision, in material ways. Otherwise, the reach of such statutes would appear to be extraordinarily broad, reaching any effort by a reporter to secure information from a source that, for example, its employer (including the government) would prefer remain secret. Accordingly, it appears that, at a minimum, the application of such statutes to the press, whether directly or through laws imposing secondary liability, can survive First Amendment scrutiny only if construed to require that (1) the press conduct at issue be unrelated to communicative acts involving the transmission of information, or (2) the defendant evince some bad-faith purpose other than and beyond the intent to obtain information for the purpose of reporting it to the public.

Absent such limitations, it appears there is a substantial argument that any prosecution of the press for violating such a criminal statute, for aiding and abetting a violation of such a statute, or for conspiring with a source to violate such a statute—based on the contention that the press had “induced” or “conspired” with a third party to engage in unlawful activity—would violate the First Amendment. As the Supreme Court has recognized on several occasions, a broad range of press conduct that involves “soliciting, inquiring, requesting and persuading” sources “to engage in the unauthorized and unlawful disclosure of information”<sup>131</sup> is protected by the Constitution. A statutory scheme that purports to criminalize such activity, without both specifying and cabining its reach, would be unlikely to survive a constitutional challenge, whether it is analyzed under the First Amendment-based requirement that even a statute that has an incidental impact on protected speech must be “narrowly tailored to serve a significant governmental interest”;<sup>132</sup> under the First Amendment-based “overbreadth” doctrine;<sup>133</sup> or under the Fifth Amendment, which “prohibits punishment pursuant to a statute so vague that ‘men of common intelligence

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131. *Nicholson v. McClatchy Newspapers*, 223 Cal. Rptr. 58, 64 (Ct. App. 1986).

132. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *see also* *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 216 (1997) (“[T]he essence of narrow tailoring’ is ‘focussing [sic] on the evils the [Government] seeks to eliminate . . . [without] significantly restricting a substantial quantity of speech that does not create the same evils.” (second and third alterations in original) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989))); *Boehner II*, 484 F.3d 573, 586 (D.C. Cir. 2007) (Sentelle, J., dissenting) (stating that where federal wiretap statute on its face yielded a result that “no one in the United States could communicate on [a] topic of public interest,” it could not be constitutionally applied to the acquisition and dissemination of newsworthy information); *Boehner I*, 191 F.3d 463, 485 (D.C. Cir. 1999) (Sentelle, J., dissenting) (“Not only is this not narrow tailoring, this is not tailoring of any sort.”), *vacated*, 532 U.S. 1050 (2001).

133. *Vill. of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 634 (1980) (“Given a case or controversy, a litigant whose own activities are unprotected may nevertheless challenge a statute by showing that it substantially abridges the First Amendment rights of other parties not before the court.”).

must necessarily guess at its meaning and differ as to its application.”<sup>134</sup> Thus, the government would face a daunting task in crafting a statute that would survive constitutional scrutiny.

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134. *United States v. Rosen*, 445 F. Supp. 2d 602, 617 (E.D. Va. 2006) (quoting *United States v. Lanier*, 520 U.S. 259, 266 (1997)).