Free Speech & Election Law

The *Bartnicki* Case and Privacy

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MR. KLAUSNER: Gloria Bartnicki, a union negotiator, was driving in her car and she made a cell phone call to the president of the teachers union, one Anthony Kane. During the conversation, they were talking about how things were not looking so good at the moment for the negotiations because the school board was not caving in.

So, at one point during the conversation, President of the Union Kane said, "If they're not gonna move for three percent, we're gonna have to go to their homes, blow off their front porches and we'll have to do some work on some of those guys." Basically, he was saying to his negotiator that this is very bad news and we're going to have to do what we've got to do.

That cell phone call was, it turned out, intercepted. Nobody knows who intercepted the phone call. But after the negotiations were over and the Union signed its contract with the Board, the head of a local taxpayer's group found in his mailbox a tape of this conversation. It was not identified, but the taxpayer's group head recognized the two voices on the tape recording. First he played it before the School Board, and then he delivered the tape to a radio commentator who played it repeatedly on the air.

Bartnicki and Kane filed a lawsuit seeking statutory damages against a variety of players, including the radio commentator. Both the Pennsylvania Wiretap Act and the Federal Wiretap Act imposed civil sanctions on those who knowingly disclose – and illegally intercept – a private cell phone conversation or other conversation.

There was no complicity. The defendants did not play any role in participating in obtaining the intercepted conversation, but there was reason to know that the conversation had been recorded illegally, without the consent of the participants.

The case came down this year, on May 21, in a divided court. The majority opinion was delivered by Justice Stevens. He was joined by Justices O'Connor, Kennedy, Souter, Ginsberg and Breyer. There was a concurring opinion, which was filed by Justice Breyer, joined by Justice O'Connor. The Chief Justice filed a dissent, joined by Justices Scalia and Thomas.

In an interesting juxtaposition, in his opinion for the Court, Justice Stevens applied strict scrutiny and found that there was a First Amendment privilege to publish unlawfully intercepted conversations about a matter of public concern in order to avoid disproportionately harming media freedom.

Breyer's concurrence, joined by O'Connor, emphasized that the Court's narrow holding did not imply a broad constitutional immunity for the media.

The dissent basically said this is not a strict scrutiny case because you are not dealing with showing a need of the highest order. This is an intermediate scrutiny case. The statutory restrictions were content-neutral and, under these circumstances, the Court should not protect the involuntary disclosure of the personal conversations.

We have a very distinguished panel here to address this fascinating case, and we have a number of points of view. What we're going to do is have a ten-minute presentation by each of our speakers, and then we will have plenty of time for Q & A.

I will briefly introduce each of the speakers at the outset, and then I will call them in sequence to start. I will be introducing them in the order in which they'll be speaking.

Our first speaker is Professor Eugene Volokh,. Professor Volokh teaches free speech law, also copyright law, firearms regulation policy. He has been teaching at UCLA Law School and this year he is visiting at George Mason. Professor Volokh also has authored a First Amendment casebook, recently published by Foundation Press. He's written dozens of law review articles. One of his articles, from *Stanford Law Review*, is included in the Continuing Legal Education materials. It came out last year, and the title is "Freedom of Speech and Information Privacy — the Troubling Implications of a Right to Stop People from Speaking About You".

After Professor Volokh, we will be hearing from Marc Rotenberg. Marc is director of the Electronic Privacy Information Center in Washington, D.C. He teaches information privacy law at Georgetown University Law Center. He has testified on numerous issues before Congress. He has edited a volume called *The Privacy Law Sourcebook*, and he is co-editor of a volume called *Technology and Privacy — the New Landscape*, which was published three years ago by MIT

Press. Marc Rotenberg also, I should say, is the winner of the 2000 Norbert Weiner Award for Professional and Social Responsibility, and a variety of other distinctions, in his career.

Our third speaker, Stuart Taylor, is a widely read weekly opinion columnist for *National Journal*. He is a contributing editor for *Newsweek*. He focuses on legal, political and policy issues of national importance. He has had many of his articles reproduced and widely circulated. He appears regularly on many national television programs and news programs. Stuart was legal affairs reporter, from 1980 to 1985, for the *New York Times*, and he was their Supreme Court reporter in the Washington bureau for several years in the late '80s. That led to Stuart getting a nomination for Pulitzer Prize in 1988 for his Supreme Court coverage, among many other honors that he has received.

One of Stuart's most notable pieces was his incisive discussion of the Paula Jones sexual harassment lawsuit against President Clinton, a seminal piece in the *American Lawyer*, which helped reinvigorate interest into that litigation.

Our next speaker is going to be Lillian BeVier, who teaches at the University of Virginia Law School. Professor BeVier is presently the Henry L. and Grace Dougherty Charitable Foundation's Professor of Law and the Class of 1963 Research Professor at the University of Virginia Law School. She teaches property, constitutional law, including First Amendment, intellectual property, including copyright, and unfair competition. She is widely published on many issues and has had many, many honors over the years. Professor BeVier's most recent writings include the forthcoming "The Invisible Hand of the Marketplace of Ideas". That will be forthcoming in *Eternal Vigilence*. Lee Bollinger and Jeff Stoner are editors of that publication.

Earlier last year in *UCLA Law Review*, Professor BeVier published "Mandatory Disclosure — Sham Issue Advocacy" and "*Buckley v. Valeo* — a Response to Professor Hazen." And also last year in the *Journal of Supreme Court History*, Professor BeVier published "Free Expression in the Warren and Burger Courts." And also, in the wake of the change of Administrations last year, Professor BeVier was keynote speaker at the Cato Institute's very excellent program, since published, on the rule of law, in the wake of Clinton.

Our last speaker has is John Malcolm. John is one of us who has sort of become one of them. John Malcolm is currently Deputy Assistant Attorney General in the Criminal Division of the Department of Justice. John served as law clerk to judges both on the United States District Court for the Northern District of Georgia and the 11th Circuit Court of Appeals. He was an assistant U.S. attorney in Atlanta for some seven years. He is a frontline prosecutor, who is assigned to the Fraud and Public Corruption Section, and received numerous awards in his tenure in Atlanta, including the Director's Award for Superior Performance by an Assistant U.S. Attorney. John has taught. He is the former Chairman of the Criminal Law Practice Group of the Federalist Society, and he is going to be our last speaker today.

So, if we'd start with Professor Volokh. You'll have ten minutes. Thanks.

PROFESSOR VOLOKH: Thank you very much. I think *Bartnicki* is such a fascinating case because it isn't just about the rather boutique-y area of publication of intercepted cellular telephone conversations; rather, it touches on several other very important First Amendment questions that arise in a lot of different situations.

The majority opinion certainly has problems, but I think the outcome is correct. And had there been another outcome, then I think there'd be some pretty substantial problems for other cases down the line.

We're talking here about the problem of tainted information — information that, while true and while perhaps of considerable interest to listeners and speakers, is somehow tainted at the outset. One way it may be tainted is by having been gathered by someone in violation of eavesdropping laws. The question is, may the media be punished for publishing information that they knew was gathered by someone in violation of these laws?

I am not, by the way, challenging the knowledge point. In some cases, there may be some uncertainty about whether it was illegally gathered, but I am perfectly willing to stipulate that the media in this case knew the information had been gathered by someone in violation of the law.

What's the big deal about the media losing access to this very narrow range of information? Well, what about information that was illegally gathered by police? Some people actually draw an analogy, "Well, information gathered in violation of Fourth Amendment rights would be excluded in court. " But do we really think that if information is gathered illegally by police and the media hear about it, possibly at a suppression hearing, the media should be legally barred from publishing this information? And let's even say they are doing it after the trial, where there are no more fair trial concerns?

If you apply the logic of the statute in *Bartnicki*, you could make a very similar argument that information illegally gathered by police is also tainted at the outset and the newspapers can be punished for publishing it. If the Court had reached the opposite result in *Bartnciki*, lower courts might find it hard to resist this logic.

What about information leaked by corporate employees in violation of a non-disclosure agreement or a duty of loyalty? I have no support for the leakers themselves. We can imagine some whistle-blowing situations where the obligations of the confidentiality might be superseded by some higher obligation, but these are few and far between. If you make a deal to keep something quiet, you should keep that deal; if you do not keep that deal, you should be punished.

But can the newspaper or websites or radio stations also be punished for publishing the leaked material?

Now, this isn't just a little isolated circumstance. This is the bread and butter of a lot of investigative journalism, of many front pages breaking many important scandals.

I believe the answer is no, and I think most people would agree – the media must be free to publish the leaked material. But if *Bartnicki* had come out the other way, how could the leak scenario be distinguished?

The argument for punishing the media in *Bartnicki*, after all, was publishing intercepted communications was like knowingly receiving and using stolen property. Well, publishing leaks is then like knowingly receiving and using embezzled property — information that the leaker had a legal right to have but no legal right to pass on.

The law does not draw much of a distinction between theft and embezzlement. First Amendment law certainly couldn't do that. So if the Court had come out the opposite way in *Bartnicki*, all of this stuff would be subject both to civil lawsuits and criminal punishment.

Today, there's no statute punishing the publication of illegally leaked information; but if it seemed that such a statute would be upheld, it might well be enacted. And even without the statute, there might be liability under tort claims such as interference with business relations.

I think such claims should fail – but only because the First Amendment protects the media's right to publish information, even if it was illegally leaked or illegally intercepted by a third party.

The Bartnicki question also ties in to another important aspect of First Amendment law — the ample alternative channels inquiry. Content-neutral speech restriction must both pass intermediate scrutiny and leave ample alternative channels for the communication. (There is a question here as to whether this restriction is content-neutral; but I'm going to set that aside. Let's assume that it is indeed content-neutral.)

Consider a classic content-neutral restriction: you can't drive around a neighborhood in a sound truck blaring out your message. One of the reasons you can't do this is that you can still put up billboards, send out mailings, go door to door, buy television ads, and so on. These may not be perfect channels for you, but they are ample alternative channels.

A ban on publishing illegally gathered or leaked materials does not leave open other ample alternative channels for communicating the facts. After all, if a newspaper gets this information, they cannot publish it at all. In fact, according to the statute, they cannot even use the information, so they can't try to gather the information in other ways using what they have learned from the leak.

But even if they could use the information to try to regather the data legally, what can they really do? Say they call up the people and say, "Did you ever say X, Y, Z?" "We didn't," the people respond. They know the newspaper can't publish the original information, so they completely clam up. The law is a total ban on the communication of information; it doesn't leave ample alternative channels.

You could argue that there should be a new First Amendment exception that would justify bans on publishing tainted information, but I don't think that you can say, as the dissent did, that the law is okay under the existing traditional content-neutral scrutiny test. The dissent just didn't address this ample alternative channels issue, even though it's a critical prong of the content-neutral test.

Now, a third issue that comes up in *Bartnicki*, especially in Justice Breyer's opinion, is the constitutional tension argument: the argument that speech restriction may be justified as a means of protecting some kind of countervailing constitutional right. The argument is, "What do you mean we're suppressing free speech? We're not — we're fostering free speech. We're encouraging people to speak freely to one another without fear of being intercepted and taped."

It's a plausible argument; there's something appealing to this notion of balancing these constitutionally-inspired values. But exactly the same argument can be made and has been made to justify many other speech restrictions. One example is bans on racist speech. Repeatedly, these bans are defended on the theory that the ban is needed to protect the countervailing constitutional interest in equality.

What about barring speech that criticizes religion? Again, the constitutional tension argument was once made here, too: there's a tension between the values of free speech and freedom of religion, so it's ok to restrict speech that harshly attacks religion. Likewise, some have argued that *Buckley v. Valeo* was wrong and that even independent expenditures could be suppressed, because of the competing value of democracy and equality and free speech itself.

Interestingly, Breyer is the one who most focuses on this argument in *Bartnicki;* and in an earlier case, he made exactly the same argument in the context of advocating restrictions on independent campaign-related speech. So if you buy this constitutional tension argument, you might reach a result that you find appealing in this case. But you also risk reaching a result that is quite unappealing in other cases, and can lead to serious constraint on all sorts of speech.

What's more, if you really look at this argument, it talks about tension between rights; but there is no actual conflict between the rights. Publishing intercepted statements does not violate the freedom of speech, even if it might discourage other people from speaking on cellular phones. The tension is between a constitutional *right* to be free of government suppressing your speech and this supposed constitutional value of speaking without fear of having one's conversation be published. And of course there are lots of other constitutional values that could be similarly asserted in other cases.

I'm going to skip over another item which is pretty important and save it for Q and A.

Let me close with a brief discussion of free speech versus privacy, because this is yet another area in which this case bears on broader debates. There have been at least a half-dozen cases which have dealt with the tension between free speech and privacy. In many of these cases, the argument was that the newspaper was disclosing private facts. But of course, which facts are of private concern and which facts are of legitimate public concern is very much in the eye of the beholder.

For example, some lower court cases say that the media could be sued for publishing people's criminal histories. The theory is that it is not legitimate for the public to be concerned about the fact that this guy was an armed robber who engaged in a shoot-out with the police 11 years before (to take an example from one case). A magazine published it and the court said, "Well, there's no legitimate public concern here." But that's a value judgment, it seems to me, that should be left for readers and speakers to make for themselves. What is of legitimate public concern should not be for the government to determine.

Other situations, admittedly, are difficult. In one case, where a newspaper named a rape victim, the Court actually struck down the law barring publication of the names of rape victims; all of us surely must sympathize with the victim in a case like that. The trouble though, is that if the speech could be suppressed in that case, it would be hard for the Court to prevent much broader "privacy" –- justified speech restrictions in the future.

Finally, returning to situations like the one in *Bartnicki*, say that somebody leaks a confidential memo that includes the name of a government employee or corporate officer or union official. If you take seriously the notion that you can suppress constitutionally protected free speech to further privacy then publication of this leaked memo could be punished on privacy grounds just as surely as publication of the tape in *Bartniki* could be.

So, my take-home point from all of this: This is not a case where people instantly think, "Yes, the media has to have the right to publish." It might seem like such a picayune little issue. But it definitely implicates much broader concerns and had the case come out the other way, it could have lead to a great deal of interference with the right of the media to publish accurate factual information.

MR. KLAUSNER: Thanks, Eugene. The next speaker is Mr. Rotenberg.

MR. ROTENBERG: I am going to begin with two brief observations and then provide my rejoinder to Eugene's very good presentation.

The first is that when I teach privacy law, I always begin with the Brandeis-Warren article from 1980. I try to persuade my students that this article is of ongoing interest to the legal community, and sometimes even to the Court. So I was very pleased to see the Brandeis-Warren article cited in the majority opinion in *Bartnicki*.

I was interested, and perhaps somewhat amused, to see it cited in the concurrence. Then, lo and behold, it appears as well in the dissent. The article on the right to privacy in this case is cited in all three opinions, which I think is extraordinary and worth noting.

But things get even more bizarre. Here I am on a panel defending Justice Rehnquist, as Eugene is defending Justice Stevens, in a term where I found myself siding with Justice Scalia in *Kyllo*, which is a thermal imaging case. So we really have a lot of stuff tossed up in the air this afternoon. But I am just thrilled to be here.

Now, Eugene has a wonderful set of hypothetical claims, and with my free speech hat on, I could very well agree with him on any number of those fact patterns that he presented. Obviously, there are competing First Amendment interests, and those First Amendment interests will increase as we move toward broader statutes, as we move toward statutes that try to regulate conduct of government and so forth.

But none of those facts are truly at issue in this case because this was a case about a particular provision of the Federal Wiretap statute, which I was familiar with. I worked for the Judiciary Committee on some of the other amendments to Title 3. Section 2511(1)(c) basically said that if we are going to make real the privacy of electronic communications, then we have to discourage the subsequent publication illegally obtained by someone knowing that the interception was unlawful. That is the theory behind 2511(1)(c), the so-called dry-up-the-market approach.

Now, let's look at the statute. Is there prior restraint here? Is the government trying to prevent someone from publishing? No. It simply imposes a civil fine. Is the government exercising any type of censorious conduct? Is it saying that *your* communications can go forward, but *your* communications may not? No. This is content-neutral. It says that anybody who picks up the phone is entitled to a certain degree of privacy.

There is a notice requirement here. To be subject to this statutory provision, you have to know that it was unlawfully obtained. The statute protects the privacy of electronic communication. As Justice Rehnquist noted in dissent, citing, very interestingly I thought, *Times v. Sullivan* for people to engage in robust communication, they must have reason to believe in this electronic environment that their speech, that their private communication, will be protected. What is the alternative? To be guarded in your communication when you pick up the phone because you think it may be disclosed.

There is a line here in the concurrence, which I just find extraordinary. Justice Breyer, in trying to analyze

these competing interests, says here, "The speaker's legitimate privacy expectations are unusually low, and the public interest in defeating those expectations is unusually high." What does that mean, "their expectations are unusually low"? These are two people who are participating in a private communication. Would you, in the use of a telephone, have to make a determination at the outset that we are about to engage in a conversation involving matters of public interest; therefore, I have to take additional measures to safeguard the privacy of the communication. It almost doesn't make sense.

Before the panel, Eugene and I discussed what we make of Stevens' opinion. I think, for him, it doesn't quite work because, from his viewpoint, it doesn't go far enough. I think, of course, it goes too far. But I don't know what it tells Congress.

In other words, I don't know what you do at this point if the Court has said to Congress, "For certain types of communications that appear to be of public interest, although we do not want to call them a public interest exception, we will permit the publication by these third parties."

Is Congress now to say in effect, "We are going to make the content-based determination that certain types of communication are entitled to privacy protection, while others are not." It seems to be a paradoxical result.

So I side with the dissent here. I think this is one of the ways you protect privacy in an electronic communications environment. I do not think it requires that all forms of confidential communication, if they're obtained, cannot be subsequently published by the press. I do not think it has that type of chilling impact on press publication. But in this very narrow situation where Congress makes no attempt to distinguish among types of speech, where it imposes no prior restraint, where it gives notice to the party that the publication is not permitted, where the information, is not in the public domain because this is not information that would be available otherwise to the press but for the interception, I think the statute should have been upheld. That's my view.

MR. KLAUSNER: Thank you, Marc. Stuart Taylor is next.

MR. TAYLOR: Marc, that was much too fast. I'm the journalist on the panel and I am still reading the dissent.

I am not a very representative journalist, perhaps, so the rest of them should not be saddled with what I am going to say.

I am torn in this case. It may be the kind of constitutional tension that Eugene speaks of. I am as suspicious as he is of this constitutional tension idea. It is a good way to say that almost anything can be a constitutional value that would override a constitutional right. One could say that there is a constitutional tension between the Pentagon's desire not to be burglarized and my need to burglarize it for the purpose of facilitating my freedom of speech. I know journalists who have actually made the argument that there is a constitutional right to burglarize the Pentagon. I'm not sure whether they were serious or not.

But in approaching this, going from the general to the particular, there are cases in which there should be and clearly is, I think, a First Amendment right to publish some truthful information of public importance, even if it's a statutory crime.

The *Pentagon* case is a paradigm in a sense, although the issue there was prior restraint and, therefore, it doesn't stand for the proposition that you could not have had a criminal prosecution of the *New York Times* and the *Washington Post* for publishing the Pentagon papers. I think that if that issue were presented, the Court should hold and would hold that, in fact, you can't have a criminal conviction. There was nothing in the Pentagon papers that jeopardized national security, although they were of considerable value in terms of giving the public a basis for evaluating the war effort.

This case, *Bartnicki*, is not the *Pentagon* papers, but there is a little bit of a similarity. I think part of what was driving Justice Breyer, in particular, to reach the result he did was a feeling that the conduct of the people on the telephone here did not really deserve to be protected because they were engaging in reprehensible conduct — talking about bombing somebody's front porch. I don't know if they were joking or not, but for purposes of the decision, they don't seem to be assuming.

It is interesting to look at what Breyer said in the oral argument, in which one might have guessed that he was going to be on the other side of this decision. In the oral argument he asked the lawyer for the radio host whether a newspaper could constitutionally be sued for publishing information brought to it by an eavesdropping trespasser who broke into a home and listened at the bedroom door. I think your answer is straightforwardly "No." The newspaper could not be punished, Justice Breyer said. He got the answer he was looking for. And then he said, quite heatedly, "I don't see how you are going to have any privacy left. I mean, what kind of privacy," says Breyer, "if people can break into your house, steal all your information and it can be published in the newspaper, and you can't get any damages from that newspaper?"

Well, a few months later, up pops Breyer writing the controlling concurring opinion, saying that the newspaper in this case is protected. I don't think he underwent a conversion experience. Maybe he thought this is different because a bedroom is different than a telephone.

I think the essence of the difference, and he stressed it in his opinion, was that these people who were claiming that their privacy was invaded were privately talking about bombing somebody's front porch. He wrote his

concurring opinion, which I think is the controlling opinion because it's considerably narrower than Justice Stevens' is, and he and Justice O'Connor, who joined the Breyer opinion, were essential to the majority. His concurring opinion is very limited. He upheld the First Amendment claim on two conditions. One, the radio broadcasters acted lawfully in the sense that they were not complicit in the making of the improper tape. And two, the matter publicized involved a matter of unusual public concern — namely, a threat of potential physical harm to others.

That leaves you to wonder, "Well, suppose another case comes along just like this one but the conversation was, say, a congressional candidate and his or her campaign press secretary plotting strategy, something that they would want to be secret but that was in that sense reprehensible." I think Justice Breyer, and hence the majority, might very well come out the other way in a case like that, and I don't have a strong opinion about whether they should or not. I hadn't quite finished reading the dissent when Marc stopped.

But I want to close by anticipating a complaint that is sometimes made in cases like this, which is that the media are seeking for themselves and the Court here is giving them a special privilege that's available to nobody else: "Who do the media think they are?" I grant the general persuasiveness and attractiveness of that proposition, but I doubt its applicability to this particular case for a couple of reasons.

One, although the institutional media may be the main beneficiary of decisions like this, they are not the only beneficiary. The theory isn't that we are trying to help the institutional media. An individual who went out and did a newsletter or a flyer publicizing this conversation — let's say it was somebody opposed to these people — would presumably get the same protection.

Second, a couple of analogies. One could say that the constitutional protection of patent holders really only helps rich corporations because that is who gets the patents. Or one could assert that tax cuts like President Bush's really are only for rich people because they get most of them. Or that the takings clause is really only for rich people — or perhaps, most aptly, that the court's decision in *Buckley v. Valeo*, the aspect of it that created a constitutional right to self-finance campaigns — by Steve Forbes' millions and millions — clearly only benefits rich people directly. But in each of those cases, the defenders of those decisions would say that there is a larger societal benefit and the rich people who are the immediate beneficiaries are the proxies for that societal benefit.

Finally, there is a hypothetical question that I would like to float. Suppose that the person who made this illegal tape, instead of taking it to the newspaper or to somebody who took it to the newspaper, took it to the police. Suppose the D.A. decided to prosecute these people for plotting to blow up the porch. Would or should that evidence have been admissible? And by the way, what do you think Chief Justice Rehnquist and the two other dissenters in this case would have held, if those had been the facts?

There's a very strong argument that it should have been admissible because the police would have clean hands. It's not their fault that this was done illegally and it's a good thing that people be prosecuted for crimes. The purpose of the exclusionary rule, which is deterring the police misconduct, is not presented.

I called a friend of the Solicitor General's Office this afternoon to see what the case law is on this. He said there's a split on the circuits; our position is that the police ought to be able to introduce it. There's one circuit with us and there are three or four against it. I think the reason the circuits have gone against the government on that is that, under the literal terms of the statute, the police would be in the exact same position as the media are here, which is that it would clearly violate the statute, read in any ordinary way, for the police to use it. As the Court here held, it would violate the statute, but for the First Amendment, for the media to use it.

I think it is interesting to speculate on how each member of the Court would have voted, if those had been the facts.

MR. KLAUSNER: Thanks, Stuart. Lillian BeVier is next.

PROFESSOR BeVIER: I think there is lots to disagree with and contend with in what has been said so far. Let me first of all just suggest that this business about the constitutional tension that Eugene brought up — I think we always ought to view that with considerable care. But Eugene says you can't take a constitutional right and balance against it constitutional values. The difficulty with asserting that in the context of this case is that it's so incredibly question-begging.

The whole issue in *Bartnicki* is whether there is a constitutional right of the press to publish this information. That is what is at stake. The question of whether there should be or not is a question that, of course, you reason to your answer by whatever method of constitutional interpretation or First Amendment seems to you to be the most persuasive and lead generally to the best results.

Gene's assertion that there is a practically absolute right in the media to publish accurate factual information, I think, is not valid. But let me go to the beginning of the comments that I was planning to make.

From an instrumentalist point of view, when you think about the First Amendment as a set of rules by which the society attempts to accomplish certain social purposes that we deem important — among them, to be free from government control — it seems to me that *Bartnicki* is profoundly misguided, as a matter of First Amendment doctrine. The

Court seems to think that it is furthering a First Amendment interest in free dissemination of information about matters of public interest. I think that you can make an argument — I will try to make it — that precisely the contrary is true. The reason for that is something that has been alluded to previously. The reason for that really is that the ability to further the First Amendment interest in the free dissemination of information with respect to matters of public concern is wholly parasitic on information being produced in the first place. You can not freely disseminate information that is not available, and you can not eavesdrop on conversations that people do not hold or that they take effective precautions to keep secret. So the whole idea of trying to further dissemination in this particular case, by laying down a rule that in the future encourages people to take more precautions to keep their conversations private seems to me to be misguided from an instrumentalist point of view. The rule is one whose effect will be that we end up with less information in the future. We will end up with fewer conversations and less free discussion among the citizenry of both matters of public concern and of private interest to themselves.

The relationship between privacy and dissemination of information is not one so much of balance as it is a sort of synergy. The more privacy people have, the more freely they will communicate with one another. The more freely they communicate with one another, the more likely they are to share and ultimately produce information, and eventually to disseminate it or put it to socially useful purposes.

This seems to me to be a common-sensical insight, and it certainly is reflected in a myriad of ways in our law, ways that are not directly related to *Bartnicki* but that suggest that the law recognizes how important confidentiality is in furthering important communications. Just think, for example, where you would be without the lawyer-client privilege of confidentiality.

Now I'm going to take on Stuart's point. The notion that the media has a privilege that is not enjoyed by other citizens to publish truthful information that it knows was illegally gathered seems to me to be both perverse and quite wrong. I guess I am going to take on a couple of Eugene's hypotheticals, too. I do think the question Stuart asked about whether a prosecutor would be able to use the information to obtain a conviction is one of the more interesting questions that flows out of this.

Let's consider trade secret law. I don't know how many of you know anything about trade secret law. What I would really like to ask you is whether you think it's unconstitutional as a violation, generally, of the First Amendment? You do not have to answer and I will not call on you.

I will just give you a doctrinal assertion here, which happens to be true. If you obtain a trade secret through a wiretap or you knowingly accept a disclosure of information you know to be confidential, you will be liable as a trade secret violator to the holder of that secret. If you disclose that information, having received it knowing that the person who gave it to you is in violation of trade secret law, you will be liable as a trade secret violator. You may be enjoined, perhaps permanently from making any use of that information, and you may be subject to damages. That in a nutshell is trade secret law. It is generally thought to serve very benign social purposes, and it has not until very very recently been thought by anyone to contain an implicit exception for the press. Do you really think that that law violates the First Amendment rights of people who obtain information unlawfully? By the way, you will be liable as a trade secret violator not only if you disclose information in breach of a confidentiality agreement but also if you obtain the information by unlawful means, such as trespassing, for example, or illegally wiretapping someone's phone.

Business people across the country both are beneficiaries of trade secret law and susceptible to causes of action when they violate it by attempting in one fashion or another to get the trade secrets of their competitors. But does the generalization that the media has a privilege to publish truthful information — i.e., a trade secret — when it knows that the secret was unlawfully obtained mean that the media is not bound by trade secret law? Why? Why would this be so? What purpose would it serve? Would any genuine First Amendment interest be truly advanced by privileging the media in this way?

Of course, once the media publishes the trade secret, it's out of the bag, so you can imagine that this would be a great way for someone who wants to begin to use trade secret information simply to avoid liability himself or herself: just steal the information and then give it to the media, have the media publish it, and then go ahead and use the information themselves.

But either the media has a privilege that others do not to publish unlawfully obtained information or both the media and the general public have such a privilege for illegally obtained information in violation of trade secret law, or neither do. My view is, quite firmly, that neither do and neither ought to have.

MR. KLAUSNER: Thanks, Lillian. John Malcolm.

MR. MALCOLM: Thank you. I am really pleased to be here. I was saying to myself yesterday, I wonder what it feels like to be fifth on a panel of five late on a Friday afternoon, knowing that you are the only thing that stands between your audience and a cocktail party?

Now I know what that feels like, so I'm a better man for it.

I have a lot of sympathy for the majority in *Bartnicki* for many of the reasons that Stuart and Eugene

pointed out. Still, looking at it as a totality, I think the majority got it wrong. And the reason I think the majority got it wrong is that they gave very short shrift to two values which Congress clearly wanted to promote, and which I think Congress can promote.

The first is to create a disincentive to engage in illegal activity; in this case, unlawfully intercepting conversations. As Justice Stevens states in his majority opinion, "It would be quite remarkable to hold speech by a law-abiding possessor or information can be suppressed in order to deter conduct of a non-law abiding party."

I frankly don't see why that is such a remarkable proposition, given the ease with which perpetrators can now illegally intercept conversations, and given their incentives to disseminate this, either for strategic advantage or for notoriety, even if they are going to deliver it anonymously. I believe that a lot of times these tapes are left anonymously. They're there in order to gain something just from the dissemination.

Given these incentives, I don't see any reason why Congress can't employ, as Marc Rotenberg talked about, a dry-up-the-market theory. Now, a dry-up-the-market theory in essence says, we're going to remove incentives to engage in wrongful conduct by drying up the market for the downstream possession or use. As the dissent stated in *Bartnicki*, this is neither novel nor implausible.

Such an approach is considered legitimate in all manner of laws. It is considered legitimate with respect to illegal narcotics. It is considered legitimate with respect to child pornography. It is considered legitimate with respect to inside information. And I see no reason why it can not be considered legitimate with respect to illegally intercepted information.

In fact, in child pornography, you can argue that the greatest harm to the child, the victim, is in the production — the actual taking of the picture or the making of the movie — and that the downstream possession by the consumer of the child porn is not as bad as the original exploitation and taking of the picture. In the case of illegally-intercepted conversations, the downstream use is far more harmful than the original interception. The person who had the conversation is unaware that the original intercept took place. The harm occurs when it is spread to the world. So I don't see why Congress in this case couldn't try to go after creating a disincentive or destroying an incentive by going after the point where the real harm occurs.

Now, I think it is perfectly reasonable for Congress to have concluded that, given the strategic advantages to be gained by dissemination of unlawfully intercepted conversations and the unfortunate ease with which such conversations can be intercepted, there would be virtually no disincentive to stopping this, unless you employed a dry-up-the-market theory. Justice Stevens, in his majority opinion, treats this with the back of his hand. He dismisses this by saying, "There is no empirical evidence to support the assumption that the prohibition against disclosures reduces the number of illegal intercepts."

I have to say that I think it's very difficult to take him seriously when he says that because, as far as I know, there is no reporting mechanism for people to say, "I wasn't stopped by this law: I went ahead and illegally intercepted this conversation." Or, for people who say, "Gee, I would have illegally intercepted this conversation but for the fact that its downstream use was prohibited and therefore I was stopped." How do you get an empirical analysis of this? I just think he is wrong about it.

The second value that I think the majority gave short shrift to was Congress' desire to promote private communication. Really, an ability to limit — not necessarily stop — the dissemination of one's thoughts. Still another First Amendment value, which is the freedom of association, the ability to pick and choose with whom you deal in a private setting.

I don't really think that this case is about the First Amendment versus privacy. I really view this case as a congressional preference for private speech over public speech in instances in which the speaker means to keep his thoughts relatively private and non-public, when those thoughts have been disseminated because of an unlawful interception by an unwanted outsider. I think it's not about choosing between the First Amendment and something else. I really think it's making a rational choice among competing First Amendment values.

The majority states again, "In a democratic society, privacy of communication is essential, if citizens are to think and act creatively and constructively." But then the majority goes on to say, "In this case" — which I believe, by the way, is a very important qualifier for reasons I'll discuss in a minute — "privacy concerns give way when balanced against the interest in publishing matters of public importance." The majority never really says why that must give way, why that is so. And it also never says why the Court, rather than Congress, is the appropriate body in which to engage in that balancing test.

As a general proposition, I think the press is entitled to the same First Amendment rights as everybody else — no more, no less. The media does not have — and the majority recognizes this — an unfettered right to engage in any kind of illegal conduct. That would include the unlawful possession and use of illegally obtained material when it wants to produce a story.

As Eugene Volokh talked about, in terms of alternative adequate channels, there is nothing about this law that prevents the press from reporting on any topic whatsoever. They can ask the participants about those conversations. They can go talk to others who may have been involved in that conversation. In short, it involves the press having to do

what investigative agencies do all the time — gumshoe work.

All that is being said is that the press is prohibited from utilizing material that it should never have had in the first place. Nobody ever questions, for instance, the right of a legislature to punish a fence who receives ill-gotten gains from a thief and then uses it to some advantage. Nobody questions that right, even though it may well be the case that the fence had nothing to do with the theft of the underlying material. If Congress can punish the fence, I don't see why it can't punish the press for using the fruit of a poisonous tree in order to make its story.

Lest you think this is some kind of a new proposition, William Blackstone, as far back as 1769, in his Commentaries distinguished between prior restraint, which was not involved in this case, and punishing post-publication speech. He said, "The liberty of the press is indeed essential to the nature of a free state, but this consists in laying no previous restraints upon publication and not in freedom from censure for a criminal matter when published.

Every freeman has an undoubted right to lay what sentiments he pleases before the public. To forbid this is to destroy the freedom of the press. But if he publishes what is improper, he must take the consequences of his own temerity."

In my opinion, I think essentially that *Bartnicki* is a case of 'bad facts make bad law'. I think that the majority was concerned about the chilling effect if a state legislature criminalized the publication of unlawfully obtained information in a case of a whistleblower who wanted to disclose extreme misconduct, either by a private actor or a governmental actor. As I say, I have sympathy for this, and Eugene has cited this.

I question, however, in *Bartnicki*, whether the outcome would have been very different if, instead of talking about a loud-mouthed, hot-headed, tough union boss talking to his chief negotiator, the case involved a public official admitting to his psychiatrist or to his pastor in a confessional that he had taken a bribe. That is clearly a matter of public concern. Or, if it involved an illegally taped conversation of a criminal defendant who's discussing trial strategy with his attorney? Or, a board meeting in which trade secrets are discussed or a private meeting among governmental scientists in which they're discussing the potential vulnerabilities of nuclear power plants to terrorist attacks.

I believe, given the comments by the two concurring Justices, Justice Breyer and Justice O'Connor, that the outcome might very well have been different and in fact might well be different if the facts change ever so slightly in the next case.

I would also say that I think — and I think Eugene Volokh shared this by saying, "I don't wholly agree with Justice Stevens" — that the majority opinion is dissatisfying and, for that matter, the concurring opinions are dissatisfying from a number of perspectives. In the concurrence, for instance, Justice Breyer says, "Well, I don't believe that this matter is completely beyond the reach of legislatures in terms of their ability to write a law; they just didn't quite write a law in this case that was narrowly tailored enough." I actually find it very difficult to imagine how a legislature could have written a law any more narrowly tailored. Congress in essence said, there is no topic that is off limits. You can publish what you want. You just can't use unlawfully intercepted material in order to make that story.

The majority, for instance, tries to distinguish between matters of private concern and public concern. As Eugene also said, that makes no sense. They make no attempt to define that whatsoever. It seems to me that such a statement is entirely conclusory and entirely circular. Basically, if a media outlet gets something and it believes that its listener or its readership want to find out about stuff, it's going to be hard-pressed for me or anybody else, it seems, to say this really wasn't a matter of public concern. To me, saying that it's a matter of public concern means nothing.

Most importantly, the majority, and the concurrence make very clear that their opinion in this case is tied to the specific facts in this case. In fact, the concurring justices — remember, you had three dissenters; two concurring justices — stressed the fact that one of the things that they found important to their decision is that this was threatening speech — which, by the way, I think was a complete canard. But they said that this is threatening speech, and that as a result of being threatening speech, it's entitled to little or no First Amendment protection.

As Justice Stevens said in the majority, "The future may bring scenarios prudence counsels our not resolving anticipatorally." In light of this comment and the comments from the concurrence, the importance of *Bartnicki* really remains to be seen. Given the degree of hesitancy that was expressed both by the majority and the concurrence, I'm not sure, if I were a member of the media, that I would be taking that much solace in *Bartnicki* because they very well may end up finding themselves vulnerable, if the facts change ever so slightly.

Thank you.

MR. KLAUSNER: Thank you, John. So we have time for questions. We have at least 25 minutes before the conclusion of this session.

AUDIENCE PARTICIPANT: I would say the cell phone is a radio transmitter. If you speak on it with an expectation of privacy because Congress has passed a law that says you have privacy, I think you're being quite silly.

I'm an attorney, so I've got a few more hypotheticals for Professor Volokh, to add to numerous ones he offers. Suppose one of the participants in the cell phone conversation, hearing that the press has obtained an illicit copy of

the conversation, goes into court and files a copyright claim in which he says that that conversation was a copyrighted work. I'm entitled to an injunction to enjoin the press or broadcaster from reproducing this copyrighted work. That's my first question.

My second question would be, what happens when a radio broadcaster decides that as a matter of exercising their First Amendment freedoms they undertake to broadcast recordings on the air without the consent of the copyright holder?

PROFESSOR VOLOKH: I think it's an excellent question, and it's similar to what people ask in many other First Amendment states, whether about campaign-related advocacy, allegedly bigoted speech, allegedly pro-communist speech, or what have you. We already allow all these other exceptions, the argument goes; why not allow this one, too? So while these exceptions, such as the copyright exception, do exist, I'm worried about the creation of a new exception, precisely because I worry about what happens two years later when somebody says why don't we restrict this other speech by analogy to this new exception. This process of broadening by analogy the zone of unprotected speech needs to be checked.

Fortunately, it turns out that the very exception you mentioned illustrates the correctness of the result in *Bartnicki*. When the Supreme Court upheld copyright law in *Harper & Row*, it specifically stressed that copyright law barred only the copying of *expression*, and left people free to relate *facts*.

If there is a copyright claim based, for example, on a corporate document that's leaked to the newspaper, then, first, the newspaper can claim a fair use privilege, which the Court also said may have constitutional significance. And second, even if the newspaper may not quote the entire publication literally, it can include short literal excerpts and accurately paraphrase the rest. Copyright law leaves open ample alternative channels that allow speakers to convey the same facts, using other kinds of expression.

That is precisely what the law in *Bartnicki* does not allow you to do; not only can you not literally play the recording, but you can't even use any of the facts that you discovered. You cannot use them in your broadcast, and you can't even use them in further investigating the story. Any use of these facts is prohibited.

The copyright exception thus actually illustrates the importance of maintaining the distinction between allowing some constraint over the use of expression and allowing people to block the communication of facts. And the Supreme Court was quite right in saying that speakers should remain free to communicate facts.

PROFESSOR BeVIER: What about trade secret law?

PROFESSOR VOLOKH: Another excellent example of the importance of leaving people free to communicate facts. Let's say, for example, that a newspaper learns that a company is about to do something that some people — and I will almost certainly not be one of them, given my views on environmentalism — believe will be a great environmental risk. The plans of a company, as to introduction of new products or creation of new plants or whatever, are certainly trade secrets.

So, let's say that somebody sends to the newspaper a copy of a document that says the company is about to build this nuclear power plant, produce this new product or whatever else. Under trade secret law, the newspaper could not only be punished but could even be enjoined from reporting on the company's plans. But the First Amendment, I think, must override this aspect of trade secret law, and leave the newspaper free to publish the leaked plans.

Now, the person who leaked the document can quite properly be punished. I agree with trade secret law to that extent. And incidentally, while writing my Stanford article, I did a search for cases and there were virtually none where in fact there was an attempt to punish a downstream speaker, whether the media or a private person sending out a newsletter or whoever else.

But as to the hypothetical of the media publishing trade secret information, yes, I think the First Amendment, notwithstanding trade secret law, must allow the media to publish information in leaked documents.

MR. ROTENBERG: I'm sorry. If I may, you know, the media —

PROFESSOR VOLOKH: I'm sorry. The media and others. The media are just the ones who usually want to publish this stuff.

MR. ROTENBERG: The media doesn't have an unfettered right to get what it wants and publish what it wants. For instance, there's case law upholding — if a reporter were doing a story on illegal narcotics or a reporter were doing a story on child pornography — suppose there's a particular organization out there; NAMBLA, the National Association on Man-Boy Love — and they wanted to report on this stuff and talk about the pervasiveness and describe the content of this material, possession of this sort of material, obscenity or child pornography or whatever the case may be. And there's case law that clearly says that just because you're a reporter doing a story on child pornography doesn't mean you're allowed to possess this stuff. And I don't see why this is any different —

PROFESSOR VOLOKH: There is —

MR. ROTENBERG: — if I could just finish my thought. You have the same sorts of adequate alternative remedies, which is, you can go to talk to people about this subject; you can go and talk to people who are engaged in this sort of activity; you can have some conversations; you can do some digging that way. But you're not allowed to just say, "Hey, I'm doing a story; give it to me and I'll do what I want with it in order to make my story."

MR. TAYLOR: I'd like to hear more about that case law. I'd like to quote something first, from the Majority opinion — something I think they did say right as a general matter. And then they quote from *Smith v. Daily Mail Publishing Company* in 1979. "State action to punish the publication of truthful information seldom can satisfy constitutional standards." I don't think the court — you can cite many Supreme Court cases where the publication of truthful information, particularly on matters of public importance, has been published. I think, arguably, that's a line that we shouldn't cross too readily, although I can imagine the cases where it would have to be crossed.

While I'm at it, I'd like to address quickly the chilling effect argument — people won't talk on the telephone if they know that a newspaper might get a copy of something in which the justices anticipate that they're going to bomb somebody's porch, et cetera, et cetera. Well, as was pointed out earlier, everybody knows that if you're on a cell phone, somebody can be listening. So the incremental harm is that the media publishes.

Now, everybody who pays attention to this decision, if they pay enough attention to it, they will know that all the Supreme Court has cleared the way to publish without punishment is information that Justice Breyer thinks may lead to destruction of life or limb. That wouldn't chill my cell phone conversations incrementally one bit.

MR. MALCOLM: I just want to jump in on this point that because it's possible to intercept and publish someone else's cellular communication; therefore, there's no expectation of privacy. I think there's a bit of a problem there because virtually every privacy law relating to new technology is applied to a situation where the technology makes possible the capture of personal information that wouldn't otherwise arise.

This is basically the dilemma that was posed by Katz, in the reasonable expectation of privacy analysis. You know, Professor Amsterdam wrote after that case, the problem with the reasonable expectation of privacy analysis in a period of rapidly expanding technologies that enables surveillance, is the government simply says, "Hey, guess what, we've got the ability to conduct surveillance and you have no expectation of privacy."

So, when the Congress tries to legislate in this area and says in effect, "You know, yes, you are physically capable of doing these things, just as you are physically capable of trespassing onto someone's property and entering their home and stealing their possessions. Nonetheless, we will agree as a matter of law that we're not going to allow you to engage in that type of behavior."

So, I don't have a problem with the thought that Congress might choose to legislate, to create by statute, an expectation of privacy, which otherwise the technology would take away. That's the whole enterprise in this area.

I think the argument is the statute doesn't stop that, and everyone knows it.

MR. KLAUSNER: Yes.

AUDIENCE PARTICIPANT: There's an old Libertarian saw that says "Be wary of any law that the government does not apply to itself." Up the road in Ft. Meade, NSA intercepts tens of thousands of conversations everyday and uses those for intelligence purposes.

The question is why should private citizens be denied the right to do that which the government is doing —

SPEAKER: Yes, but if the NSA does that domestically, in violation of Title 3, they're breaking the law as well. I think that's another argument that just does not fly in this area.

We pass laws where technology evolves because we value privacy. And if you're really prepared to embrace the principle that laws play no role in this area, then I think you have to be prepared to give up your privacy.

SPEAKER: And I think the answer to that is that there are competing statutes, and there's a process involved by which the government goes and gets the ability to do this. You may like the process; you may not like the process constitutional or unconstitutional. But there is a process involved that the average citizen does not go through when they are intercepting a telephone conversation.

MR. KLAUSNER: Yes, sir.

AUDIENCE PARTICIPANT: This is for Professor BeVier. I believe you made reference to attorney-client privilege. And I don't really think that helps your argument because, if a client is telling a lawyer of an intention to do a future criminal act, the attorney-client privilege doesn't even apply. In fact, the attorney would have an obligation to try to dissuade the clients and, failing that, take other steps to prevent the crime.

PROFESSOR BeVIER: Right. I really didn't mean to say it was directly analogous. What I was really suggesting was simply the basic point that we have a number of privileges up for confidential communications that are designed precisely to achieve the goal of encouraging conversation for socially beneficial purposes.

MR. ROTENBERG: I actually do think it's a good analogy. And that's because you've picked one tiny subset of potential conversations between an attorney and client. In fact, the subset that you have picked is the commission of crime. The crime-fraud exception is a tiny subset of conversations that take place between criminal defendants, a lot of whom are guilty, and their attorneys who are trying to protect their due process rights in preparation for trial.

A conversation, say, between Johnny Cochran and O. J. Simpson sitting in the bowels of the detention center during the middle of a trial might be a matter of public concern; lots of people might want to hear about it. It's still a privileged conversation, and it is not a crime-fraud accepted conversation.

AUDIENCE PARTICIPANT: That relates to a crime already committed. I'm talking about future crimes — a cell phone conversations related to an intended future crime.

SPEAKER: Nobody was prosecuted.

PROFESSOR BeVIER: Right. I think one of the funny things about the case itself is, does anybody know how the negotiations turned out? And were these people — I mean, what happened to the union leaders and so forth? What was the deal that they finally signed to get to the teachers back to work?

MR. MALCOLM: I'm not sure, but I think the relevant point for purposes of analyzing what this decision does is that the controlling opinion by Breyer and O'Connor, which limits it, proceeded on the assumption that this was precisely a future crime-fraud exception type of a situation, that they were talking about bombing somebody's porch. Now that may have been a canard; it may have been silly; it may have been rhetoric. But that's the assumption on which they proceeded. And it limits their decision.

SPEAKER: I agree, and that's exactly why I think *Bartnicki* may be of very utility, because the concurrence latched on to this, and I think it's going to create a very, very narrow fact pattern. But the fact of the matter is, whether it was a legitimate threat at the time or not, time proved that it was purely hyperbolic speech.

The negotiations continued; the negotiations concluded. And this tape wasn't turned over to law enforcement. This tape was turned over to an taxpayers' advocate who just wanted to make the union look bad for future negotiations. And then it was played by a sympathetic radio host, Fred Bopper. So, if there was a real threat involved, it certainly didn't play out under the facts of this case. This was disseminated long after that "threat" had been made, and was quintessential hyperbolic speech.

PROFESSOR VOLOKH: But actually, let's pick up on this privilege point. Let's say that Bill Clinton went to his lawyer or to his minister or to his psychiatrist and said, you know, I did have sex with that woman; I did perjure myself. I knew it all along, and now I'm getting away with it.

MR. TAYLOR: Didn't he do that already?

PROFESSOR VOLOKH: Exactly. Let's say that he had said it early enough, before everybody already knew it.

Now, I fully agree that those people are under a legal duty not to reveal this, and I think if they do reveal it, they should be suitably punished.

But let's say that one of them tells Stuart this information. So, the claim as I understand it — Marc hasn't spoken up on this, but judging by his comments, I don't see how he could distinguish this — the claim is that Stuart could be legally prohibited from revealing this accurate information that we might have good reason to think is quite useful to public debate even though he himself was under no original duty of confidentiality.

MR. MALCOLM: But Eugene, we've got to sort of bring the facts a little bit more in line here. Let's say that that

conversation took place between Clinton and his attorney by means of cellular communication, and someone intercepts the communication and leaves the tape with Stuart. And now Stuart wants to write this story —

PROFESSOR VOLOKH: It's true; it's important; it's public debate. He has a right to write it.

MR. MALCOLM: But see, now we're in 2511(1)(c). We're not talking about some future act. I think we would argue — I mean, it's going to be very interesting to go back and look at this concurrence. Is that not of public interest? I mean, a phrase that Breyer's very much trying to avoid here — but those facts regarding the conduct of the President during that point in American history — I mean, I don't know where the First Amendment interest would be greater. Right?

Now, where do you come down on those facts?

PROFESSOR VOLOKH: To me, it's an easy question. I don't see how you could distinguish publishing information leaked by lawyer in violation of his duty of attorney-client confidentiality from publishing information leaked by a corporate employee in violation of his duty of confidentiality to his employer or of trade secret law.

I just don't see how you could limit your principles to the facts —

MR. MALCOLM: So, under those facts, same result?

PROFESSOR VOLOKH: Of course it has to be publishable. This is the bread and butter of the front pages of many newspapers.

PROFESSOR BeVIER: No. No, that is not true. Their bread and butter is not publishing trade secrets or overheard conversations. And the notion here that because the information is important and of public interest is the trump card that the media holds seems to me to be quite troublesome because, of course, the whole reason for privileges of confidentiality is that you are producing information; you are engaging in conversation that other people would really like to have.

SPEAKER: So it would be illegal for Stuart to publish that?

PROFESSOR BeVIER: Yes. Absolutely — poor Stuart, and he's going to jail, directly to jail; he will not pass Go.

MR. TAYLOR: Since I'm the one they want to send to jail, I will quickly address the point. First, I don't take all that much comfort from the *Bartnicki* decision, if I want to publish that, because the limitations in the Breyer opinion have been addressing. It has obviously been of huge public importance, but it's obviously of huge public importance, but it's not a contemplated future crime; it's not blowing up somebody's porch.

So, I'm sitting out there thinking, "Gee, what do I do here?" And then I go to my editor and he goes to his lawyer, and they tell him, "It's your problem." I think that I ought to be able to publish it and anybody else ought to be able to publish it who gets it under similar circumstances. Part of the reason is — another distant analogy of the Pentagon Papers — I think Justice Stuart in his concurrence in the Pentagon Papers made the point that the government has ways of protecting itself from these leaks short of prosecuting the people who publish them. And the analogy here would be the President and his lawyer are responsible for guarding their own secrets — wait a minute. That doesn't work; I take it back.

I was going on Eugene's hypothetical, not your modification. I withdraw the Pentagon Papers analogy. But I do think that the importance of the information probably justifies the publication thereof.

PROFESSOR BeVIER: It does in the eyes of the press. Isn't that interesting?

SPEAKER: I mean, there are certain types of confidential communications, including attorney-client communications, priest-penitent communications, and marital communications, that are good and that we need to foster so that someone can enjoy his due process rights or have a happy marriage or meet their maker with a clean soul. And these concerns have been considered to justify these core privileges.

If you're going to recognize this sort of "Well, we're interested in what they had to say," then, you know, bring the Secret Service back here and sweep the confessional before you walk in.

MR. KLAUSNER: Let me call on —

AUDIENCE PARTICIPANT: Yes. This is for Marc Rotenberg.

I agree, by the way, that the expectation of privacy is not one based on technology but on societal norms, perhaps tradition, perhaps some sort of moral values. What do people reasonably expect as opposed to what scientists can

do.

But I'm wondering if you would take that same expectation of privacy in the copyright arena, where there's an expectation that regardless of technological advances, people who have property rights secured by Congress have the right to expect that their DVD code won't be broken; that their music, which is encrypted, won't be cracked and transferred throughout the Internet; that, sure, some clever person out there might be able to, in the copyright arena, technologically overcome an expectation protected by law of privacy, but nevertheless we're not going to permit it. Do you see that the developments in the *Bartnicki* case might happen?

SPEAKER: So in other words, isn't it okay to enjoin the publication of the DCSS code and description, because that's necessary to foster —

SPEAKER: Well, I mean, it's a very interesting question. It's in different field, of course. I mean, I'm not arguing against intellectual property rights, and I think you can apply norms, as you say, to evolving technology. I have argued in the intellectual property realm that Congress has been overly enthusiastic about that enterprise. So, you have the anti-circumvention provisions in the DMCA, you have the new Electronic Theft Act, and another whole series of provisions that I would argue actually sweep too broadly and do implicate First Amendment interests.

But returning to the privacy realm, I mean, it is — as I said before, the entire enterprise is to, by statute, as you say, protect certain social values in this area. And I just don't see what the alternative is. I mean, what you're left with is this — and there's a hint of this, by the way, in Breyer's concurrence. He sort of drops in this line about encryption, which I thought was very interesting. We've done a lot of work over the years in opposition to government restrictions on the use of encryption, which is a sort of privacy self-help means, which arguably is where we head if we're not allowed to rely on statute.

But I think where we end up, if we go down that road, is essentially a form of privacy survivalism. In other words, we only get privacy in the communications environment, you know, if we're willing to swap private keys and we're sort of sitting in tempest-tested rooms. It's sort of like a Get Smart cone of silence world, because what else are we left with?

I mean, we're essentially saying we cannot use legislation in this fashion because there are all those publications out there, that Eugene wants to defend, which basically are, you know, privacy communications daily, where you get to read the transcript of what everybody's been saying that's been caught by a scanner.

PROFESSOR BeVIER: No, private communications of genuine public interest.

MR. TAYLOR: Well, let's test the limits of that. Suppose that Manny and I have a conversation that Eugene overhears, during which we are plotting to murder you — don't take it personally.

SPEAKER: I haven't in the past.

MR. TAYLOR: Lillian's listening in because it's a cell phone conversation, and now she knows that you're going to be murdered unless she does something about it. But I think your reading of the law precludes her from doing anything about it.

MR. ROTENBERG: Well, I think your hypo's interesting. If she goes to the police with this information, that's one thing. If she goes to the radio station with this information —

MR. TAYLOR: Does the statute let her go to the police.

PROFESSOR BeVIER: But maybe I would just go to you with it, Marc.

MR. TAYLOR: I don't think it lets — does it let you go to the police?

SPEAKER: That's true. But there is such a thing as prosecutorial discretion. And frankly, if there's a civil lawsuit left that Lillian can bring, she'd be stupid to bring it because no jury on the planet would award her any money and no lawyer worth his salt would take it on a contingency fee.

So, you can consider outrageous —

SPEAKER: What if the police don't much like Marc?

MR. ROTENBERG: Another not unfamiliar problem.

SPEAKER: And they say for whatever reason, you know, we don't think is serious. And Stuart —

MR. ROTENBERG: I don't have a porch, by the way, in case anyone's going there.

SPEAKER: I mean, the notion in which the only way you can blow the whistle on that conduct is by going to the police. And if the police say, "Sir, we're not interested," that's the end of the story. It is now a crime, and so to blow the whistle on bad conduct seems to be a pretty troublesome notion.

SPEAKER: But, if law enforcement was really at issue here, there are adequate alternative remedies. There are all sorts of other law enforcement agencies who can go and warn the person, and there is such a thing about whether or not any civil law suit would be laughed out of court, and whether any —

SPEAKER: Why can't you go and warn the person?

MR. KLAUSNER: We want to get two more quick rounds, so that nobody will be murdered here.
We'll take one from over there, then to the back room will be the last question.

AUDIENCE PARTICIPANT: You've been talking a lot about the narrower case, what happens in a narrower case. It turns out we have one, *Boehner v. McDermott*, the case of Congressman Bainer suing Congressman McDermott, who got a tape of Boehner, who was talking about how to deal with the ethics violation against Gingrich. He turns around and gives it to the *New York Times*. The *New York Times* isn't getting sued by Congressman Bainer, but Congressman McDermott is. The case is currently on remand before the D.C. Circuit.

I'm curious what the various panelists think is likely to happen in that case, given that it presents a marginally narrower set of facts, or at least no one's plotting to blow up the Supreme Court.

MR. ROTENBERG: That's true, by the way, in the third case, which is *Peavy* from Texas. In that case, the press did not have clean hands. They were, in effect, participating in the, you know, ongoing disclosure of the unlawful interception. So, your point is good.

My quick answer is that I think it's quite possible in both *McDermott* and *Peavy*, you do not get the benefit of *Bartnicki*. These are really somewhat extraordinary facts, and under the Breyer concurrence I think it's a narrow bit of protection here.

MR. TAYLOR: My answer is that you lose Breyer and O'Connor's up for grabs, as in every other field.

PROFESSOR VOLOKH: My answer is that this is a clear case where the First Amendment gives people the right to say, "This is what our elected officials are saying when they don't think we're listening."

What's more, I should stress that at least under Lillian and John's theory even if the speech wasn't overheard, but rather it was leaked by somebody who was in the room who was under a non-disclosure agreement, the press would still be barred from publishing it. That can't be right. This seems to me to be a classic example of constitutionally protected reporting of factual information.

MR. ROTENBERG: I don't think that's a good analogy because the person who breaks the NDA clearly violates a contract. If the person to whom he gives the information widely disseminates it is somehow complicit, pays him in some way —

AUDIENCE PARTICIPANT: No, no — there's no complicity.

MR. MALCOLM: Then fine, but then you don't have a statute that says that this is somehow wrongful.

PROFESSOR VOLOKH: Well, let's say a state legislature passes a statute protecting information covered by non-disclosure agreements just as much as the law protects personal —

MR. MALCOLM: And if the press realizes that the person has violated the NDA to get it? Remember, one thing that's important —

PROFESSOR VOLOKH: Exactly.

MR. MALCOLM: And if I was with the Electronic Privacy Information Center, I'd probably side with them.

MR. KLAUSNER: Okay. In back.

AUDIENCE PARTICIPANT: I'll ask all the questions at once.

I take it at the first level, you would not say the First Amendment prohibits someone from intercepting something. They're not —

SPEAKER: Communications and not interceptions.

AUDIENCE PARTICIPANT: Going a step further, I assume you would also agree — you said earlier something along this line — that there's not a person then that would punish the person who intercepted it for disclosing it.

PROFESSOR VOLOKH: Yeah, although I think it would probably be better to punish for the interception.

AUDIENCE PARTICIPANT: Once you go down that — go down one step more. The interceptor and his friends — I know the interceptor's going to go and steal it. The interceptor brings it back to me — this is our plan. I turn around and publish it.

PROFESSOR VOLOKH: So it's a conspiracy.

AUDIENCE PARTICIPANT: Conspiracy. You get a little bit further along that line. You may or may not go after the conspirator.

Then you take it one more step to, I wasn't involved in the end. But the interceptor comes to me and says, "Hi, I just stole the conversation." Now you publish.

PROFESSOR VOLOKH: I think there's a very basic distinction between punishing someone for disclosing something — which is, after all, speaking — and punishing someone for either intercepting something or being essentially involved in a conspiracy to intercept it. I think that's a pretty crisp line.

AUDIENCE PARTICIPANT: The disclosure's present in the second set, when the interceptor is being punished for his disclosure.

PROFESSOR VOLOKH: That's why I actually think it would be a lot cleaner to punish the interceptor and the interceptor's co-conspirators for the interception rather than for their own disclosure. So I would say don't punish for the speech; punish for the conduct.

But while your argument is intuitively powerful, exactly the same argument can be made as to the publication of information leaked in violation of a non-disclosure agreement. This is why I don't quite understand how Marc would purport to draw a distinction between the *Bartnicki* situation and the non-disclosure agreement case.

Clearly, we would all agree that if somebody has a non-disclosure agreement, they don't have a constitutional right to breach it. They don't have a constitutional right to get together with some other person and breach it. So therefore, according to this very logic you describe, then, if a newspaper gets information knowing it was leaked in violation of a non-disclosure agreement then it too could not publish the information.

So, I think your argument illustrates the slippery slope that I describe. Now Lillian and John may say that it is good for newspapers to be barred from publishing illegally leaked documents. But I think the right to publish them is a fundamental aspect of free speech.

MR. KLAUSNER: Any other comments?

Let me thank the panelists and the audience.