

PAUL GEWIRTZ

PRIVACY AND SPEECH

We often disclose ourselves to the world at large, or at least we act as if indifferent to the world's eyes. But at other times, most of us try to control the disclosure of certain matters about ourselves. Sometimes we share thoughts, feelings, information, personality, or bodily appearance with no one at all. More commonly, we share these things with a limited number of other people. Privacy in this sense—the ability to control and to avoid the disclosure of certain matters about oneself—is a widely recognized value, an important precondition for human flourishing.

Freedom of speech and freedom of the press are also deeply cherished values. The right to generally say and publish what one wants is a bedrock element of human freedom and democratic self-governance, and this encompasses saying and publishing things about other people, including things they would prefer not be said or published about them. The tension between free speech and privacy is not so much a conflict among camps of adherents as it is a tension within ourselves. Both privacy and speech are values of great importance, and people typically embrace both of them. Louis Brandeis, the co-author of the most famous article on privacy ever written,¹ was also the author of some of the greatest prose ever written about free speech.²

Although the tension between speech and privacy is hardly a

Paul Gewirtz is Potter Stewart Professor of Constitutional Law, Yale Law School.

AUTHOR'S NOTE: I am grateful to Zoë Baird, Jack Balkin, Philip Chen, Jacob Katz Cogan, Owen Fiss, Linda Greenhouse, and Spiros Simitis for their very helpful comments on an earlier draft, and to Daniel Marx for his excellent research assistance.

¹ Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 Harv L Rev 193 (1890).

² *Whitney v California*, 274 US 357, 372 (1927) (Brandeis concurring).

new one, it has expanding significance. New technologies have opened up wonderful new possibilities for communication and expression, but also have created ominous new possibilities for diminution of privacy. Any breach in privacy, of course, can be greatly magnified if the media discloses it to the public—and the public's appetite for information about other people's private matters, and the media's willingness to satisfy that appetite, have never been greater. These and other developments have underscored the vulnerability of privacy and have created new concerns about the balance between free speech and privacy.

The Supreme Court has considered this tension in a number of cases over the past decades, and there is a clear pattern. Speech almost always wins. In rejecting privacy claims, the Court's broadly stated First Amendment rationales leave little room for privacy protection in cases of a speech-privacy conflict. In this article, I argue that the Supreme Court should give more weight to privacy protection than it has. My goal is to define a constitutional position that gives strong weight to speech, recognizing its central and indispensable role, but that also gives sufficient weight to privacy, recognizing its crucial role as well.

My starting point is last term's decision in *Bartnicki v Vopper*.³ *Bartnicki* continues the Court's basic pattern of ruling for the media in cases of speech-privacy conflict. In *Bartnicki*, the Court held, by a vote of 6–3, that the media has a First Amendment right to broadcast certain information that had been illegally intercepted from a cell phone conversation. The "opinion of the Court" written by Justice Stevens makes some bows in the direction of protecting privacy, but ends up giving privacy little weight.

But the case may well represent a turn on the Court toward greater protection of privacy and greater restrictions on the media and speech. It is misleading to think of Justice Stevens's opinion as a true "opinion of the Court." Justice Breyer, joined by Justice O'Connor, wrote an important and unusually interesting concurring opinion analyzing the speech-privacy conflict in a way far more protective of privacy than Justice Stevens's opinion. Although Justices Breyer and O'Connor joined the Stevens opinion, their votes were needed to make up the six-member majority.

³ 121 S Ct 1753 (2001).

When read alongside the opinion of the three dissenters, who thought the media should lose this case, the Breyer opinion makes clear that a majority of the Court is prepared to uphold significant restrictions on the media in order to protect privacy.

The time is now ripe to establish a new framework for considering speech-privacy cases that gives enhanced protection to privacy. Justice Breyer's opinion is a start in that direction, as well as a significant installment in his little observed but important ongoing effort to develop a new approach to the First Amendment generally. As Justice Breyer's opinion suggests, it will be difficult to enhance privacy protection without, to some extent, modifying First Amendment doctrine as it currently exists. The challenge is to find greater room for protecting privacy within our constitutional law without undermining the media's freedom to perform its crucial roles. In this article, I seek to advance that effort.

I

At issue in *Bartnicki* was the constitutionality of a provision in Title III of the Omnibus Crime Control and Safe Streets Act that sought to prevent invasions of privacy that occur through the interception and disclosure of wire, oral, or electronic communications. The statute provides sanctions against "any person who . . . intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of" such a communication.⁴

The case involved the unlawful interception of a cell phone conversation between two union officials during a period of collective bargaining negotiations involving the teachers' union and a local Pennsylvania school board. The conversation concerned various matters related to the status and handling of the negotiations and a possible strike. At one point, one union official said to the other, "If they're not gonna move for three percent, we're gonna have to go to their, their homes . . . To blow off their front porches, we'll have to do some work on some of those guys."⁵ The telephone call was covertly and unlawfully intercepted and taped by

⁴ 18 USC § 2511(1)(c).

⁵ 121 S Ct at 1757.

an unidentified person who gave the tape to a prominent union opponent, who then gave it to a radio station broadcaster. The broadcaster played the tape on his talk show. The union officials whose conversation had been intercepted filed suit for damages under Title III. The case reached the Supreme Court after a divided U.S. Court of Appeals for the Third Circuit ordered entry of summary judgment for the broadcaster.⁶

Justice Stevens's opinion for the Court affirmed, declaring the Act unconstitutional as applied because it restricted media freedom to publish the illegally intercepted material. Two factors were critical for Justice Stevens. First, the media was not itself involved in the illegal interception of the conversation. Second, the information disclosed involved a matter of "public concern"; the intercepted conversation was between two union officials discussing negotiations over the proper level of compensation for teachers in the union.

Justice Stevens starts his opinion by stating that "these cases present 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 and, more specifically, in fostering private speech."⁷ But there is very little in what follows that treats these interests as if they were of equivalent importance and both of the "highest order."

Justice Stevens's legal analysis begins with notable elusiveness in discussing the governing legal standard. Both the majority and dissent in the Court of Appeals had concluded that an "intermediate scrutiny" test should be used, not "strict scrutiny," because Title III is a "content neutral" law.⁸ The Solicitor General, urging reversal, agreed that "intermediate scrutiny" was appropriate.⁹ These conclusions were not surprising in light of prevailing First-

⁶ 200 F3d 109 (3d Cir 2000).

⁷ 121 S Ct at 1756.

⁸ 200 F3d 109, 121, 131 (3d Cir 1999). The other two Courts of Appeals that had considered the issue before the case came to the Supreme Court also applied intermediate scrutiny. *Boehner v McDermott*, 191 F3d 463, 467 (DC Cir 1999), vacated and remanded, 121 S Ct 2190 (2001); *Peavy v WFAA-TV*, 221 F3d 158 (5th Cir 2000), cert denied, 121 S Ct 2191 (2001). Both courts found Title III constitutional as applied to the facts of those cases.

⁹ Reply Brief for the United States at 11–13, 16–33, *Bartnicki v Vopper*, 121 S Ct 1753 (2001) (Nos 99-1687, 99-1728) (available at 1999 US LEXIS Briefs 1687).

Amendment doctrine. "Strict scrutiny," the Supreme Court has said, is applied "to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content," but content-neutral laws of general applicability are subject to "an intermediate level of scrutiny" because they "pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue."¹⁰

Title III is a content-neutral law of general applicability. It protects all private communications from unlawful intrusions and prohibits the use and disclosure of all illegally intercepted communications, without regard to the content of what is intercepted. The prohibition on disclosure is triggered by the source of the communication—an illegal interception—not the substance of an interception. Indeed, exactly the same content can be published if its source is not an unlawful interception.¹¹ Moreover, Title III applies generally to all "uses" of the unlawfully intercepted communication—speech uses and non-speech uses (say, using the information in buying securities or developing a product), and expressive uses by all media. Title III's purpose is not to suppress disfavored ideas, but to protect the privacy of communications, without regard to the content of what is privately communicated. In doing so, Title III not only protects privacy but also promotes free speech itself by encouraging uninhibited expression and reducing the fear that uninhibited discussions might be intercepted, used, and disseminated. As such, Title III's use and disclosure restrictions meet all the criteria for "intermediate scrutiny."

But Justice Stevens does not apply intermediate scrutiny—indeed he does not mention it, except in his summary of the Court

¹⁰ *Turner Broadcasting System v Federal Communications Commission*, 512 US 622, 641–43, 661 (1994). See also *Cohen v Cowles Media Co.*, 501 US 663, 669 (1991); *San Francisco Arts & Athletics, Inc. v United States Olympic Comm.*, 483 US 522, 536–37 (1987). A content-neutral law of general applicability will be sustained under "intermediate scrutiny," the Court has said, "if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Turner Broadcasting System v Federal Communications Commission*, 512 US at 662 (quoting *United States v O'Brien*, 391 US 367, 377 (1968)).

¹¹ Cf. *Seattle Times Co. v Rhinehart*, 467 US 20, 34 (1984) (media defendant may be placed under protective order not to disclose information that had come from the defendant in the discovery process, although it could publish identical information that came from a different source).

of Appeals' opinion below.¹² Indeed, nowhere in the opinion does Justice Stevens say that he is applying either strict scrutiny or intermediate scrutiny. The closest he comes to articulating a governing legal standard is to say that the restriction here must be justified by "a need . . . of the highest order" (quoting *Smith v Daily Mail Publishing Co.*).¹³ The dissent calls this "strict scrutiny,"¹⁴ and perhaps it is—although Justice Breyer, who joins the Stevens opinion, says in his concurrence that "strict scrutiny" is "out of place" in this kind of case.¹⁵

Justice Stevens takes this "need . . . of the highest order" standard from a series of four cases that do not seem applicable: *Florida Star v B.J.F.*,¹⁶ *Smith v Daily Mail Publishing Co.*,¹⁷ *Landmark Communications, Inc. v Virginia*,¹⁸ and *Cox Broadcasting Corp. v Cohn*.¹⁹

¹² Justice Stevens begins his legal analysis of the case (Part V of the opinion) by saying that "we agree with petitioners" that Title III is "a content-neutral law of general applicability," and explaining why:

[T]he basic purpose of the statute at issue is to "protect the privacy of wire[, electronic], and oral communications. . . ." The statute does not distinguish based on the content of the intercepted conversations, nor is it justified by reference to the content of those conversations. Rather, the communications at issue are singled out by virtue of the fact that they were illegally intercepted—by virtue of the source, rather than the subject matter.

121 S Ct at 1760. Characterizing Title III as a "content-neutral law of general applicability" was exactly what led the Court of Appeals below and the Solicitor General before the Supreme Court to argue that the intermediate scrutiny test was appropriate here. Yet instead of taking the seemingly next step of saying that therefore this case is governed by intermediate scrutiny, Justice Stevens simply moves on. "[O]n the other hand," he says, "the naked prohibition against disclosures is fairly characterized as a regulation of pure speech, . . . not a regulation of conduct. . . . [A]s such, it is the kind of 'speech' that the First Amendment protects." Id at 1761. Leaving to one side the revealing characterization of the regulation here as a "naked" prohibition (of "pure" speech no less), this "on the other hand" discussion seems beside the point. It is true that intermediate scrutiny, in addition to being used for "content-neutral laws of general applicability," is sometimes also used for laws that regulate "conduct" and have only an incidental effect on "speech." Justice Stevens sensibly appears to be rejecting this alternative basis for using intermediate scrutiny. But rejecting a second possible ground for using intermediate scrutiny is not an "on the other hand" counterargument to the first ground. Having made this "on the other hand" point, though, Justice Stevens simply moves on, drawing no conclusion here at all about the appropriate legal standard to be used. All of Part V of the opinion reads like a false start.

¹³ Id at 1761 (citing the *Daily Mail* case at 443 US 97, 102 (1979)).

¹⁴ Id at 1770 (Rehnquist dissenting).

¹⁵ Id at 1766 (Breyer concurring).

¹⁶ 491 US 524 (1989).

¹⁷ 443 US 97 (1979).

¹⁸ 435 US 829 (1978).

¹⁹ 420 US 469 (1975).

In all of these cases, the Court sided with the media in concluding that the First Amendment prohibited the government from punishing the publication of information claimed to invade people's privacy. Although superficially similar to *Bartnicki*, these cases were very different in fundamental respects relevant to both the choice of legal standard and the outcomes.

Most significantly, these cases all involved the publication of information that was "lawfully obtained." This was the explicit and crucial predicate for the legal standard used. As the Court in *Florida Star* summarized the rule governing these cases (referred to commonly as "the *Daily Mail* principle"), when "a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order."²⁰ In each of these cases, the information published by the media was not unlawfully obtained by the media or by anyone else. In *Cox Broadcasting*, a television station broadcast a rape victim's name that had been in "official court records open to public inspection."²¹ In *Landmark Communications*, a newspaper printed information about proceedings pending before a judicial inquiry commission, information that the Supreme Court emphasized had not been "secure[d] . . . by illegal means."²² In *Daily Mail*, a newspaper published the name and photograph of a fourteen-year-old boy arrested for murder after getting the information by "routine newspaper reporting techniques."²³ In *Florida Star*, a newspaper published the name of a victim of a sexual assault after learning the name from a police report placed in the police department's pressroom.²⁴ Some of these cases are critiqued below for giving insufficient weight to privacy interests, but at least the published information in these cases was not illegally secured, as it was in *Bartnicki*.

The fact that published information has been lawfully obtained properly structures First Amendment analysis. More directly relevant here, the fact that information is *unlawfully* obtained properly

²⁰ 491 US at 533 (quoting *Smith v Daily Mail Publishing Co.*).

²¹ 420 US 469, 495 (1975).

²² 435 US at 837.

²³ 443 US at 103.

²⁴ 491 US at 527.

structures First Amendment analysis, and justifies a very different legal standard. This is because, where information has been obtained unlawfully, very different values are predictably involved—most obviously, there are likely to be distinctively strong privacy (or confidentiality) interests as well as an understandable desire to arrange incentives (including the incentives of the media) to reduce the incidence of unlawfulness.²⁵ In *Florida Star*, the Court not only repeated the formulation of the *Daily Mail* standard that is limited to “lawfully obtained” information, but specifically stated that a case would fall “outside the *Daily Mail* principle” if the information were in private hands and obtained “nonconsensual[ly].”²⁶

Because the information broadcast in *Bartnicki* was unlawfully intercepted,²⁷ the case involves a range of concerns outside the *Daily Mail* principle. Justice Stevens makes much of the fact that the initial unlawful obtaining of the information was done by a third party rather than the broadcaster. But it is hard to see why this should make any difference. Title III limits the media only where it knows or has reason to know that the information comes from an illegal interception.²⁸ Surely the knowing exploitation of an illegality is not an innocent state of mind. More fundamentally, the illegal interception is what makes the broadcast a distinctive invasion of privacy, which properly prompts a constitutional analysis different from that in the *Daily Mail* line of cases.

The particular laws challenged in the *Daily Mail* line of cases and the circumstances of their application involved other features that further demonstrate why *Bartnicki* should have triggered a different analysis under current First Amendment doctrine. First, in all four cases, the challenged law was content-specific—and, as

²⁵ Doctrinal rules are rules of thumb that take account of the predictably competing values at stake in applying legal provisions in particular types of circumstances. It would defeat the purpose of doctrinal rules not to use different tests when predictably very different values are involved.

²⁶ 491 US at 534. At another point in the *Florida Star* opinion, the Court adds that “the *Daily Mail* principle does not settle the issue whether, in cases where information has been acquired unlawfully by a newspaper or by a source, government may ever punish not only the unlawful acquisition, but the ensuing publication as well.” 491 US at 535 n. 8.

²⁷ In addition, the information came to the radio station through a series of “disclosures” that were themselves illegal.

²⁸ The statute also limits liability to those disclosures that are “intentional.” 18 USC § 2511(1)(c). Negligent disclosure of the contents of an illegally intercepted conversation is not sanctioned.

noted above, content-specific laws generally trigger strict scrutiny. In *Cox Broadcasting*, *Florida Star*, and *Daily Mail*, the challenged statutes prohibited disclosures of certain specific types of information in criminal cases (the names of rape victims in the first two, and the names of juvenile offenders in the latter). In *Landmark Communications*, the statute prohibited disclosures of the content of judicial commission proceedings only. Indeed, in at least *Landmark Communications*, the state law had the earmarks of the government trying to censor unpleasant information about government officials and limiting criticism of the government (allegations that might harm a "judge's reputation" or public "confidence in the judicial system"). In *Bartnicki*, by contrast, the law is content-neutral and has none of the earmarks of government censorship of particular information or ideas.

Second, in all of the cases except *Landmark Communications*, the challenged law applied only to disclosures by the media or by some media. Thus, these were arguably not laws of general applicability.²⁹ The limited scope of the laws in these cases raised questions not only about evenhandedness but also about whether the state was effectively furthering its claimed interests. In *Bartnicki*, by contrast, Title III is a law of general applicability, prohibiting all use and disclosure of illegally intercepted communications.

Third, in all four cases, the government itself was the source of the information. As the Court noted in each case, this means that the government (at least in theory) could have taken steps to control the information rather than creating causes of action against media entities that learn of the information.³⁰ In *Bartnicki*, by contrast, the communication involved private parties rather than the government—and private parties who were victims of a deliberate illegal interception, not their own casualness with the information.

In spite of these differences, Justice Stevens applies the *Daily*

²⁹ In *Cox Broadcasting*, the statute prohibited only the disclosure of rape victims' names by print, broadcast, television, or radio media. In *Daily Mail*, the statute prohibited only newspapers from publishing the names of juvenile offenders. In *Florida Star*, the statute prohibited publishing rape victims' names only "in any instrument of mass communication." In *Landmark Communications*, the statute was not focused on particular media, but made it unlawful to "divulge" information about the proceedings.

³⁰ Arguably, the government should be allowed the additional tool of punishing further disclosures following a leak of its information that it failed to prevent. See text accompanying note 127. But the balance of interests in such a case is somewhat different from the balance in a case where information has been intercepted from private parties.

Mail standard in *Bartnicki*. He concludes that Title III does not advance a "need of the highest order" that would justify restrictions on the media's disclosures. The fact that the information broadcast was unlawfully obtained neither affects his choice of legal standard nor furnishes a justification to satisfy the standard.

The government identified two "interests" related to protecting privacy from illegal interceptions, but neither satisfies the Court. First, the government argued that punishing disclosures helps to "dry up the market" for illegally intercepted private conversations, and thus reduces the incentives to intercept in the first place. It is especially important to punish disclosures, including those by people who lawfully obtained the illegally intercepted material, because the original act of interception is often hard to detect and punish.³¹ Justice Stevens states that "[t]he normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it."³² But in fact the law commonly tries to deter unlawful conduct by restricting those who try to piggyback on the illegality. Most obviously, the exclusionary rule in criminal cases rests precisely on the belief that police misconduct can be deterred by barring prosecutors and others from using the unlawfully seized evidence.³³ Moreover, the law regularly punishes the knowing receipt and sale of stolen property as a way of deterring thefts.³⁴

Justice Stevens argues that it would be "quite remarkable" to "hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party."³⁵ But there is nothing remarkable or novel about restricting speech that is the fruit of unlawful action as a means of deterring the unlawful action. For example, the First Amendment permits a ban on the distribution of erotic material portraying children, even though not legally obscene, as a means of controlling the illegal exploitation of children in the production of the material. As the

³¹ 121 S Ct at 1773-75.

³² *Id* at 1762.

³³ E.g., *Oregon v Elstad*, 470 US 298, 306 (1985); *Elkins v United States*, 364 US 206, 217 (1960). Indeed, Title III itself has an exclusionary rule barring the use of illegally seized communications as evidence, in order to deter illegal interceptions. 18 USC § 2515.

³⁴ 121 S Ct at 1773-74 (Rehnquist dissenting) (citing W. R. LaFare and A. W. Scott, Jr., 2 *Substantive Criminal Law* § 8.10(a) at 422 (1986)).

³⁵ *Id* at 1762.

Court said in *New York v Ferber*, "[t]he most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product."³⁶

Illegal conduct that yields stolen information can be every bit as wrongful and offensive as illegal conduct that yields stolen goods, and there is no reason why deterrence of the former should be disfavored any more than deterrence of the latter. The fact that the fruit of an illegality is speech acts does not make it wrong to try to discourage the illegality, does not make distributing the fruits of the illegality praiseworthy, and does not make it improper to try to discourage the illegality by drying up the market for the illegally obtained material. To say otherwise is inescapably to say that we care less about deterring the illegal stealing of information than the illegal stealing of other things, and that is unjustified. Justice Stevens asserts that in most instances the identity of the person illegally intercepting the communication will be learned. Thus, he argues, there are few instances where prohibiting third party disclosures will help deter unlawful interceptions, and therefore no government interest of the "highest order" is involved. But Congress concluded that "[a]ll too often the invasion of privacy itself will go unknown. Only by striking at all aspects of the problem can privacy be adequately protected."³⁷ Especially since there is such plausibility to Congress's assumption that illegal acts will be deterred if wrongdoers are prevented from enjoying the fruits of their wrongdoing, the Court should not have substituted its own judgment.

³⁶ 458 US 747, 760 (1982). See also *Osborne v Ohio*, 495 US 103, 109-10 (1990) (it is "surely reasonable for the State to conclude that it will decrease the production of child pornography if it penalizes those who possess and view the product, thereby decreasing demand"). To be sure, the speech involved in *Ferber* and *Osborne*, although not legally obscene, is widely understood to have very limited value. It might be argued that suppressing speech that is related to public issues in order to deter the illegal conduct of others is a different matter (just as some object to an exclusionary rule that suppresses valuable probative evidence as a means to deter unlawful police searches). There is indeed a difference, which is one reason I would rest more on the government's second "interest" in limiting the media disclosures—protecting privacy by limiting the harm that the illegal conduct produces. See text accompanying notes 38-40. But *Ferber* and *Osborne* demonstrate that whether the fruit of illegal activity is property or speech, the Supreme Court has concluded that closing off outlets deters the illegal conduct.

³⁷ S Rep No 1097, 90th Cong, 2d Sess 69 (1968) (quoted in 121 S Ct at 1773 (Rehnquist, joined by Scalia and Thomas, dissenting)).

In any event, quite apart from deterring illegal interception, punishing the disclosure of illegally intercepted communications promotes a second and even clearer interest: protecting privacy by limiting the harm that the illegal conduct produces. Preventing media disclosure is more than a means to deter someone else's illegality (the government's first interest); it also directly protects privacy. As the Court has recognized in other contexts, disclosing illegally intercepted communications "compounds the statutorily proscribed invasion of . . . privacy."³⁸ Such disclosures also deepen the chill on private communication. It is as much an invasion of privacy to disclose an illegally intercepted communication as to make the illegal interception in the first place. Indeed, the intrusion on conversational privacy from the disclosure is often the more serious intrusion, for it allows a far wider audience to "overhear" the private communication. If a legislature has a weighty interest in protecting privacy from unwarranted interceptions of private communications, surely it has the same interest in protecting that privacy from disclosures that many times over "compound[] the statutorily proscribed invasion."³⁹

Nor is it at all remarkable, as Justice Stevens suggests, to limit publication where publication is what produces the harm. If someone breaks into my home and steals my diary or personal letters, of course that person can be sanctioned for publishing the diary's or letter's contents. This is usually a rule of government-created intellectual property law, and nothing in the First Amendment prohibits it.⁴⁰ Similarly, nothing in the First Amendment should

³⁸ *Gelbard v United States*, 408 US 41, 52 (1972).

³⁹ There appears to be an inconsistency in how Justice Stevens characterizes the weight of the interest in protecting privacy. At the outset of his opinion, Justice Stevens states that "the interest in individual privacy" is an interest "of the highest order." 121 S Ct at 1756. But once he announces that the governing legal standard is the *Daily Mail* standard requiring the government to show a "need of the highest order" to justify regulating the media, he stops characterizing the government's interest in protecting privacy as having that rank. Instead, at the point where he assesses the government's argument that punishing media disclosures prevents compounding the harm from the illegal interception (the government's strongest argument), Justice Stevens starts calling the protection of privacy of communication only "an important interest," *id.* at 1764, obviously something less than "an interest . . . of the highest order." He nowhere reconciles the inconsistency.

⁴⁰ Copyright law, as well as the common law, have long protected private letters from unauthorized publication. See *Salinger v Random House, Inc.*, 811 F2d 90, 94 (2d Cir 1987); *Birnbaum v United States*, 436 F Supp 967, 978-82 (EDNY 1977); David Nimmer, *Nimmer on Copyright* § 5.04 at 5-57 (1999). Far from being barred by First Amendment principles of free expression, copyright law is understood as itself "an engine of free expression." *Harper & Row, Publishers, Inc. v Nation Enterprises*, 471 US 539, 558 (1985). Moreover,

prohibit the government from creating an analogous rule of privacy law in Title III.

It is significant that Title III limits its sanctions for disclosures to those "knowing or having reason to know that the information was obtained through [an illegal] interception." First Amendment law properly reflects a concern about "timidity and self-censorship" by the press in the performance of its valued roles.⁴¹ But legitimate press activities will not be chilled by a rule that prohibits disclosures of material that reporters know was illegally obtained. And to the extent that the press becomes "timid and self-censoring" about publishing illegally intercepted material that invades people's privacy, that is a good thing.

Title III's prohibition on disclosures by those "having reason to know" that the information was illegally obtained is potentially more troublesome. This standard might leave reporters uncertain whether, after the fact, a trier of fact will conclude that they "had reason to know" even though they did not in fact know. This could chill the reporting of legally secured information out of fear that its origins will be misjudged. On the other hand, a "reason to know" standard, unlike a "should have known" standard, "imposes no duty of inquiry; it merely requires that a person draw reasonable inferences from information already known to him."⁴² Significantly, in his briefs in the Supreme Court, the Solicitor General took pains to dispel any chill by strictly construing the "reason to know" provision.⁴³ Nevertheless, had the Court pointed to distinc-

copyright protection may not be ignored simply because the work "contains material of possible public importance" or there is "social value in dissemination," *id* at 558, 559 (internal citations omitted). The fact that an author's words "may of themselves be 'newsworthy' is not an independent justification for unauthorized copying of the author's expression. . . ." *Id* at 557.

⁴¹ *Florida Star*, 491 US at 535; see *Bartnicki*, 121 S Ct at 1765 n 22; *New York Times Co. v Sullivan*, 376 US 254, 271-72 (1964).

⁴² *Novitski v Cook*, 946 F2d 938, 941 (DC Cir 1991).

⁴³ "Title III's prohibition applies only to those who either have actual knowledge of the nature of the interception or actual knowledge of facts that make those origins 'so highly probable that' one should assume such to be true. Restatement (Second) of Torts, § 12, cmt. a (1965). Indeed, the facts surrounding the interception must be apparent, because Title III imposes no duty of inquiry. *Ibid.*; U.S. Br. 45-46. Consequently, Title III does not deter (and for the past three decades has not deterred) the press from reporting the news. Far from requiring reporters to research sources for fear of illegality, it merely requires them to refrain from use if they know or all but know that the source was an unlawful interception." Reply Brief for the United States at 20, *Bartnicki v Vopper*, 121 S Ct 1753 (2001) (Nos 99-1687, 99-1728) (available at 1999 US Briefs LEXIS 1687).

tive First Amendment concerns with the "reason to know" standard, it would have highlighted a legitimate concern about chilling reporting that relies only on *legally secured* information; it would have rooted the decision in the right to report legally secured information, rather than extending the mantle of First Amendment protection over reporting information that the press knows to have been illegally secured. And of course it would not have invalidated the application of Title III in cases where the press actual knows that the information was illegally intercepted.

In the end, for Justice Stevens nothing turns on the fact that the information here was stolen. *New York Times Co. v Sullivan* put the mantle of First Amendment protection around the publication of factually false information, but not the publication of information the media knows to be false.⁴⁴ Neither should *Bartnicki* have protected the publication of information known to be illegally secured.

A case that hangs over *Bartnicki*, and may help to explain why Justice Stevens gives so little weight to the fact that the published information was illegally obtained, is *New York Times Co. v United States*,⁴⁵ the *Pentagon Papers* case. Justice Stevens invokes it at the very outset of his discussion of why it is irrelevant that the conversation was illegally intercepted.⁴⁶ Decided in 1971 when public debate about the ongoing Vietnam War was intense, the *Pentagon Papers* case was a suit by the U.S. government against *The New York Times* and *The Washington Post* to enjoin their publication of materials from a classified Defense Department study of the war. It was apparently undisputed that the newspapers were publishing classified material that they knew had been stolen and given to them by Daniel Ellsberg.⁴⁷ The *Pentagon Papers* case is a free press icon. How could the Court now rule that the press had no right to disclose illegally secured information?

But *Pentagon Papers* is easily distinguishable from *Bartnicki*. First, *Pentagon Papers* was a prior restraint case. The only issue before the Court was whether the publication of the papers could be en-

⁴⁴ 376 US 254, 279-80 (1964).

⁴⁵ 403 US 713 (1971).

⁴⁶ 121 S Ct at 1761.

⁴⁷ Although this fact was not discussed in the majority opinions, Justice Harlan emphasized it in his dissent. See 403 US at 754.

joined. Prior restraints are distinctively disfavored in First Amendment law, and the Court's per curiam opinion concluded only that the government had not met the "heavy burden" of justifying a prior restraint. Post-publication criminal prosecution of the newspapers was not foreclosed, as Justices White and Stewart explicitly noted in their concurrence⁴⁸—and, by implication, post-publication civil liability was also not foreclosed. *Bartnicki* was a post-broadcasting suit for damages, not a prior restraint case. Second, *Pentagon Papers* involved the publication of information held by the government. As noted above, in such a situation it can always be said that the government should take better steps to prevent the leak rather than allow actions against the press. Third, and most importantly, as Solicitor General Waxman put it in his oral argument in *Bartnicki*, in *Pentagon Papers* there was reason to think that the government had a "censorial motive" and was seeking "to take certain facts off the table."⁴⁹ In *Bartnicki*, nothing like a censorial motive underlies the content-neutral privacy-protection provisions of Title III.

In the end, the crucial factor for Justice Stevens in *Bartnicki* is that the content of the illegally intercepted conversation involves a matter of "public concern." The presence of content of "public concern," he argues, "implicates the core purposes of the First Amendment" and outweighs people's interest in the privacy of their communications even in a case where that privacy is violated by an illegal intrusion.

There are several interrelated problems with the "public concern" concept in this context⁵⁰ and, taken together, they leave private matters very vulnerable to disclosure. First, the phrase "public concern" is undefined. "Public concern" might include anything that the public becomes concerned about. This might involve a threat to public security or an issue being debated in the legislature; but it might also include the way an actor treats his girlfriend, what government officials say to their children, or what ordinary

⁴⁸ Id at 735–40 (White, joined by Stewart, concurring).

⁴⁹ 2000 US Trans LEXIS 77, *17.

⁵⁰ The phrase has been used in other contexts such as cases involving the scope of public employee speech, where it raises somewhat similar issues. See, e.g., *Connick v Myers*, 461 US 138 (1983); *Pickering v Board of Education*, 391 US 563 (1968); *Rankin v McPherson*, 483 US 378 (1987); *Waters v Churchill*, 511 US 661 (1994).

citizens buy from online sellers of videos—indeed, anything that becomes a matter of public curiosity.⁵¹

Even if “public concern” excludes mere public curiosity and includes only matters relevant to the public’s understanding of issues or officials, private matters can all too easily come within the concept. For one thing, there is a self-fulfilling and ever-expanding quality to “public concern.” Private matters can become subjects of “public concern” simply by being labeled so in the media. If a newspaper discloses how a government official treats his children, it will become a matter of public attention, public debate, and, at least for some voters, an element in political assessments. More generally, private matters can readily be deemed relevant to public concerns. Disclosure of private facts about virtually anyone can be said to enhance public understanding about some wider public phenomenon or public issue. If the relevance of a private fact to some public concern is sufficient to justify media publication, a justification will not be hard to give. An important cultural fact fuels this dynamic: we live in a prurient culture, with great public interest in other people’s private lives, and certainly not only the private lives of “public figures.” In these circumstances, “public concern” becomes an especially wide category, and, as a First Amendment justification, one that greatly endangers privacy.

But there is a more basic problem with Justice Stevens’s approach: He looks to the content of the broadcast communication to decide whether the Constitution protects it, rather than to the circumstances under which the conversation took place. For Justice Stevens, if the content of the communication involves a matter of public concern, it is within First Amendment protection. But a different approach is possible: One could look to whether the original communication takes place within a protected zone. If a zone is deemed a protected private zone—which can be either a place or a kind of situation⁵²—then the content of what is communicated

⁵¹ See Edward J. Bloustein, *The First Amendment and Privacy: The Supreme Court Justice and the Philosopher*, 28 Rutgers L. Rev. 41, 54–57 (1974) (“[The] weight to be given ‘the public interest in obtaining information’ should depend on whether the information is relevant to the public’s governing purposes. ‘Public interest,’ taken to mean curiosity, must be distinguished from ‘public interest’ taken to mean value to the public of receiving information of governing importance. There is [no First Amendment right] to satisfy public curiosity and publish lurid gossip about private lives.”).

⁵² See Lloyd Weinreb, *Your Place or Mine? Privacy of Presence Under the Fourth Amendment*, 1999 Supreme Court Review 253 (contrasting what he calls “privacy of place” and “privacy of presence”); Robert C. Post, *The Social Foundations of Privacy: Community and Self in the*

within that zone would be irrelevant in deciding whether the First Amendment protects the media in reporting on it. The press could be sanctioned for publishing information about conversations within that zone, regardless of content.⁵³ In Title III, Congress sought to protect privacy by creating such a protected zone, and made intrusions on that zone illegal. The fact that a conversation involves a matter of "public concern" is not inconsistent with it also warranting the label "private" because it takes place within a private zone.

Put another way, speech acts must be understood in terms of audiences as well as content.⁵⁴ In our daily narrative transactions, we are always negotiating our relationship to an audience. Privacy is ultimately about our power to choose our audience. When privacy is invaded, we are compelled to have an audience we do not want. The Court in *Bartnicki* says that publishing the intercepted conversation contributed to public debate—but the two people speaking on their cell phones did not wish to contribute to a public debate before a public audience. Their words were taken from them by stealth and put into public debate against their will. If every private statement on a public subject may be forcibly disclosed because it contributes to public debate, then privacy is a dead letter. We cannot have it both ways.

Justice Stevens's approach, which analyzes "public" and "private" as a matter of content, is far less privacy-protective in this context than an approach that analyzes "public" and "private" as

Common Law Tort, in *Constitutional Domains: Democracy, Community, Management* 54–55, 72–73 (1995) (discussing Erving Goffman's concept of "information preserves").

⁵³ This approach is somewhat analogous to the approach under Fourth Amendment law. The existence of a zone of reasonably expected privacy generates more demanding requirements before that zone may be searched. The existence within that zone of particular "content" (evidence of criminal behavior) does not generally eliminate the need to observe the Fourth Amendment requirements. In the end, of course, "content" is certainly relevant under the Fourth Amendment, however. The requirements can be met, warrants will issue, and searches be allowed if law enforcement officers demonstrate that there is probable cause to believe that particular "content" (evidence of criminal behavior) actually does exist within the zone. But the existence of the zone generates the heightened requirements.

Similarly, one can view copyright law as creating a zone that is protected without regard to content. As noted above, the fact that an author's words "may of themselves be 'newsworthy' is not an independent justification for unauthorized copying of the author's expression . . ." *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 US 539, 557 (1985); *id.* at 558, 559; note 40 above. See also *Seattle Times Co. v. Rhinehart*, 467 US 20 (1984).

⁵⁴ See, e.g., Roman Jakobson, *Closing Statement: Linguistics and Poetics*, in Thomas Sebeok, ed., *Style in Language* 353–58 (1960); Peter Brooks and Paul Gewirtz, eds., *Law's Stories: Narrative and Rhetoric in the Law* (1996).

a matter of zones and audiences.⁵⁵ It also makes the First Amendment standard itself content based—an ironic result given the fact that content-based rules are generally most vulnerable to First Amendment invalidation. The end result of Justice Stevens's approach is that it matters not at all that the communication here took place with the expectation that it would be private. Because of its content, the press is free to disclose it (so long as the press itself did not participate in the unlawful interception). The press is as unlimited in reporting the private conversation as it would be if the speakers were talking at an open public meeting.

Although Justice Stevens labels his decision “narrow,”⁵⁶ his opinion gives no indication about what legislative efforts to protect privacy against media intrusion would be constitutional. The media wins this case because a matter of “public concern” was involved, but Justice Stevens refuses to say that the media would have lost if a private matter was involved:

We need not decide whether [the privacy interest] is strong enough to justify the application of [Title III] to disclosures of trade secrets or domestic gossip or other information of purely private concern. Cf. *Time, Inc. v. Hill*, 385 U.S. 374, 387–88 (1967) (reserving the question whether truthful publication of private matters unrelated to public affairs can be constitutionally proscribed).⁵⁷

Elsewhere in his opinion, Justice Stevens emphasizes “this Court’s repeated refusal to answer categorically whether truthful publication may *ever* be punished consistent with the First Amendment.”⁵⁸ These “do not decides” and “refusals to answer” mean that Justice Stevens is leaving open everything that is distinctive about protecting privacy, because protecting a person’s privacy is not limited to preventing publication of false statements (traditionally the realm of defamation law), but involves preventing the publication of true material that is justifiably private. If it is uncertain “whether truthful publication may ever be punished consistent with the First

⁵⁵ In other contexts, however, it might end up being more privacy protective. A “zone” approach might grant the press protection to publish photographs of any person in the public space. But see text accompanying note 149. A content approach might withhold protection if the photograph did not have content of public concern.

⁵⁶ 121 S Ct at 1756.

⁵⁷ *Id* at 1764.

⁵⁸ *Id* at 1762 (emphasis added).

Amendment," it is uncertain whether media disclosures infringing on privacy can ever be limited consistent with the First Amendment. In other words, the Court's opinion does not mark out any area in which privacy trumps media prerogatives.⁵⁹

II

At the outset, though, I said that *Bartnicki* takes steps forward in privacy protection, and that is because Justice Stevens's opinion is "for the Court" only in name. Justice Breyer, joined by Justice O'Connor, wrote a concurring opinion. Although Justices Breyer and O'Connor also joined Justice Stevens's opinion to make up a six-member majority, in fact their separate opinion is much less speech protective, and much more privacy protective, than the Stevens opinion. Because Chief Justice Rehnquist, Justice Scalia, and Justice Thomas dissented in an opinion that would have upheld the limitations on the media here and is broadly protective of privacy, the Breyer opinion is determinative. The controlling law is Breyer's law.

Justice Breyer's opinion sets forth an analysis that is different from Justice Stevens's on almost all of the key matters except for the result, that points to a quite narrow constitutional immunity for the media in privacy cases, and that further develops his evolving and innovative general approach to the First Amendment. As Breyer analyzes the press versus privacy issue in *Bartnicki*, there are constitutional interests "on both sides of the equation."⁶⁰ On

⁵⁹ These statements by Justice Stevens are inexplicable for other reasons. In a variety of other circumstances, the Court has upheld sanctions on the press for publishing truthful information. See, e.g., *Cohen v Cowles Broadcasting Co.*, 501 US 663 (1991) (First Amendment does not bar a promissory estoppel action against a newspaper for publishing truthful information about the source of a political news story in breach of its promise to keep the source's identity confidential); *Harper & Row, Publishers, Inc., v Nation Enterprises*, 471 US 539 (1985) (First Amendment does not bar an action against a magazine for publishing truthful copyrighted material); *Zacchini v Scripps-Howard Broadcasting Co.*, 433 US 562 (1977) (First Amendment does not "immunize the media [from damage liability] when they broadcast a performer's entire act without his consent"); *Seattle Times Co. v Rhinehart*, 467 US 20 (1984) (First Amendment does not bar an action against a newspaper for publishing truthful information learned during discovery in a civil suit that was covered by a protective order).

⁶⁰ 121 S Ct at 1766 (quoting his earlier separate opinions in *Turner Broadcasting System, Inc. v Federal Communications Commission*, 520 US 180, 227 (1997) (Breyer concurring in part), and *Nixon v Shrink Missouri Government PAC*, 528 US 377, 402 (2000) (Breyer concurring)).

one side is the media's constitutionally rooted interest in publishing what it wishes. On the other side is a privacy interest "that includes not only 'the right to be let alone' . . . but also 'the interest . . . in fostering private speech.'"⁶¹ "The assurance of privacy," Breyer emphasizes, "helps to overcome our natural reluctance to discuss private matters when we fear that our private conversations may become public. And the statutory restrictions [in this case] consequently encourage conversations that otherwise might not take place."⁶²

This interest in fostering private speech, Breyer says, is itself a "constitutional interest" related to the system of free expression guaranteed by the First Amendment. Breyer cites his own previous separate opinions in which he characterizes the First Amendment's purposes in affirmative terms, such as "encouraging . . . open discussion," rather than simply as a prohibition on state action restricting speech.⁶³ Thus, Breyer says, there are "competing constitutional interests"⁶⁴ in *Bartnicki*, and competing constitutional interests related to free expression itself. Justice Stevens, by contrast, avoids saying that the interest on the privacy side is itself of "constitutional" dimension. Rather, he says only that "there are important interests to be considered on both sides of the constitutional calculus."⁶⁵ Justice Breyer himself hedges in one significant respect: Although he recognizes that the privacy interest includes both the "the right to be let alone" and "the interest . . . in fostering private speech," he labels only the speech-related aspect of privacy a constitutional interest and focuses his analysis on this speech-related aspect—leaving unclear how he would evaluate a case where only the nonspeech aspects of privacy were on the "other side of the equation."⁶⁶

⁶¹ *Id.* (citations omitted).

⁶² *Id.*

⁶³ *Nixon v Shrink Missouri Government PAC*, 528 US at 402; *Turner Broadcasting System, Inc. v Federal Communications Commission*, 520 US at 227. The relationship between Breyer's general conception of the First Amendment and the traditional conception is discussed further in Part IV.

⁶⁴ 121 S Ct at 1766.

⁶⁵ *Id.* at 1764.

⁶⁶ There are suggestions in his opinion that Justice Breyer is in fact giving weight to those nonspeech aspects of privacy. "As a general matter," Justice Breyer says, "the Federal Constitution must tolerate laws of this kind because of the importance of these *privacy and speech-related objectives*." And the basic standard that Justice Breyer uses in deciding this case is to ask whether the "restrictions on speech . . . are disproportionate when measured

Because Justice Breyer sees “competing constitutional interests” on both sides, he concludes that the Court should not apply “strict scrutiny.” Rather, he would use a much more flexible and multifaceted approach that gives greater leeway for protecting privacy:

I would ask whether the statutes strike a reasonable balance between their speech-restricting and speech-enhancing consequences. Or do they instead impose restrictions on speech that are disproportionate when measured against their corresponding privacy and speech-related benefits, taking into account the kind, the importance, and the extent of these benefits, as well as the need for the restrictions in order to secure those benefits?⁶⁷

Breyer then explains why the statute here “enhances private speech,”⁶⁸ prevents “serious harm” to privacy,⁶⁹ and “resemble[s] laws that would award damages caused through publication of information obtained by theft from a private bedroom.”⁷⁰ In light of this, Breyer concludes, “As a general matter, despite the statutes’ direct restrictions on speech, the Federal Constitution must tolerate laws of this kind because of the importance of these privacy and speech related objectives.”⁷¹ The phrasing of this conclusion is in direct, and presumably intended, contrast to Justice Stevens’s statement that “As a general matter, ‘state action to punish the publication of truthful information seldom can satisfy constitutional standards.’”⁷²

In the end, however, Justices Breyer and O’Connor decide for the media, but only on the narrowest of grounds, and only with a clear endorsement of the power of legislators to take significant

against the corresponding *privacy and speech-related benefits*.” Id at 1766, 1767 (emphasis added). Thus, “privacy” benefits that are not “speech-related” appear to have some independent weight in the constitutional balance. Presumably, Justice Breyer is leaving open the possibility that he would uphold government action to protect privacy from media infringement where only the nonspeech aspects of privacy are involved, even though they are not themselves a “constitutional interest,” just as in other cases he has concluded that nonspeech (and nonconstitutional) interests can sometimes justify a restriction on speech. See text accompanying notes 176–78.

⁶⁷ 121 S Ct at 1766.

⁶⁸ Id at 1766–67.

⁶⁹ “Media dissemination of an intimate conversation to an entire community will often cause the speakers serious harm over and above the harm caused by an initial disclosure to the person who intercepted the phone call.” Id at 1766.

⁷⁰ Id at 1767.

⁷¹ Id.

⁷² Id at 1761 (citation omitted).

steps to protect privacy from media incursions. For Justice Breyer, there are two reasons why the media win this case. First, as Justice Stevens also had emphasized, the broadcaster was not involved in the illegal interception. Breyer suggests a further narrowing of the Stevens approach, however, by implying that Congress might have been able to reach the media in *Bartnicki* if it had made "receipt" of the illegally intercepted tape unlawful.⁷³

Second, Justice Breyer says, "the information publicized involved a matter of *unusual* public concern, *namely a threat of potential physical harm to others*."⁷⁴ This formulation is much narrower than the one used by Justice Stevens. Far from relying on a general "public concern" rationale to outweigh the privacy interests here, as Stevens does, Breyer emphasizes that the public concern in this case was an "unusual" and "special" one involving "threats to public safety," since one of the overheard speakers suggested "blow[ing] off . . . front porches" and "doing some work on some of these guys."⁷⁵ One might question whether these remarks should be interpreted as a true and continuing threat.⁷⁶ But the

⁷³ The meaning of the relevant passage on "receipt" is somewhat uncertain. In the context of explaining that the media "engaged in no unlawful activity other than the ultimate publication," *id.* at 1767, Breyer says: "[A]s the Court points out, the statutes do not forbid the receipt of the tape itself. *Ante*, at 9. The Court adds that its holding 'does not apply to punishing parties for obtaining the relevant information *unlawfully*.' *Ante*, at 17 n.19 (emphasis added)." *Id.* The implication seems to be, although this is not certain, that punishing the receipt in these circumstances might be constitutional even if punishing "the ultimate publication" is not. Justice Breyer quite clearly seems to consider "obtaining" to include "receipt." However, the full text of Justice Stevens's footnote 19 suggests that he is probably using "obtaining" to mean no more than directly stealing or intercepting the information. Footnote 19 seems simply to make explicit that "of course" it would be "frivolous" to assert that the First Amendment protects such direct intrusions even by the press.

In any event, it is hard to see why this case should be decided differently if Congress had made the "receipt" of illegally intercepted information itself unlawful. Congress has made unlawful both the "interception" of certain electronic communications and the "disclosure" of that intercepted information. Why should the constitutionality of these provisions depend on whether an interim step between the unlawful interception and the unlawful disclosure is also explicitly made unlawful?

⁷⁴ *Id.* at 1766 (emphasis added).

⁷⁵ *Id.* at 1766, 1767, 1768.

⁷⁶ Perhaps anticipating such a question, particularly when that characterization is key to resolving a motion for summary judgment, Justice Breyer adds: "Nor should editors, who must make a publication decision quickly, have to determine present or continued danger before publishing this kind of threat." *Id.* at 1768.

It is also reasonable to ask whether it would be more appropriate to report the threat, if there was believed to be one, to law enforcement authorities. It is not settled, however, that Title III would permit this "disclosure" any more than it permits media publication. Several lower court cases have construed Title III to prohibit certain disclosures of illegally intercepted material to law enforcement entities. *In re Grand Jury*, 111 F3d 1066, 1077-

crucial point for present purposes is that Justice Stevens nowhere mentions this "unusual" and "special" public safety rationale at all.⁷⁷ Instead he focuses exclusively on the fact that the intercepted phone call involved a "public issue"—"the months of negotiations over the proper level of compensation for teachers . . . were unquestionably a matter of public concern, and respondents were clearly engaged in debate about that concern."⁷⁸ Again and again, Justice Stevens uses the unadorned phrase "public concern," never suggesting that he would limit First Amendment protection in cases of unlawful interception to disclosures involving "unusual" or "special" types of public concern. By contrast, Justice Breyer explicitly disclaims "a 'public interest' exception that swallows up the statutes' privacy-protecting general rule."⁷⁹ "Here," Breyer says, "the speakers' legitimate privacy expectations are unusually low, and the public interest in defeating those expectations unusually high. . . . I emphasize the particular circumstances before us because, in my view, the Constitution permits legislatures to respond flexibly to the challenges future technology may pose to the individual's interest in basic personal privacy."⁸⁰

The privacy-protective nature of Justice Breyer's approach is also reflected in how he treats the fact that the speakers, officials in a public employees' union, were actively involved in public life. Considering this an additional, although not necessarily independent, factor in his analysis, Breyer characterizes the speakers as "limited public figures, for they voluntarily engaged in a public

79 (3d Cir 1997); *Berry v Funk*, 146 F3d 1003, 1011–13 (DC Cir 1998); *Chandler v United States Army*, 125 F3d 1296, 1298–1302 (9th Cir 1997). Indeed, when Justice O'Connor was a state judge in Arizona, she had such a case. *State v Dwyer*, 585 P2d 900 (Ariz App 1978) (affirming Judge O'Connor's suppression, in a homicide case, of a privately intercepted telephone conversation that had been given to law enforcement authorities). In his Reply Brief in *Bartnicki*, the Solicitor General, addressing disclosures to the police, stated that "the traditional defense of 'necessity' privileges conduct that is necessary to protect lives where (as here) the defense is not foreclosed by statute." Reply Brief for the United States at 19, *Bartnicki v Vopper*, 121 S Ct 1753 (2001) (Nos 99-1687, 99-1728) (available at 1999 US Briefs LEXIS 187). Justice Breyer himself suggests that there is a broader "privilege allowing the reporting of threats to public safety," not limited to reporting those threats to law enforcement officials. 121 S Ct at 1768.

⁷⁷ He does quote this part of the intercepted conversation in his opinion's statement of facts, *id.* at 1757, but makes nothing of it in the remainder of his opinion.

⁷⁸ *Id.* at 1765.

⁷⁹ *Id.* at 1768.

⁸⁰ *Id.*

controversy.”⁸¹ But whereas Justice Stevens flatly states that “one of the costs of participation in public affairs is an attendant loss of privacy,”⁸² Justice Breyer states that public involvement may produce only “*somewhat* greater public scrutiny and . . . a *lesser* interest in privacy.”⁸³

Justice Breyer then explicitly rejects the idea that “the Constitution requires anyone, including public figures, to give up entirely the right to private communication.”⁸⁴ And he goes on to cite a number of lower court cases and authorities advocating privacy protection for public figures—emphasizing, in pointed parentheticals following each case or authority, that even where someone “famous” is involved or there is “interest of [the] public,” publication of certain private matters does not involve a “*legitimate* public concern.”⁸⁵ This distinction between “public concern” (Stevens’s phrase) and “legitimate public concern” (Breyer’s phrase⁸⁶) significantly narrows the media’s leeway. It makes clear that simply because there is a public interest in something does not justify its disclosure to the public. A normative judgment must be made, one that limits the potential breadth of the “public concern” concept. A public concern is not “legitimate” if it intrudes too far into other people’s privacy.

Justice Breyer’s short opinion does not set forth criteria for determining whether a matter involves a “legitimate” and “unusual” public concern. The threat to public security in this case, he says, comes within those categories, and he distinguishes this from the “truly private matters” in two lower court cases involving a “video-tape recording of sexual relations” and certain personal informa-

⁸¹ *Id.* The concept of “public figures” and “private figures” has been especially important in cases assessing the place of the First Amendment in defamation actions after *New York Times Co. v. Sullivan*, 376 US 254 (1964). See, e.g., *Philadelphia Newspaper, Inc. v. Hepps*, 475 US 767 (1986); *Wolston v. Reader’s Digest Assn., Inc.*, 443 US 157 (1979); *Time, Inc. v. Firestone*, 424 US 448 (1976); *Gertz v. Robert Welch, Inc.*, 418 US 323 (1974).

⁸² 121 S Ct at 1765.

⁸³ *Id.* at 1768 (emphasis added).

⁸⁴ *Id.*

⁸⁵ *Id.* (emphasis added).

⁸⁶ Breyer takes the phrase from Warren and Brandeis’s famous article on privacy, 4 Harv L Rev at 214 (cited in note 1), and it appears in Section 652D of the Restatement (Second) of Torts (1977), which establishes liability for those who “give[] publicity to a matter concerning the private life of another . . . if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.” (Emphasis added.)

tion about a divorce. But his category of "truly private matters" appears to be at a polar extreme from matters of "unusual" public concern, so Breyer's boundary and the criteria for drawing it remain uncertain. Nevertheless, Breyer's requirement that there be both "legitimate" and "unusual" public concern to establish the media's First Amendment right in this context promises substantial protection for privacy.

Justice Breyer's opinion, therefore, leaves us very far from Justice Stevens's refusal to say "whether the truthful publication of private matters unrelated to public affairs can be constitutionally proscribed,"⁸⁷ and "refusal to answer categorically whether truthful publication may ever be punished consistent with the First Amendment."⁸⁸ Justice Breyer is clear that truthful publication can be punished in order to protect privacy.⁸⁹

Justices Breyer and O'Connor do not go as far as the dissenters. The dissenters, using "intermediate scrutiny," treat the unlawfulness of the original interception as dispositive.⁹⁰ The dissenters would give no weight in this context to the fact that the intercepted information might involve information of "public concern," whether the public concern is ordinary or "unusual." They call "public concern" "an amorphous concept that the Court does not even attempt to define."⁹¹ In the most important passage in their opinion, the dissenters embrace a privacy-protection approach that

⁸⁷ 121 S Ct at 1764.

⁸⁸ Id at 1762.

⁸⁹ Justice Breyer gives an interesting gloss on his own *Bartnicki* opinion in his recent Madison Lecture. Stephen Breyer, *Our Democratic Constitution*, the Fall 2001 James Madison Lecture, delivered at NYU Law School on October 22, 2001 (copy on file with the author). He characterizes the *Bartnicki* decision as a "narrow" one and argues that the narrowness was appropriate because privacy questions are now "unusually complex." "[T]he complex nature of these problems calls for resolution through a form of participatory democracy," with "law revision that bubbles up from below." This, in turn, "suggests a need for . . . judicial caution or modesty" that does not "pre-empt" the democratic process. Id at 14-17. This is not just a general defense of narrow decisions in this area, however. It is pointedly an argument for narrowness in decisions in a particular direction—decisions that protect the media and limit the scope of privacy protection. The point is that the Court should "leav[e] open broadcaster liability in other . . . circumstances," id at 16, and allow the participatory democratic process to take privacy-protective steps.

⁹⁰ They do distinguish the *Pentagon Papers* case, however, saying that that case involved government information and was also a "prior restraint" case, rather than concluding that it was wrongly decided simply because Daniel Ellsberg had stolen the papers. 121 S Ct at 1776.

⁹¹ Id at 1769.

is undoubtedly broader than the multifactored complexity of the Breyer approach:

The Constitution should not protect the involuntary broadcast of personal conversations. Even where the communications involve public figures or concern public matters, the conversations are nonetheless private and worthy of protection. Although public persons may have forgone the right to live their lives screened from public scrutiny in some areas, it does not and should not follow that they also have abandoned their right to have a private conversation without fear of it being intentionally intercepted and knowingly disclosed.⁹²

The Stevens and Breyer opinions, taken together, extend First Amendment immunity beyond prior cases in some respects, covering situations where the information was unlawfully obtained. But the Breyer and Rehnquist opinions, taken together, contract and limit First Amendment protections in several other respects, most obviously in sharply limiting the media's "public concern" rationale for invading privacy. Overall, the combined weight of the concurrence and the dissent establishes that five Justices seem quite receptive to restrictions on speech to protect privacy.

III

This broader receptivity to privacy protection is as it should be, in my judgment. The Court should give more weight to privacy protection in cases involving privacy-speech conflicts. This conclusion reflects not only a view of the importance of privacy, but also concerns about new technological threats to privacy and about contemporary social circumstances that have made privacy more vulnerable than speech. Ultimately, it also reflects a conception of freedom of the press as largely a freedom concerned with the public sphere.

1) The values served by privacy (understood here as the ability to control and to avoid disclosure of certain matters about oneself) are many and can be variously described: the need to be let alone; promoting development of the personality; developing trusting relationships of love and friendship; avoiding pressures for conformity; encouraging creativity; maintaining the rules of civility;

⁹² *Id.* at 1776.

allowing noncompliance with ambivalently supported laws; reducing unfair, out-of-context judgments of people; letting people bury their past; protecting human dignity; sustaining individualism; and developing a liberal and pluralistic society, to mention just some that have been discussed in the literature.⁹³ Privacy also promotes a system of free expression, for people are more likely to express themselves fully, openly, and robustly when they have confidence that what they say will be heard only by a known group of listeners. Fear of being overheard, fear of public exposure, fear of one's words becoming the subject of gossip, fear of intimacies being publicly scrutinized, fear of being sanctioned or disapproved of because of what one says—all of these have a profound inhibiting effect on expression, and make it crucially important for the law to protect a realm of privacy for communications. Far from threatening speech, protecting private communication is itself a central part of constructing a vibrant system of free expression.

Given the special status of free speech in the American constitutional firmament, it is easiest to argue for readjustments in the speech/privacy balance by emphasizing the ways in which protecting privacy itself promotes free expression. By doing so, one identifies speech interests "on both sides of the equation," and restricting speech to protect privacy can be justified as a speech-enhancing rather than a speech-restricting approach.⁹⁴ But not all concerns about privacy are related to expressive freedom. The other values that privacy serves may themselves at times be strong enough to justify some restriction on what the media may publish.

We need to see privacy in the same systemic way that we have come to see speech. Suppressing speech, we recognize, is not only a loss to the individual in question. It also deprives public debate and deliberation of the benefits of wide-open and robust discussion; it harms democratic self-government. Similarly, lost privacy is not only a diminishment to the individual directly concerned. It also reduces a sphere of life that is crucial for a particular kind

⁹³ See, e.g., Warren and Brandeis, 4 Harv L Rev 193 (cited in note 1); Ruth Gavison, *Privacy and the Limits of Law*, 89 Yale L J 421 (1980); Jeffrey Rosen, *The Unwanted Gaze: The Destruction of Privacy in America* (2000); Post, *The Social Foundations of Privacy* (cited in note 52); Charles Fried, *An Anatomy of Values* (1970); Amitai Etzioni, *The Limits of Privacy* (1999); Richard C. Turkington and Anita L. Allen, *Privacy Law: Cases and Materials* (1999); Spiros Simitis, *Reviewing Privacy in an Information Society*, 135 U Pa L Rev 707 (1987).

⁹⁴ 121 S Ct at 1766 (Breyer concurring).

of human functioning that sustains a pluralistic society. Moreover, when the media puts private matters into the public sphere, it has systemic consequences for the public sphere itself.

Those who do not participate in the public square at all can make the strongest claims to privacy protection. People only tangentially or episodically in the public eye—or those who have been forced into the public square because they are victims of crime or some other misfortune—also have strong claims. Cases involving public figures are the hardest privacy cases, since public figures seem to want it both ways, to embrace the public and yet evade it, and because the accountability of public officials and political candidates is a central element of democratic self-governance. But protecting some aspect of privacy for public figures is crucial for their own human functioning. Moreover, as discussed more fully below, protecting their privacy can further the values of democratic self-governance.⁹⁵

But while privacy serves public values, at bottom privacy is anti-public. This is part of what makes it such a challenging concept for contemporary constitutional and political theory, and why many are reluctant to say that privacy should outweigh the public functions of a free press. Owen Fiss has written about a number of recent circumstances in which traditional supporters of free speech have supported restrictions on speech.⁹⁶ He discusses, for example, feminist support for restricting pornography in spite of liberalism's traditional support for freedom of sexual expression, support for hate speech laws among many in the civil rights movement in spite of their traditional opposition to censorship, and support of some civil liberties groups for campaign finance restrictions and regulations of the media to assure wider access and enhance the diversity of views available to the public. Some of these examples pit different conceptions of free speech against each other. Others, such as hate speech and pornography, can be seen as a conflict between free speech and equality, although Fiss sees them as a conflict within the First Amendment itself. But in each case, the argument in favor of restricting speech rests at bottom on a conception of the "public"—a revised sense of public debate, or

⁹⁵ See text accompanying notes 120, 135–36.

⁹⁶ Owen M. Fiss, *Liberalism Divided: Freedom of Speech and the Many Uses of State Power* (1996). See also Owen M. Fiss, *The Irony of Free Speech* (1996).

collective self-determination, or social roles, or social status. As Fiss puts it, these arguments in favor of restricting speech rest on an understanding of freedom "in more social terms."⁹⁷

But the arguments in favor of restricting speech to protect privacy are largely anti-"social"—or at least they seek to preserve a realm of the social and personal that often refuses to contribute to a wider "public." "Private speech" might be related to public issues or might be preparation for an ultimately more "public" formulation, but its value does not depend only on that, and that is not the primary reason we protect it from disclosure. We protect its privateness. We protect the right to choose a narrow audience, or no audience except oneself—to be what William Carlos Williams called "lonely, lonely," and as such to be "the happy genius of my household."⁹⁸ So too for the elements of privacy having nothing to do with speech—we protect them from disclosure largely because we know that humans are constituted in part by refusing to be public. One can and should identify public purposes served by protecting the private, as I have done above, but privacy's effort to subvert the public's knowledge and control is at the core of what it is—and, I believe, the core of its unique value.

2) In assessing the importance of enhancing privacy protection, we also need to take account of technological developments that create greater society-wide threats to privacy. It is appropriate and common for legal rules to adapt to the development of new technologies.⁹⁹ This is because legal rules are typically premised on often unarticulated background assumptions about what the world is like. When reality changes, and the background assumptions no longer hold true, existing law may not achieve its original purposes. If we adhere to existing rules in the face of new technologies, the existing balance between liberty and order may be transformed. Concerning privacy, for example, the law may not protect certain private activities or zones because there are few perceived threats to those activities or zones. The law allows access, but since access in practice is rare, the law does not occasion significant inva-

⁹⁷ Fiss, *Liberalism Divided* at 5.

⁹⁸ William Carlos Williams, *Danse Russe*, in A. Walton Litz and Christopher MacGowan, eds, *The Collected Poems of William Carlos Williams 1909–1939* at 86–87 (1986).

⁹⁹ See Paul Gewirtz, *Constitutional Law and New Technology*, 64 *Social Research* 1191 (1997).

sions of privacy. Our technological crudity protects us from wider invasions of privacy. But if new technologies create new capabilities that facilitate access and therefore open up new threats to privacy, we may have to change the rules if we wish to preserve the old rules' purposes.

Another privacy case decided last term, *Kyllo v United States*,¹⁰⁰ nicely illustrates one way that legal rules adapt to new technologies—specifically, adapt to what the Court described as the “power of technology to shrink the realm of guaranteed privacy.”¹⁰¹ *Kyllo* involved the police use of a “thermal-imaging” device in the course of a drug investigation. When aimed at a building from outside, such a device can pick up relative amounts of heat emanating from the building. In *Kyllo*, a thermal-imaging device was aimed at a private home from the street and was able to pick up hot zones suggesting that halide lights were being used inside to grow marijuana. The constitutional question was whether use of the device was a “search” within the meaning of the Fourth Amendment.

The Court acknowledged that visual observation traditionally has not been deemed a “search,” but also underscored that individuals traditionally have had a reasonable expectation of privacy in “the interior of their homes.” With “old” technologies, the two concepts are not in conflict. But with the “technological enhancement of ordinary perception” permitted by the “advance of technology,” a conflict can emerge. The Court in *Kyllo* concluded that the use of thermal imaging on a house constitutes a “search,” even though observation from the same spot without “technological enhancement” would not have been a “search.”

To withdraw protection of this minimum expectation [of privacy] would be to permit police technology to erode the privacy guaranteed by the Fourth Amendment. We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical “intrusion into a constitutionally protected area” constitutes a search—at least where (as here) the technology in question is not in general public use. This assures preservation of that degree of privacy against gov-

¹⁰⁰ 121 S Ct 2038 (2001).

¹⁰¹ *Id.* at 2043.

ernment that existed when the Fourth Amendment was adopted.¹⁰²

Technological changes creating new threats to privacy should also affect legal rules in a broader way, encouraging reexamination of the rules governing the speech/privacy balance. As new technologies make outsiders' access to private matters easier (allowing ready interceptions of phone calls or eavesdropping on bedroom conversations or hacking into electronically stored information, for example), and as new technologies facilitate the creation of permanent electronic records and footprints and simplify the ability to gather personal information from dispersed sources, laws protecting privacy become more important. At the same time, the media has a greater potential to produce more extensive harms by broadly disseminating private material, and new media technologies such as the internet and e-mailing make possible new threats to privacy.¹⁰³ A continuing reluctance to limit the media in the face of new technologies, in short, may result in a major diminishment of privacy.¹⁰⁴ It may well be that in the years ahead further techno-

¹⁰² Id (citation omitted). The Court in *Kyllo* relies on an earlier case in which technological change fostered a change in Fourth Amendment doctrine, *Katz v United States*, 389 US 347 (1967). In *Katz*, the Court discarded a constitutional rule that the Fourth Amendment was triggered only by a physical trespass, in significant part because new electronic technologies were allowing widespread intrusions on areas where there was a reasonable expectation of privacy even without any physical intrusion.

¹⁰³ See A. Michael Froomkin, *The Death of Privacy?* 52 Stan L Rev 1461 (2000); Rosen, *The Unwanted Gaze* at 57-58, 159-95 (cited in note 93); Lawrence Lessig, *Code and Other Laws of Cyberspace* 142-64 (1999); Turkington and Allen, *Privacy Law* at 311-25 (cited in note 93).

¹⁰⁴ Cf. Geoffrey R. Stone, *The Scope of the Fourth Amendment: Privacy and the Police Use of Spies, Secret Agents, and Informers*, 1966 Am Bar Found Res J 1193, 1216 (suggesting a "principle of conservation of privacy," which seeks "to maintain a cumulative level of privacy comparable to that existing at the time the fourth amendment was drafted"). This point is a general one, and has often been lost in discussions about the tension between liberty and security after the events of September 11, 2001. Many of our civil liberties doctrines and rules rest on background assumptions about the risks to security that will follow from civil liberties of a certain scope. For example, when we say it is better that ten guilty people go free than that one innocent person be convicted, we are implicitly assuming that the risk to society of setting ten guilty people free is a tolerable risk. But if technologies and access to technologies develop so that the ten guilty people have access to footlocker-sized nuclear weapons and the will to detonate them, then we may want to adjust our epigram (and at least some of our rules in some circumstances). Not to do so is to end up with a real-world balance between liberty and security that is very different from the one we started with. The point is just as applicable in the other direction. If we do not adjust existing rules when new investigative technologies give law enforcement officials much greater capacity to reduce liberty, then we will end up with a much different liberty/security balance than we thought we had. Liberty-oriented rules of wider scope will be necessary just to keep pace.

logical developments will themselves create better ways of advancing communication while also protecting privacy—for example, by strengthening encryption methods—but for now privacy protections will be significantly shaped by where the law draws the line between permissible and impermissible invasions.

3) Giving more weight to privacy in constitutional disputes is also warranted because of the contemporary social and cultural context within which these issues arise. Just as legal rules are typically premised on background assumptions about technologies, so too are such rules usually premised on assumptions about social conditions, behaviors, and attitudes. As these change, legal rules may require reexamination. Often in partnership with new technologies, social and cultural factors have made privacy more vulnerable than before—and, I would argue, more vulnerable than the press today—suggesting that legal efforts to strengthen privacy deserve added weight when balanced against press prerogatives. The events of September 11, 2001, and ongoing fears of terrorism will continue to augment the government's already great powers to collect information and monitor behavior. Employers have become expansive data gatherers and monitors. Legally, as well as culturally, there is a wider sense of a "right to know." The greater role of litigation in our society over past decades has created a new and extremely powerful engine to compel the disclosure of hitherto private information. A wider "politics of scandal" and "criminalization of politics" has unleashed powerful investigative machinery and increased mainstream attention to the private misdeeds of public figures and to the lives of private figures caught up in the investigative onslaught. I have elsewhere referred to an "Oprahfication" of American culture.¹⁰⁵ By this I mean that Americans have become ready and unashamed voyeurs, stimulated and allowed to peer into and judge the private lives of others, even as we typically try to hold on to our own privacy and support laws to protect it. Cultural boundaries between the public and private have become blurred, with private intimacies more casually the subject of public discourse, and new expectations created about what we may know about others.

The press itself has been changed by the more mainstreamed

¹⁰⁵ Paul Gewirtz, *Victims and Voyeurs: Two Narrative Problems at the Criminal Trial*, in *Law's Stories* at 135, 152 (cited in note 54).

prurience of the American people, and in turn has become a greater cultural force in diminishing privacy.¹⁰⁶ It has often been noted that “entertainment values” drive news coverage these days,¹⁰⁷ and a large part of what this means is that news coverage has increasingly broken down distinctions between what is public and what is private. The mainstream media devote more attention to personalities, gossip, and reporting on private lives of both the famous and the ordinary. Although we may seek to hold on to our own privacy and support laws to protect it, these broader cultural forces, along with new technologies, present new and serious threats to privacy.

On the other hand, the press today is not seriously endangered by government restrictions, and individual speakers are not seriously threatened by government-imposed conformity of viewpoint. Debate about public issues and public figures is extremely vigorous. The boundaries of the permissible have been extended very far out. In earlier times, this was not the case: the press and other speakers were subject to government legal action that directly sought to restrict criticism of the government and sought to limit a broad range of ideas from being expressed and heard. Understandably, free speech law sought to push back on these restrictions. But the press today has great leeway and boldness. It is true that the terrorist attacks of September 11, 2001, and the resulting war in Afghanistan have led the current administration to criticize the media—for example (and disturbingly), the Attorney General has criticized the media and others for giving “aid” to terrorists by their “fearmongering” objections to administration policies on civil liberties grounds.¹⁰⁸ But the government has taken no legal steps to restrict media criticism, and the media remains bold (although this popular war is also generally popular in the media). The system of free expression still needs to be strengthened—es-

¹⁰⁶ The point here is one of degree. Concerns about the press invading privacy and pushing boundaries in that direction are hardly new, of course. In a different social context where there were different cultural boundaries, Warren and Brandeis’s famous article on privacy expressed analogous sorts of concerns about press behavior.

¹⁰⁷ See, e.g., James Fallows, *Breaking the News* (1996); Neil Postman, *Amusing Ourselves to Death* (1985).

¹⁰⁸ *DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism*, hearing before Senate Judiciary Committee, 107th Cong 1 (2001) (testimony of Attorney General John Ashcroft, Dec 6, 2001), available at <<http://www.usdoj.gov/ag/testimony/2001/1206transcriptsenatejudiciarycommittee.htm>>.

pecially by counteracting the dominance of media giants and further diversifying the voices that can be heard (without thereby diluting the power of strong press entities to be a true check on government¹⁰⁹)—but not by strengthening the press in its freedom to interfere with privacy. It is the latter value that is now often seriously threatened, and at times threatened by the press. In deciding how to strike the press/privacy balance, it is essential to take account of where the greater vulnerabilities and dangers are.

These various factors help to justify strengthening privacy protections. But freedom of the press from government abridgment is explicitly protected by the Constitution, and freedom from non-governmental interference with privacy is not.¹¹⁰ There are only two conceptual ways for privacy concerns to prevail in the face of the press' claim of First Amendment protection: (1) to conclude that the First Amendment right does not apply, or does not apply at full strength, when the press infringes on certain private matters; or (2) to conclude that privacy is a strong enough competing interest in particular circumstances to outweigh the First Amendment interest. Each conception is plausible, and indeed they are related.

The freedom of the press protected by the First Amendment must be seen as primarily about the press' contribution to democratic self-governance, to public debate, and to checking the power of the state.¹¹¹ This core freedom is a broad one, and it includes

¹⁰⁹ Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 Am Bar Found Res J 521 (1977).

¹¹⁰ A right to privacy as the freedom to keep the government from having unwanted access to personal information is protected through the Fourth Amendment and also as an aspect of substantive due process under the Fifth and Fourteenth Amendments. *Whalen v Roe*, 429 US 589 (1977). The Fourth Amendment is phrased as a "right of the people to be secure . . . against unreasonable searches and seizure," and, as literally phrased, does not have a state action requirement. But the Fourth Amendment has not been interpreted as providing protections against nongovernmental interference, and I do not rest my argument on a claim that media interference with "privacy" violates a constitutional right of privacy.

¹¹¹ The idea that the First Amendment as a whole has this core meaning has its contemporary roots in the writings of Alexander Meiklejohn, e.g., *Free Speech and Its Relation to Self-Government* (1948), and has been developed in recent years by Owen Fiss, e.g., *Liberalism Divided* (cited in note 96); *The Irony of Free Speech* (cited in note 96), and Cass Sunstein, *Democracy and the Problem of Free Speech* (1993). These writers do not distinguish between freedom of speech and freedom of the press. However, this understanding of the First Amendment seems to have distinctive force in understanding freedom of the press in particular, both because the institutional nature of media entities makes less relevant another standard rationale for free speech—promoting self-fulfillment—and, more importantly (as

not only explicitly "political" speech but also a broad range of "cultural" expression, since cultural expression contributes to our public life¹¹² and since experience teaches us that cultural censorship so often has a political motivation.¹¹³ This understanding of freedom of the press as primarily about the public sphere reflects both an affirmative concept about the press' role and also, I would argue, a recognition that a wider concept of press freedom would conflict with other values that a society properly cherishes, such as privacy. Thus concern about privacy is built into a proper conception of press freedom itself. Freedom of the press is not fundamentally about the freedom to disclose private matters or to invade the private sphere.¹¹⁴ The freedom to publish the truth strikes many as the core of what freedom of the press is about; but truthful information about oneself is also at the core of what privacy protects. A plausible way to harmonize these ideas is to understand the press' freedom as focused primarily on the public sphere.

The alternative way to bring privacy protection into the constitutional analysis is to see privacy as a value that competes with the value of a free press. This is a plausible way of proceeding as long as we accept that interests not explicitly protected by the Constitution (here, the interest in protecting privacy from nongovernmental interference) can in certain circumstances outweigh interests that are.¹¹⁵ In fact, almost all doctrinal "tests" in constitutional law

I note below), because a wider concept of freedom of the press would distinctively threaten privacy values.

¹¹² This was Alexander Meiklejohn's rationale, *The First Amendment Is an Absolute*, 1961 Supreme Court Review 245, 255-57. For a criticism of Meiklejohn's inclusion of culture, see Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind L J 1, 26-28 (1971).

¹¹³ See Sunstein, *Democracy and the Problem of Free Speech* at 135-36, 164-65 (cited in note 111). For a criticism of Sunstein's view—indeed, a broader criticism of approaches that see the First Amendment's primary purpose as promoting deliberation about public issues—see J. M. Balkin, *Populism and Progressivism as Constitutional Categories*, 104 Yale L J 1935 (1995).

¹¹⁴ What differentiates freedom of the press from freedom of speech is that the former typically involves an institution of production and distribution. Since wide distribution of information is usually the main threat to privacy protection, arguably "freedom of the press" poses a greater danger to privacy than "freedom of speech" *simpliciter*—and therefore particular care should be taken in defining what comes within the constitutional concept of freedom of the press or particular receptivity shown when privacy values are balanced against it.

¹¹⁵ There are countries in which both free press and privacy are explicitly protected by the Constitution—indeed, privacy is protected from both governmental and nongovernmental infringement. See text accompanying notes 140-55. In such countries it may not matter greatly which analytic route is followed and, in particular, whether a core conception of

reflect this, with, for example, "substantial" or "compelling" (but nonconstitutional) interests justifying restrictions on constitutional ones in certain circumstances. At bottom, under either approach, the task must be to reconcile protection for both a free press and for privacy, to reconcile protecting the need of the public to know with the competing need of individuals to keep things private. These are each things that we rightly cherish, and that the Constitution must be read as recognizing that we rightly cherish. Of course, "the right to be let alone [can] develop into an impediment to the transparency necessary for a democratic decisionmaking process."¹¹⁶ But we must impose some limits on the transparency of the private, even where transparency might marginally enhance public deliberation, if we want to preserve a private sphere of meaningful scope.

In light of this, the concept of "public concern" is insufficient to mediate the press-privacy conflict. Superficially, this concept might appear to preserve the public/private distinction, but it does not. In fact, the notion that content of "public concern" justifies media attention protected by the First Amendment is an engine for destroying privacy. It is always possible to construct an argument that public knowledge about a "private" matter is relevant in some way to public understanding of public issues or public roles. It can always be said that some private fact is an exemplification of a wider public phenomenon and that informing the public about it will enhance public understanding.¹¹⁷ If identifying "relevance" to

free press is defined. Even a very broad conception of free press will have to be reconciled with or "balanced" against the privacy values protected elsewhere in the constitution itself. But in our Constitution, the stakes in understanding the rationale for protecting a free press may be higher, for in our press-privacy cases freedom of the press is the only explicit constitutional right in the picture.

¹¹⁶ Simitis, 135 U Pa L Rev at 731 (cited in note 93).

¹¹⁷ There are endless varieties of these kinds of weak and privacy-destroying nexus arguments. To give just one example from a well-known case, Judge Richard Posner upheld on First Amendment grounds the reporting about private facts about an ordinary citizen (as summarized by Posner, "his heavy drinking, his unstable unemployment, his adultery, his irresponsible and neglectful behavior toward his wife and children") using the following argument in part: "Reporting the true facts about real people is necessary to 'obviate any impression that the [general social] problems raised in the [reporting] are remote or hypothetical.'" *Haynes v Alfred A. Knopf, Inc.*, 8 F3d 1222, 1233 (7th Cir 1993). Obviously, if personal and embarrassing private facts (here, from thirty years previously) can be published simply because they establish that some general social problem is not remote or hypothetical, no one with "problems" has any protection from media disclosure. See also text accompanying note 128, discussing the way that the Restatement (Second) of Torts limits the privacy protections for "involuntary public figures."

a "public concern" is sufficient to justify media publication, some relevance can always be found or created, and privacy will be only a matter of media grace and forbearance. To preserve some realm of the private from public disclosure, we need to develop more nuanced criteria, which inevitably will turn on matters of degree: how private, what degree of public significance, how much relevance between private fact and public concern, and so forth. Justice Breyer's concept of "legitimate public concern" in *Bartnicki* is a recognition that a limiting normative judgment is required. The need for limiting criteria is even clearer once we appreciate that in this context the usual nostrum that the remedy for problematic speech is more speech has no applicability. More speech following disclosure of a private matter would only deepen the loss of privacy, not protect it.¹¹⁸ To permit the media to invoke "public concern" to justify publicizing private information means either that no one will fight back or that the fighting back will further undermine privacy.¹¹⁹

I would also argue that limiting invasion of the "private" actually enhances public debate. Information about the private lives of public officials easily distracts us from their official actions. The public has great curiosity about these private matters, and the media has financial incentives to satisfy that curiosity. The public and the press each push along these tendencies in the other, but the fundamental element here is an aspect of human nature, the weakness for voyeurism that we all have, a weakness that drives out (or at least diminishes) public attention to official actions and policies when offered more prurient alternatives. It is no accident—and only slightly hyperbolic to point out—that while the media were endlessly reporting and re-reporting details about Representative Gary Condit's sex life, they barely noted the Rudman-Hart Commission's Report on Terrorism and offered virtually no criticism of our ineffectual antiterrorism policies or our utter unpreparedness for terrorist attacks. Enhanced media prerogatives do not necessarily mean improvement in public discourse or enhance-

¹¹⁸ See Geoffrey R. Stone, Louis M. Seidman, Cass R. Sunstein, and Mark V. Tushnet, *Constitutional Law* 1075 (4th ed 2001).

¹¹⁹ Litigation of a privacy claim, of course, presents a similar problem. See Harry J. Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?* 31 L. & Contemp. Probs. 326, 328 (1966). However, establishing a privacy right would presumably deter publication to some extent.

ment of the press' role in society. To the contrary, augmented leeway to publicize private matters almost surely means less coverage of more public matters and a diminishment of political discourse. What may be even worse, it can transform what we consider to be "public and political discourse"—with private matters coming to play a comparatively greater role both in what passes for "public and political discourse" and also in the ultimate public judgments of public figures. At times, enhanced media prerogatives not only can damage the competing value of privacy, but can distort public debate itself. Strengthening privacy protection will help reclaim both the "private" and the "public."¹²⁰

For all these reasons, then, the Court should be more receptive to rules that protect privacy even when the media's desire to publish certain truthful information is restricted. The Supreme Court has allowed the speech/privacy balance to shift too far against privacy interests. And the problem is not only the rules the Court has adopted and the Court's repeated "refusal to answer whether truthful information may ever be punished consistent with the First Amendment."¹²¹ The problem includes the fact that, in virtually every case that the Supreme Court decides involving a press/privacy conflict, the privacy claim loses. The Court sends signals by its patterns, not only by its rules.

What privacy protections will be, of course, is initially in the hands of state and federal lawmakers, and there have long been different views about the appropriate scope of privacy protection "simply" as a matter of statutory or common law.¹²² It is clear, however, that for some time statutory and common law tort rules have developed in the shadow of perceived First Amendment re-

¹²⁰ Cf. Lee Bollinger, *Images of a Free Press* 133–45 (1991) (arguing that members of a democratic society, aware of their own "deficiencies," may use public regulation to improve "the quality of public discussion"); Geoffrey R. Stone, *Imagining a Free Press*, 90 Mich. L. Rev. 1246, 1262–63 (1992) (arguing for "some limit" on what the press reports about political candidates, "designed not only to respect [their] legitimate privacy interests . . . , but also to reflect our right, as a society, to decide that some matters simply should not play a significant role in our political process" because "the information has a greater potential to distract and distort than to inform our better judgment"); Rosen, *The Unwanted Gaze* at 143 (cited in note 93) ("knowing everything about someone's private life inevitably distracts us from making reliable judgments about his or her character and public achievements").

¹²¹ 121 S. Ct. at 1764, and text accompanying notes 57–59.

¹²² See, e.g., Marc A. Franklin and Robert L. Rabin, *Tort Law and Alternatives: Cases and Materials* 1098–1215 (2001); Turkington and Allen, *Privacy Law* (cited in note 93).

strictions resulting from Supreme Court decisions. The Restatement (Second) of Torts is explicit that its "model" privacy tort rules take the shape they do because of the drafters' efforts to fit those rules within the constraints of existing First Amendment doctrine.¹²³ If the Court placed fewer First Amendment restrictions on state and federal flexibility to strengthen privacy protections, not only would statutes like Title III have wider force in protecting privacy, but other federal and state protections of privacy could well expand.

In my judgment, where information has been obtained *unlawfully*, and the law prohibits further disclosures, the First Amendment should not be interpreted to stand in the way of damage actions for media disclosures, except where there is an extraordinary justification for the publication. Justice Breyer may be right that the situation in *Bartnicki* presented the kind of public security threat that counts as an extraordinary justification. If so, however, it is important to be clear that, generally speaking, the publication of unlawfully intercepted conversations, even conversations about matters being publicly debated, is not protected by the First Amendment. Even when they have a public content, they come from a private zone that the state may protect from media intrusion. Although Justice Breyer emphasizes that *Bartnicki* involves an "unusual" public concern, and that he would "not create a 'public interest' exception that swallows up the statutes' privacy protecting general rule," his examples of information that the government may protect from disclosure are all from a polar extreme—"situations where the media publicizes *truly private matters*,"¹²⁴ by which he appears to mean "truly private" content (his examples concern sexual relations and divorce). Where information has been secured unlawfully, however, and a private zone has been unlawfully invaded, privacy law should be permitted to limit the media more substantially, restricting it from disclosing conversations from that zone which concern public issues as well as personal matters.

Where information is obtained *lawfully*, but the law seeks to prevent publicity and protect privacy, the First Amendment analysis is rightly more complex. The goal is to strike a balance that pro-

¹²³ Restatement (Second) of Torts, § 652D (1977) ("Special Note on Relation of § 652D to the First Amendment of the Constitution").

¹²⁴ 121 S Ct at 1768 (Breyer concurring) (emphasis added).

protects privacy but does not unduly restrict the press. A variety of factors should be relevant, similar to those identified in Justice Breyer's *Bartnicki* opinion.¹²⁵ One element of the analysis is the substantiality of the public concerns—put another way, the substantiality of free press concerns in light of the purposes of the First Amendment. This turns in part on the identity of the figure receiving public attention. A fuller range of a public figure's life is properly a subject of public scrutiny, and the media must have a wider "breathing space" in its coverage of such figures in order effectively to contribute to political deliberation and democratic self-governance. The nature of the information involved is also relevant. Information about "truly private matters," even concerning public figures, should generally be protectable. A second element of the analysis is the interrelated question of the extent and degree of the privacy invasion. This turns in part on content, whether intimate private characteristics or behavior is concerned. It also turns on the circumstances involved, whether the information comes from a zone of reasonably expected privacy.¹²⁶ Final elements in the constitutional analysis concern what might be called the "need" for the particular restriction involved. Are there reasonable and practical alternatives to restricting publication that would protect privacy? Does the law operate with undue selectivity, suggesting either a censorial motive concerning certain ideas or singling out of particular media unrelated to the privacy-protection rationale?

This approach would recalibrate the press/privacy balance and lead to different outcomes in some familiar cases. One example is

¹²⁵ See text accompanying note 67.

¹²⁶ As an element of the tort of "Publicity Given to Private Life," § 652D of the Restatement (Second) of Torts requires that the disclosure of a private fact be "highly offensive." See note 86. This is an incomplete measure. Even where a disclosure about intimate details of someone's life is not "highly offensive," protection may be justified. Consider a touching and tasteful story and photograph about a terminally ill teenager, published without his family's consent, or simply the publishing of ordinary personal details about a child. These may not be "highly offensive," but that should not end the inquiry. See also Rosen, *The Unwanted Gaze* at 50 (cited in note 93) ("In an age that is beyond embarrassment, it's rarely clear what a 'reasonable person' would find highly offensive.").

The Restatement also states that the tort cannot be established if the matter publicized is of "legitimate concern to the public." The word "legitimate" is in effect a placeholder, for it operates here essentially as a conclusion that the public concern is appropriate—a judgment that, as I indicate in the text, reflects a range of factors and normative trade-offs, including not only the substantiality of the public concern but also the degree to which privacy is invaded.

*Florida Star v B.J.F.*¹²⁷ A Florida statute made it unlawful to "print, publish, or broadcast . . . in any instrument of mass communication" the name of a victim of a sexual offense. The *Florida Star* violated the statute and its own internal policy of not publishing such names, and was sued by a rape victim for damages. The Court held that the First Amendment barred recovery, emphasizing that the information was "truthful" and "lawfully obtained." But why should that count for almost everything? Publicizing a rape victim's name is a cruel invasion of privacy concerning a matter of great sensitivity to the victim. Furthermore, in most cases, why is the name of a rape victim a matter of legitimate public concern? The fact of the rape or even the name of the alleged perpetrator is one thing, but the victim's name is ordinarily not something the public profits from knowing. If the rape victim is a public figure or limited public figure, it is only because she has been dragged into the public square against her will as a victim of crime. It is hard to see that publicizing her name contributes to the crucial role the press plays in promoting democratic self-governance. The balance in these circumstances seems very much on the side of privacy. In addition, the Florida law in question was clear and specific. It is hard to see how enforcing this law would "chill" any valuable reporting.

The Court, invoking the *Daily Mail* test requiring the state to show a "need of the highest order" to justify limiting publication of lawfully acquired and truthful information, points to two main factors to explain its holding. First, the *Florida Star* obtained the rape victim's name from a police incident report that had inadvertently included her name. Although the Sheriff Department could in theory have prevented the name from becoming public, the department's error cannot be seen as evidence that the state lacked a commitment to protecting rape victims' privacy. The privacy interests belonged to the victim. An error by the Sheriff's Department should not put her at the mercy of the newspaper, which knew full well that it had a legal obligation not to disclose the victim's name and itself had an internal policy against doing so. Protecting privacy should not be a game of gotcha. Second, the Court said that the Florida statute was underinclusive in that it

¹²⁷ 491 US 524 (1989).

prohibited publication only by "an instrument of mass communication," not by other means. But since Florida's primary concern was to prevent the widespread dissemination of rape victims' names, the statute's focus is understandable. This is not a case where the state has singled out one segment of the news media for adverse treatment in a manner suggesting that there are favored and disfavored media entities. It is hard to see how the interest in press freedom and free expression is harmed by this "underinclusiveness."

The flavor of the Court's opinion in *Florida Star* is that the Court will find any conceivable escape hatch for media liability. The Court gives only token recognition to the value of implementing legal protections of privacy. This extreme solicitude for the one and sharply limited solicitude for the other is what should be reversed.

Florida Star involved a private figure victimized by crime. Unfortunately, other types of "involuntary public figures" also receive too little privacy protection under current law. The official comments to Section 652D of the Restatement (Second) of Torts ("Publicity Given to Private Life"),¹²⁸ clearly influenced by existing First Amendment law, state:

There are other individuals who have not sought publicity or consented to it, but through their own conduct or otherwise have become a legitimate subject of public interest. They have, in other words, become "news." . . . These persons are regarded as properly subject to the public interest, and publishers are permitted to satisfy the curiosity of the public As in the case of the voluntary public figure, the authorized publicity is not limited to the event that itself arouses the public interest, and to some reasonable extent includes publicity given to facts about the individual that would otherwise be purely private. (Comment f.)

I would not interpret the First Amendment to prohibit protections against disclosures of "purely private" and tangential matters. Consider the case of Oliver Sipple, who, while standing in a crowd of onlookers, blocked Sara Jane Moore's arm as she was about to shoot at President Gerald Ford. The *San Francisco Chronicle* thereafter disclosed that Sipple was gay. When Sipple sued the newspa-

¹²⁸ See note 86.

per for invasion of privacy, his case was dismissed on First Amendment grounds. The California appellate court noted that Sipple had not completely concealed his sexual identity (although the court did not dispute that Sipple had kept the information from his family and that, as a result of the publicity, Sipple's family abandoned him). But the court's main argument was that "the publications were not motivated by a morbid and sensational prying into appellant's private life but rather were prompted by legitimate political considerations, i.e., to dispel the false public opinion that gays were timid, weak and unheroic figures. . . ."¹²⁹ Given the intensely personal nature of Sipple's sexual identity and the care many homosexuals take to limit general knowledge about that identity, and given that Sipple did not seek notoriety, this asserted connection between the private fact and "political considerations" was simply too weak to warrant the *Chronicle's* disclosure.¹³⁰

The privacy protections permitted to a true public figure—a political official, an entertainment personality—must be more limited. Most obviously, the media must have a very broad right to cover the actions of political figures because of the presumptive connection between such coverage and the process of democratic self-governance and because the media must be given "breathing space . . . to ensure the robust debate of public issues."¹³¹ Voters assess public officials on a wide variety of grounds, and the scope of press coverage properly reflects this. But this rationale should not make every aspect of a public figure's life fair game for media attention.

Public officials have some legitimate expectations of privacy because they are human beings as well as "public officials." They magnify and reconfigure, but do not abandon, our own complex and ambivalent relations to the public as we assume multiple roles in day-to-day life. Indeed, since public figures are typically our

¹²⁹ *Sipple v Chronicle Publishing Co.*, 201 Cal Rptr 665, 670 (Cal App 1st 1984).

¹³⁰ For a different view, see Rosen, *The Unwanted Gaze* at 48 (cited in note 93). Rosen describes "the brutal outing of Oliver Sipple" and recognizes the "psychological distress" it caused (Sipple eventually committed suicide), but concludes: "[D]espite the tragic personal consequences that often result from the disclosure of true but embarrassing private facts, it's appropriate, in a country that takes the First Amendment seriously, that invasion of privacy suits against the press rarely succeed."

¹³¹ *Dun and Bradstreet, Inc. v Greenmoss Builders*, 472 US 749, 776 (1985); *New York Times Co. v Sullivan*, 376 US at 271-72.

proxies and representatives in the public space and perform so many public functions for us—letting us preserve more of the private than we otherwise could—we arguably owe them space for at least some reciprocal measure of our own ambivalence and our own needs for privacy. When Justice Stevens says in *Bartnicki* that “[o]ne of the costs of participation in public affairs is an attendant loss of privacy,”¹³² he is making a descriptively true statement. But he seems to be using this inevitable descriptive truth as a justification for allowing the law itself to undermine privacies that can be preserved. Some people, of course, will enter public life even if they know that their lives will be lived on the front pages of newspapers; and there always will be some public figures complicitous in destroying their own potential privacy. Nevertheless, our legal regime should not compel those interested in public affairs to pay such a price against their will.

Reporting on sexual habits or on intimate family matters of public figures should generally be outside First Amendment protection, particularly when the information comes from circumstances of reasonably expected privacy. To be sure, media disclosures concerning these private matters can always be said to promote the greater accountability of public officials because there will always be some citizens who view those private matters as relevant to the official’s suitability for office.¹³³ But that, by itself, cannot justify First Amendment protection for such disclosures. Accountability in this expansive sense should not trump all other values. It is a very important value, but not our democratic society’s only value. If public figures should have some zone of protected privacy, then some limits on the media’s leeway to invade privacy will have to be accepted, even if this also means some limit on accountability. I am prepared to accept this, although many will disagree and al-

¹³² 121 S Ct at 1765.

¹³³ See Post, *The Social Foundations of Privacy* at 74–85 (cited in note 52); Geoffrey R. Stone, 90 Mich L Rev at 1262–63 (cited in note 120); Owen M. Fiss, *Do Public Officials Have a Right to Privacy?* in Dieter Simon and Manfred Weiss, eds, *Zur Autonomie des Individuums: Liber Amicorum Spiros Simitis* 91–98 (2001). For example, Professor Post writes: “The claims of public officials to a ‘private’ information preserve are simply overridden by the more general demands of the public for political accountability. . . . Because American law views the public, in its role as the electorate, as ultimately responsible for political decisions, the public is presumptively entitled to all information that is necessary for informed governance.” *Id* at 76, 78.

though I recognize, and would seek to minimize, the risks of chilling more legitimate press coverage. The law already recognizes some of these limits on the media. As Justice Stevens himself notes in *Bartnicki*, we forbid reporters from stealing documents and from wiretapping, even if these activities would provide newsworthy information.¹³⁴ A prohibition on publishing certain lawfully obtained information involves different concerns, of course. But where a democratically elected legislature seeks to give limited additional protection to the privacy of public officials, neither First Amendment principles nor a commitment to democratic self-government should necessarily bar this.

Indeed, as I argued above, information about the private lives of public officials so readily distracts us from their official actions that limiting press coverage of these private matters would likely enhance public discourse and public debate that is at the heart of the First Amendment's purposes. Such limitations could also strengthen the process of democratic self-government in other respects. In the name of improving the quality of official actions by enhancing public scrutiny, media coverage that intrudes on private matters can distort the personalities of public officials and damage their performance. In addition, it is widely believed that many talented people are being deterred from running for office or assuming senior political appointments because of a concern about the extreme loss of privacy that now must be expected for oneself and one's family. If there were greater protections for privacy, the political system as a whole could be strengthened by drawing greater numbers of talented people into public service.¹³⁵ As Justice Breyer has argued in a recent speech,¹³⁶ we should see the Constitution as a whole and read the First Amendment as a part of that whole—a document seeking to advance a system of effective democratic self-governance. Certain media restrictions to protect privacy, even though limiting the press' leeway, may in overall effect contribute positively to advancing public debate and democratic self-governance.

¹³⁴ 121 S Ct at 1764 n 19. See also *Wilson v Layne*, 526 US 603 (1999) (Fourth Amendment violated by media "ride-along" to accompany police during attempted execution of arrest warrant in a person's home).

¹³⁵ See, e.g., Fiss, *Do Public Officials Have a Right to Privacy?* at 94 (cited in note 133).

¹³⁶ Breyer, *Our Democratic Constitution* (cited in note 89).

There are too many special circumstances related to President Clinton's relationship with Monica Lewinsky to make that a prime example here (the presidency is arguably a special case; the information about President Clinton's relationship with Monica Lewinsky developed out of the Paula Jones legal proceeding and then became relevant to a possible perjury prosecution and impeachment, raising distinctive questions regarding the proper scope of discovery, sexual harassment law, and "high crimes and misdemeanors"; and adulterous sexual relationships had already become an issue in President Clinton's political campaigns and in political judgments about him). But whatever one thinks about that episode (I consider it to have been a distraction from the public's business), I would not interpret the First Amendment as categorically barring efforts to prevent media disclosures about the private sexual behavior of public officials. Nor should it bar restrictions on the publication of other intimate personal matters, such as information about their children or private photographs. Once again, relevance to matters of public concern could undoubtedly be drawn in most cases—sexual behavior may suggest something about a person's character or general willingness to take risks, family details may reveal something relevant to the public policies the official has articulated, etc. At times the relevance to public matters may indeed be substantial, and therefore publication addresses a legitimate public concern. But if we allow any articulated relevance to a public concern to justify publication, however weak that relevance is, we have eliminated privacy protection for public figures, and that is too extreme.¹³⁷

The constitutional law of other countries reinforces the reasonableness of the approach suggested here, or at least makes clear that our own Supreme Court's approach has judicial competitors. Other countries often take a significantly more privacy-protective and media-restrictive approach than we do. These countries, of

¹³⁷ "Public figures" from the entertainment world present somewhat different issues because such figures are typically less connected than public officials to the process of public deliberation and democratic self-government. Matters of public significance that might justify media publicity may therefore be less clearly involved. On the other hand, entertainment figures often utilize publicity about their private lives (including their sexual partners) to enhance their public image, so the interest in the privacy of personal facts may sometimes be less apparent. Nevertheless, in my judgment, there should still be protectable zones of privacy that the media may not invade—for example, publishing intrusively (if lawfully) secured photographs of entertainment figures with their children.

course, have somewhat different constitutional provisions, and I do not suggest that comparisons can be made in any simple fashion. But a few examples will illustrate that our Court has struck the speech/privacy balance quite differently from many other democratic countries with highly developed constitutional systems and a vibrant free press.

In Great Britain, for example, a well-known case quite analogous to *Bartnicki* was decided against the media, with more weight given to the fact that the published material had been unlawfully obtained. In *Francome v Mirror Group Newspapers Ltd.*,¹³⁸ an unknown person illegally bugged telephone conversations made to and from the home of a champion jockey—a criminal offense under British law. The *Daily Mirror*, a newspaper that had nothing to do with the bugging, obtained tapes of the telephone conversations and wanted to publish material based on them. Publication, the *Daily Mirror* said, was justified because the tapes revealed actions contrary to the public interest and possible criminal conduct by the jockey. The jockey sought to enjoin the *Daily Mirror's* publication of the material. The Court of Appeal upheld the trial judge's granting of an injunction pending full trial. Sir John Donaldson wrote, "I regard [the *Daily Mirror's*] assertion as arrogant and wholly unacceptable. . . . If . . . the *Daily Mirror* can assert this right to act on the basis that the public interest, as [it] sees it, justifies breaches of the criminal law, so can any other citizen."¹³⁹

The Supreme Court of Germany and the German Constitutional Court, the most influential constitutional court in Europe, have developed a rich speech/privacy jurisprudence that is very different from ours conceptually, and that yields quite different results in particular cases, including one quite similar to *Bartnicki*. What we in the United States call the right to privacy is protected in Germany by the constitutional right to "the free development

¹³⁸ 2 All ER 408 (CA 1984).

¹³⁹ Sir John Donaldson added: "The media . . . are an essential foundation of any democracy. In exposing crime, anti-social behavior and hypocrisy and in campaigning for reform and propagating the views of minorities, they perform an invaluable function. However, they are peculiarly vulnerable to the error of confusing the public interest with their own interest. . . . In the present case, pending a trial, it is impossible to see what public interest would be served by publishing the contents of the tapes which would not equally be served by giving them to the police or to the Jockey Club. Any wider publication could only serve the interests of the *Daily Mirror*." *Id.* at 413.

of one's personality"¹⁴⁰ in conjunction with the right to "human dignity."¹⁴¹ The personality right "comprises the authority of the individual to decide for himself—based on the idea of self-determination—when and within what limits facts about one's personal life should be disclosed."¹⁴² The right is conceptualized as a right to "informational self-determination."¹⁴³ The individual, however, "has to accept limitations on his right to informational self-determination for reasons of a predominant public interest." "In formulating enactments," the Constitutional Court has said, the legislature "has to observe the principle of proportionality"¹⁴⁴—"proportionality" being the widely invoked concept of balancing in many constitutional courts and supreme courts around the world.¹⁴⁵

The German courts have decided several cases addressing the balance between the right to "informational self-determination" and "freedom of the press." The courts' analysis, of course, depends upon a constitutional context quite different from ours: the privacy right is expressly protected by the German Constitution and applies to relationships among citizens, not simply between the citizen and the state. But the comparison is instructive. The *Bartnicki*-type case involved a suit against the magazine *Stern* for publishing the transcript of an illegally taped telephone call between two senior political party officials about political matters in Germany.¹⁴⁶ *Stern* knew that the information had been obtained unlawfully but had not participated in the intrusion. The German Supreme Court concluded that the plaintiffs' "personality" right was violated and that the defendant's "free press" right was not.

¹⁴⁰ Grundgesetz (Basic Law), Art 2. The English translations of the German materials discussed here are taken from Paul Gewirtz and Jacob Katz Cogan, *Global Constitutionalism: Privacy, Proportionality, The Political Case* (2001) (hereafter cited as *Global Constitutionalism*). Grundgesetz (Basic Law), Art 2, appears in *Global Constitutionalism* at II-27.

¹⁴¹ Grundgesetz (Basic Law), Art 1, in *Global Constitutionalism* at II-27.

¹⁴² *Census Act Case*, BVerfGE, 1 (1983), in *Global Constitutionalism* at I-3.

¹⁴³ *Id.* at I-4. The right is understood as not only contributing to an individual's personal development but as also contributing to "the common good" because informational self-determination fosters important elements of a "free democratic community" such as "communication" and "participation." *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ See Part IV (discussing proportionality).

¹⁴⁶ *On the Limits Placed on the Press by the Personality Right*, BGHZ 73, 120 (1978), in *Global Constitutionalism* at II-25.

"[B]alancing the conflicting interests,"¹⁴⁷ the Court concluded that "[o]nly a very grave public need to be informed could possibly justify" publishing the transcript of the phone call, which exposed the "personal sphere . . . in an unusually intrusive form."¹⁴⁸ That "grave public need" did not exist in this case, even though public officials were involved and the conversation concerned their public functions.

In another important decision, the German Constitutional Court ruled that Princess Caroline of Monaco's "personality" rights were violated by magazines that published photographs of her and her boyfriend in a garden cafe which had "the characteristics of . . . a sphere of seclusion" even though members of the public were present, as well as photographs of Princess Caroline with her children on a street and in a canoe.¹⁴⁹ The publication of other photographs showing Princess Caroline in "the public sphere" was held not to violate her personality rights.

In a well-known Indian speech/privacy case, the Supreme Court of India stated that "[t]he sweep of the First Amendment to the United States Constitution and the freedom of speech and expression under our Constitution is not identical though similar in their major premises."¹⁵⁰ Among these differences, the Indian Court concluded that a "proper balancing of the freedom of press" and the "right to privacy" means that "the victim of a sexual assault, kidnap, abduction or alike offense should not further be subjected to the indignity of her name and the incident being publicised in press/media."¹⁵¹

Lastly, the Supreme Court of Canada, which is generally strongly press-protective, has upheld a damages action for the un-

¹⁴⁷ Id at II-30. As a general matter, the Court observed, "[t]he more the information is private in character and the more it involves personal interests in keeping it secret and the more it involves personal harm, the greater the 'public value' will have to be if the press wants to disregard the person's wish in keeping it [private]." Id at II-31. Note the similarity to Justice Breyer's balancing approach in *Bartnicki* and his conclusion there that "the speakers' legitimate privacy expectations are unusually low, and the public interest in defeating those expectations unusually high." 121 S Ct at 1768.

¹⁴⁸ *Global Constitutionalism* at II-27. The Court, in a crucial conceptualization, observed that the taped conversation "addressed very *personal* concerns, even though these were still related to their *public* occupations." Id at II-26 (emphasis added).

¹⁴⁹ *Princess Caroline of Monaco Case*, BVerfGE 101, 361 (1999), in *Global Constitutionalism* at II-33.

¹⁵⁰ See *Rajagopal v State of Tamil Nadu*, 6 S C C 632, 648 (1994).

¹⁵¹ Id at 648, 650.

authorized publication of a photograph that a magazine photographer had taken of the plaintiff in a public place and published without that person's consent.¹⁵² In doing so, the Canadian Court specifically disagreed with American constitutional law. The Court held that "the right to one's image is included in the right to respect for one's private life" protected by the Quebec Charter, that the "freedom of expression" was also involved here, and that it was necessary "to balance these two rights."¹⁵³ The Supreme Court of Canada rejected the approach of the Court of Appeal that "the public's right to information will prevail where the expression at issue concerns information that is 'socially useful.'"¹⁵⁴ The Court stated:

This notion seems to have been borrowed from American law A photograph of a single person can be "socially useful" because it serves to illustrate a theme. That does not make its publication acceptable, however, if it infringes the right to privacy. We do not consider it appropriate to adopt the notion of "socially useful" for the purposes of legal analysis. . . . Only one question arises, namely the balancing of the rights at issue. It must, therefore, be decided whether the public's right to information can justify dissemination of a photograph taken without authorization. . . . In our view, the artistic expression of the photograph, which was alleged to have served to illustrate contemporary urban life, cannot justify the infringement of the right to privacy it entails. It has not been shown that the public's interest in seeing this work is predominant. . . . [F]reedom of expression must be defined in light of the other values concerned.¹⁵⁵

No other democratic country forbids restrictions on expressive conduct as completely as the United States. Supreme courts and constitutional courts in most other democracies give greater weight to values of privacy and human dignity when they conflict with free speech claims, and they therefore are more inclined to permit legal actions against privacy invasions, libel, and hate speech. They also permit the state to play a much greater role in assuring wider public access to the media even though some restriction on the speech of others is involved. Although the consti-

¹⁵² *Aubry v Editions Vice-Versa Inc.*, 1 S C R 591 (1998).

¹⁵³ *Id.* at 615, 616.

¹⁵⁴ *Id.* at 617.

¹⁵⁵ *Id.* at 617-18.

tutional rules in these countries are somewhat different, the press is vibrant and robust. The glories of the American free speech tradition have had great and greatly beneficial influence worldwide. But to other countries, our current free speech doctrines seem to have become quite extreme, and our current law indeed is at the far end of the spectrum. Thus, far from being aberrational, giving more weight to privacy in speech/privacy cases would move American free speech law closer to the global democratic mainstream.

IV

Justice Breyer's concurring opinion in *Bartnicki*, while directly relevant for its treatment of the speech/privacy tension, deserves further comment because of its wider implications for First Amendment analysis generally. Many of Justice Breyer's key moves in *Bartnicki*—his conceptualization of speech on both sides of the constitutional analysis, his receptivity to some restrictions on speech where doing so would produce important "privacy and speech-related benefits," his utilization of flexible proportionality analysis—are part and parcel of an important new approach to First Amendment analysis that Justice Breyer has been developing in various separate opinions over the last several years.¹⁵⁶ He has recently developed these views further in his ambitious Madison Lecture,¹⁵⁷ placing his First Amendment views in the context of a wider constitutional theory that emphasizes "participatory self-governance" as a central theme in constitutional law generally.

Breyer's First Amendment approach has several key elements:

1) The First Amendment's protection of "the freedom of speech" seeks not only to prevent government restrictions on speech, but also to "enhanc[e]" speech,¹⁵⁸ "to facilitate . . . public discussion and informed deliberation,"¹⁵⁹ and to help advance "the

¹⁵⁶ See *Turner Broadcasting System, Inc. v Federal Communications Commission*, 520 US 180, 225–29 (1997) (Breyer concurring in part); *Nixon v Shrink Missouri Government PAC*, 528 US 377, 399–405 (2000) (Breyer concurring); *United States v Playboy Entertainment Group, Inc.*, 529 US 803, 835–47 (2000) (Breyer dissenting); *Bartnicki v Vopper*, 121 S Ct 1753, 1766 (2001) (Breyer concurring); *United States v United Foods, Inc.*, 533 US 405, 450–59 (2001) (Breyer dissenting).

¹⁵⁷ Breyer, *Our Democratic Constitution* (cited in note 89).

¹⁵⁸ *Bartnicki v Vopper*, 121 S Ct at 1766.

¹⁵⁹ *Turner Broadcasting System, Inc. v Federal Communications Commission*, 520 US at 227.

Constitution's general participatory self-government objective."¹⁶⁰ In others words, the freedom of speech is not only a negative liberty but also an "active liberty,"¹⁶¹ concerned with "encouraging the exchange of ideas,"¹⁶² "encouraging . . . public participation and open discussion,"¹⁶³ "assuring that the public has access to a multiplicity of information sources,"¹⁶⁴ "facilitat[ing] . . . informed deliberation,"¹⁶⁵ and "prevent[ing]" the speech of "a few from drowning out the many."¹⁶⁶

2) Current First Amendment cases tend to see the restriction of speech as the only free speech interest in the picture. However, many challenged laws enhance the speech of some people while restricting the speech of others. The "speech-enhancing"¹⁶⁷ dimensions of such laws promote First Amendment interests even though other aspects of these laws restrict First Amendment interests. Thus, in one of Breyer's central ideas, reiterated in *Bartnicki*, "[C]onstitutionally protected interests lie on both sides of the legal equation."¹⁶⁸

3) Once one accepts that "constitutionally protected interests lie on both sides of the legal equation," conventional First Amendment doctrine becomes less useful and less appropriate. Under the conventional doctrines, laws that directly restrict speech typically trigger "strict scrutiny"—a strong presumption against a law's constitutionality, which almost always condemns the law to invalidation. But where laws have speech-enhancing elements as well as speech-restricting ones, Justice Breyer says, the proper constitutional analysis must involve balancing of these interests. The key question should be one of "proportionality"—whether the "laws impose restrictions on speech that are disproportionate

¹⁶⁰ Breyer, *Our Democratic Constitution* at 6 (cited in note 89).

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Nixon v Shrink Missouri Government PAC*, 528 US at 401.

¹⁶⁴ *Turner Broadcasting System, Inc. v Federal Communications Commission*, 520 US at 227 (citation omitted).

¹⁶⁵ *Id.*

¹⁶⁶ *Nixon v Shrink Missouri Government PAC*, 528 US at 402.

¹⁶⁷ *Bartnicki v Vopper*, 121 S Ct at 1766.

¹⁶⁸ *Id.* at 400.

when measured against their corresponding . . . speech-related benefits."¹⁶⁹

4) Because the First Amendment seeks to advance "the Constitution's general participatory self-government objective" and not simply to "protect[] the individual's 'negative' freedom from governmental restraint,"¹⁷⁰ First Amendment doctrine must "distinguish among areas, contexts, and forms of speech."¹⁷¹ Nearly every human action involves speech, and strict scrutiny is inappropriate in evaluating restrictions on commercial speech, government speech, or the speech of government employees. If the First Amendment is interpreted more expansively, it would impose "a serious obstacle to the operation of well-established, legislatively created, regulatory programs, thereby seriously hindering the operation of that democratic self-government that the Constitution seeks to create and to protect."¹⁷²

Using these new building blocks of First Amendment analysis, Justice Breyer's separate opinions over the past few years take a more tolerant approach to laws limiting the speech of some in order to enhance the overall system of free expression.¹⁷³ He has shown greater tolerance for campaign finance laws that limit campaign contributions and spending so that the speech of "a few" does not "drown[] out the many."¹⁷⁴ He has embraced a more tolerant approach to telecommunications laws that open communications pathways such as cable to more diverse voices, even though the speech interests of the cable owners are somewhat restricted.¹⁷⁵ And, in *Bartnicki*, he showed a more tolerant approach to legislation that restricts the media in order to promote the privacy of communications and thereby "foster[] private speech."

¹⁶⁹ 121 S Ct at 1766.

¹⁷⁰ *Id.*

¹⁷¹ Breyer, *Our Democratic Constitution* at 10 (cited in note 89).

¹⁷² *United States v United Foods, Inc.*, 121 S Ct at 2346 (2001).

¹⁷³ As Jeffrey Rosen has noted in a recent article, Justice Breyer "is certainly the first Supreme Court justice to embrace this view of the First Amendment wholeheartedly, and to apply it consistently across a variety of cases." Jeffrey Rosen, *Modest Proposal: Stephen Breyer Restrains Himself*, *The New Republic* (Jan 14, 2002), 21, 24. Academic writing that has explored somewhat similar ideas in recent years include Fiss, *Liberalism Divided* (cited in note 96); Fiss, *The Irony of Free Speech* (cited in note 96); Sunstein, *Democracy and the Problem of Free Speech* (cited in note 111); and Post, *Constitutional Domains* (cited in note 52).

¹⁷⁴ *Nixon v Shrink Missouri Government PAC*, 528 US at 400.

¹⁷⁵ *Turner Broadcasting System, Inc. v Federal Communications Commission*, 520 US at 225.

Justice Breyer also seems willing to look at the constitutional equation in speech cases with greater receptivity for values on the "other side" that are not themselves "speech-enhancing." In *Bartnicki*, Breyer balanced the speech restrictions of the challenged law against both the "privacy and speech-related benefits" of the law,¹⁷⁶ not just the speech-related ones. In another First Amendment decision last term, Justice Breyer would have allowed the government to burden commercial speech in order to further rather ordinary economic regulation.¹⁷⁷ And in a case decided the prior year, Breyer wrote a dissenting opinion stating that he would uphold a statutory limit on the programming leeway of cable operators where the value on the "other side" was protecting children from indecent programming.¹⁷⁸

These decisions represent an important new approach to the First Amendment on the Supreme Court. Breyer's core substantive idea is that in our constitutional system of participatory self-government, the First Amendment's role is not simply to protect individuals from direct government restraints on speech. "Freedom of speech" means a system of free expression that provides speakers wide opportunities for public and private expression, provides listeners diverse sources of information, encourages meaningful interactions between speakers and listeners, and fosters greater public participation. This sometimes requires restrictions on speech, but these can be justifiable where they enhance the overall system of free expression.

Breyer's opinions also indicate that he would modestly recalibrate the balance between speech and other interests to take account of contemporary threats to free speech as well as to other social interests. He clearly believes that current First Amendment law has tilted somewhat too decisively in the direction of protecting speech interests and does not give enough weight in certain contexts to other important interests such as privacy, human dignity, protecting children, and equality. Suggesting modifications in our free speech law undoubtedly causes concern in some quarters. But to preserve free speech, Justice Breyer suggests, the Court

¹⁷⁶ 121 S Ct at 1766-67.

¹⁷⁷ *United States v United Foods, Inc.*, 121 S Ct at 2346.

¹⁷⁸ *United States v Playboy Entertainment Group, Inc.*, 529 US at 835.

must be attentive to serious new threats that imperil free speech; and where there are serious new threats to other values, and laws can address them without significantly weakening free speech, the Constitution should not be interpreted to stand in the way.

Breyer's conception of constitutional rights as protecting "active liberty" has another interrelated effect—one with potentially general implications for constitutional law. Under conventional constitutional analysis, burdens on speech or privacy imposed by nongovernmental entities do not violate the First Amendment because of the state action doctrine. Therefore, in a case like *Bartnicki*, Title III's governmental interference with the media would come under First Amendment scrutiny, but the private broadcaster's interference with speech by publishing illegally intercepted conversations does not. Conceptualizing freedom of speech as an "active liberty," however, enables Justice Breyer to characterize the interests on both sides of the dispute as "constitutional interests." I do not understand Breyer to be saying that there is an independently enforceable constitutional right of free speech against nongovernmental interference, or to be saying that the state has a judicially enforceable constitutional obligation to protect speech from private interference (at least not yet). But his view does lead to a different understanding of the permissible roles of the state. In understanding free speech as an "active liberty," and the First Amendment as having positive goals of fostering an overall system of free expression, Justice Breyer sees state action that protects speech from private interference as furthering the same democracy-enhancing objective as the First Amendment and thereby furthering a "constitutional interest."¹⁷⁹ This allows him to give the privacy side of the equation in *Bartnicki* heightened stature (and greater weight) in the constitutional analysis, and in other contexts to uphold state actions that "strike a reasonable balance between their . . . speech-restricting and speech-enhancing consequences."¹⁸⁰

The basic questions raised are not only whether this recalibrated balance is called for but also whether courts can be trusted to im-

¹⁷⁹ Breyer, *Our Democratic Constitution* at 6–7 (cited in note 89).

¹⁸⁰ *Id.* at 7.

plement it. Justice Breyer's analysis requires judges to determine not only whether the government has imposed a substantial burden on someone's speech, but whether the overall balance of speech-restricting and speech-enhancing benefits of a law is reasonable. In at least some areas, such as laws governing election campaigns, this invites courts to assess the overall fairness and balance of public debate—is the voice of a few “drowning out the voice of the many”?—and creates a risk that courts will consciously or unconsciously favor certain points of view in making their assessment. But the question is which risk is greater: the risks of an unregulated speech market (which risks a bias in favor of certain interests and viewpoints) or the risks of some regulatory efforts to foster more open and balanced debate (which risks smuggling in certain biases in the drafting of such legislation and in the judicial assessment of its fairness).

The balancing may be even more difficult where values other than speech are weighed against speech. In his separate opinions, Justice Breyer has indicated several values other than speech (or clear and present danger) that might justify certain restrictions on speech: protecting children from sexually explicit speech, protecting privacy (in its nonspeech dimensions), and economic regulation (where the restriction was on commercial speech). It is unclear how far Justice Breyer is prepared to go in this direction, what values are sufficiently important to justify speech restrictions, or how such balances will be made. Where speech is “on the other side of the equation,” the justification for restricting speech is the same constitutionally rooted speech value, and at least in theory there is a common metric (e.g., enhancement of diversity of viewpoints). But where nonspeech values are on the other side, the justification for restricting speech will typically not itself be a constitutional value and, in addition, there will be no common metric. For those who consider free speech to be highly vulnerable in our society, and who greatly distrust whether legislatures and judges will adequately protect it, allowing nonspeech values to trump speech values will always be a very risky business (and especially so in times of national stress). In short, questions and concerns are understandable. But based on the evidence thus far, Justice Breyer has applied his approach in a finely tuned way that is taking more open and fuller account of the complex contending interests genuinely at stake, yet also remaining strongly speech-protective.

Justice Breyer's approach is also significant in its method. His opinions reveal a growing skepticism about the complex array of doctrinal formulas that now make up First Amendment law, a concern that they invite "mechanical"¹⁸¹ applications and do not keep in view the purposes of the First Amendment or take open account of the full complexities and likely consequences of decisions or readily accommodate new social realities. Justice Breyer favors a more explicit and multifactored balancing of interests. In *Bartnicki*, for example, he rejects strict scrutiny, but does not embrace any other existing "test." Rather, he says:

I would ask whether the statutes strike a reasonable balance between their speech-restricting and speech-enhancing consequences. Or do they instead impose restrictions on speech that are disproportionate when measured against their corresponding privacy and speech-related benefits, taking into account the kind, the importance, and the extent of these benefits, as well as the need for the restrictions in order to secure those benefits?¹⁸²

As the word "disproportionate" in this passage indicates, one of the most striking things about Breyer's approach is that he has begun to embrace a formulation of balancing widely used by supreme courts and constitutional courts in other leading democracies: "proportionality." "Proportionality" is a general element of constitutional analysis used by these courts in diverse areas of constitutional law,¹⁸³ but it has not in so many words entered American

¹⁸¹ *Nixon v Shrink Missouri Government PAC*, 528 US at 400; *United States v Playboy Entertainment Group, Inc.*, 529 US at 841.

¹⁸² 121 S Ct at 1766.

¹⁸³ An analysis of the concept of "proportionality" as used by other countries' supreme courts and constitutional courts is beyond the scope of this article. For a fuller discussion, see Paul Gewirtz and Jacob Katz Cogan, *Global Constitutionalism* at IV-1-98 (cited in note 140). Examples of cases from other jurisdictions discussing and applying the proportionality concept include: *Lebach Case*, BVerfGE 35, 202 (1975) (Constitutional Court of Germany); *Cannabis Case*, BVerfGE 90, 145 (1994) (Constitutional Court of Germany); *Reiten im Walde Case*, BVerfGE 80, 137 (1989) (Constitutional Court of Germany); *R. v Oakes*, 1 S C R 103 (1986) (Supreme Court of Canada); *Dagenais v CBC*, 3 S C R 835 (1994) (Supreme Court of Canada); *Thomson Newspaper v Canada (A.G.)*, 1 S C R 877 (1998) (Supreme Court of Canada); *Decision Dated April 26, 1995 (K.11/94)* (Constitutional Court of Poland), in *Constitutional Tribunal, a Selection of the Polish Constitutional Tribunal's Jurisprudence from 1986 to 1999*, at 153-58 (1999); *United Mizrahi Bank Ltd. v Migdal Village*, 49 (4) P D 221 (1995) (Supreme Court of Israel). See also P. van Duk and G. J. H. van Hoof, *Theory and Practice of the European Convention on Human Rights* 80-82 (3d ed 1998); Walter van Gerven, *The Effect of Proportionality on the Actions of Member States of the European Community: National Viewpoints from Continental Europe*, in Evelyn Ellis, ed, *The Principle of Proportionality in the Laws of Europe: A Comparative Study* (1999).

constitutional law. Justice Breyer has been the boldest of the current U.S. Supreme Court Justices in drawing upon concepts and examples from the constitutional jurisprudence of other countries, including "proportionality."¹⁸⁴ His concurrence in *Nixon v Shrink Missouri Government PAC*, for example, explicitly cited "proportionality" cases from the European Court of Human Rights and the Supreme Court of Canada, with Breyer writing:

[W]here a law significantly implicates competing constitutionally protected interests in complex ways[,] the Court has closely scrutinized the statute's impact on those interests, but refrained from employing a simple test that effectively presumes unconstitutionality. Rather, it has balanced interests. And in practice that has meant asking whether the statute burdens any one such interest in a manner out of proportion to the statute's salutary effects upon the others (perhaps, but not necessarily, because of the existence of a clearly superior, less restrictive alternative). . . . [This approach] is consistent with that of other constitutional courts facing similar complex constitutional problems.¹⁸⁵

In his dissent in *United States v Playboy Entertainment Group, Inc.*, he counsels the Court "not to apply First Amendment rules mechanically, but to decide whether, in light of the benefits and potential alternatives, the statute works speech-related harm (here to adult speech) out of proportion to the benefits that the statute seeks to provide (here, child protection)."¹⁸⁶ His recent Madison

¹⁸⁴ In addition to the "proportionality" concept, Justice Breyer has referred to other countries' constitutional law in other respects. See, e.g., *Printz v United States*, 521 US 898, 976-77 (1997) (Breyer dissenting) (discussing other countries' approach to federalism); *Nixon v Shrink Missouri Government PAC*, 528 US 377, 403 (2000) (Breyer concurring) (discussing other countries' approach to campaign finance); Breyer, *Our Democratic Constitution* at 7 (cited in note 89) (referring to same); *Knight v Florida*, 528 US 990 (1999) (Breyer dissenting from denial of certiorari) (discussing other countries' treatment of delays in capital punishment executions). In speeches he has also spoken approvingly of the fact that "[j]udges who enforce the law as well as those who write it increasingly turn to the experience of other nations when deciding difficult open questions of substantive law, particularly human rights law. . . ." He notes that U.S. courts "less frequently refer to judicial opinions from abroad" than other courts do, and has called upon American lawyers and academics to "themselves become familiar with foreign material relevant to particular legal disciplines and facilitate the judicial use of that material." Stephen Breyer, Dinner Keynote Speech, International Symposium on Democracy and the Rule of Law in a Changing World Order, New York University Law School, March 9, 2000 (copy on file with author).

¹⁸⁵ 528 US at 402, 403 (citations omitted).

¹⁸⁶ 529 US at 841. Citing his own separate opinion in *Bartnicki*, Justice Breyer also invoked the idea of proportionality in last term's dissent in *United States v United Foods, Inc.*, a commercial speech case:

Several features of the program indicate that its speech-related aspects, i.e., its compelled monetary contributions, are necessary and proportionate to the legiti-

Lecture is the most direct: "The basic question the Court should ask is one of proportionality."¹⁸⁷

It is fair to ask whether this balancing or "proportionality" review invites too much subjectivity and arbitrariness from judges. The question, of course, is not whether we trust judges like Justice Breyer to engage in this kind of balancing, but whether we trust our adjudicative system as a whole. I remain of two minds about this. Concerns about subjectivity and arbitrariness in balancing are altogether legitimate. But the system of doctrinal rules that we have now itself invites subjectivity and arbitrariness, both in deciding what rule to apply in a particular circumstance and in applying the selected rules. The variety of different doctrinal rules in contemporary First Amendment law—"strict scrutiny," "intermediate scrutiny," the *Daily Mail* principle, "clear and present danger," the *New York Times Co. v. Sullivan* test, content neutrality, prior restraint, "public forum" rules, rules for commercial speech and other "low-value" speech, etc.—reflects the complexities of the balances that need to be made and continuing disagreements about the appropriate approach. As the invocation of both "intermediate scrutiny" and "the *Daily Mail* principle" in the *Bartnicki* litigation itself demonstrates, the current doctrinal cacophony creates remarkable leeway for choosing which doctrinal rule to apply as well as what result to reach. Interest balancing often occurs, but not in a fully open way.

In this rather chaotic doctrinal situation, and in circumstances of social and technological change that create new background conditions, an open recognition of the factors at stake and a more direct consideration and debate about the values in the balance have distinctive value. With more open balancing, a fuller range of factors can be made visible. Justice Breyer's use of balancing and proportionality analysis has a refreshing candor and lucidity, and his very openness about the factors at work for him is a constraint on subjectivity.¹⁸⁸ What he says in his Madison Lecture

mate promotional goals that it seeks. . . . [At] the same time, those features of the program that led [dissenters in an earlier case] to find its program disproportionately restrictive are absent here. . . . In consequence, whatever harm the program may cause First Amendment interests is proportionate.

533 US at 457.

¹⁸⁷ Breyer, *Our Democratic Constitution* at 7 (cited in note 89).

¹⁸⁸ See Rosen, *Modest Proposal* at 25 (cited in note 173).

about his pragmatic attention to "consequences" is as applicable to his balancing approach generally: An approach that exclusively emphasizes "language, history, tradition, or prior rules," at least in the "borderline" cases, will "produce a decision which is no less subjective but which is far less transparent than a decision that directly addresses consequences in constitutional terms."¹⁸⁹ In addition, many of the existing rules would still have value as guidelines because they reflect and crystalize past experience about where the balance should lie. The balancing inquiry may eventually lead to new guidelines. The debate about rules versus balancing is a perennial one in law, of course, and such persistence is usually a sign that there are real advantages and disadvantages to the contending approaches.¹⁹⁰ But in this context, the case for more open balancing appears strong, at least when compared to the current doctrinal rules.

Justice Breyer is developing the most important new ideas about the First Amendment on the Supreme Court since Justices Brennan and Black. To say the least, it will be interesting to watch how his ideas evolve, and to see whether they will come to shape First Amendment doctrine on the Court as a whole.

CONCLUSION

In the particular area of privacy and speech, *Bartnicki* demonstrates that there is currently no single view that a majority of the Justices shares. But a majority does seem prepared to allow some new restrictions on speech to protect privacy. This is a development to be praised. But even in this area, working out the details of a new approach will be difficult, requiring elaboration of the complexities of privacy in its speech and nonspeech dimensions,

¹⁸⁹ Breyer, *Our Democratic Constitution* at 22 (cited in note 89).

¹⁹⁰ See, e.g., Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 Harv L Rev 54 (1997); Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 Harv L Rev 22 (1992); T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 Yale L J 943 (1987); Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, 68 BU L Rev 917 (1988); Paul Kahn, *The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell*, 97 Yale L J 1 (1987); Charles Fried, *Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test*, 76 Harv L Rev 755 (1963).

the complexities of different understandings of the role of speech and press in society, and a finely tuned accommodation of the competing interests. Above all, it will require the most sensitive attention to the risks that always attend limitations of speech. The only justification for taking these risks is the judgment—which I have now reached—that the risks of not doing so are greater.