M E M O R A N D U M

LDRC Prepublication/Prebroadcast Review Subcommittee Report: News Gathering Practices After *Bartnicki v. Vopper*

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NEWS GATHERING PRACTICES AFTER *BARTNICKI V. VOPPER*

I. INTRODUCTION

In *Bartnicki v. Vopper*,[1] the United States Supreme Court held that a radio station could not be held liable under the federal and Pennsylvania wiretapping acts for disclosing the contents of an illegally intercepted and taped cellular telephone conversation on the grounds that the contents of the conversation concerned a matter of public importance and the station played no role in the illegal interception. As one of the Supreme Court's rare forays into the area of news gathering and as a decision addressing the tension between full and free dissemination of information and individual privacy, *Bartnicki* provides important guidance for reporters and media lawyers beyond its narrow statutory and factual context.

This memorandum discusses certain broader implications of *Bartnicki* for news gathering activities in connection with arguably private information, particularly when obtained by illegal or other questionable means. Specifically, *Bartnicki* highlights three variables in assessing the risk of liability for news gathering in such circumstances –

(1) the level of invasiveness typically associated with the method or means by which the information obtained, *i.e.*, a surreptitiously taped phone call versus a consensual interview;

(2) the reporter's role in obtaining the information, *i.e.*, direct participation versus passive receipt; and

(3) the level of public interest, or newsworthiness, of the information obtained.

Particularly in the wake of *Bartnicki*, media lawyers giving pre-publication counseling should consider each of these variables when determining whether to recommend or approve a particular news gathering tactic.

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[1] 532 U.S. 514, 535 (2001).

II. THE *BARTNICKI* DECISION

Gloria Bartnicki and Anthony Kane represented a Pennsylvania teacher's union involved in collective bargaining negotiations with a local school board. In May, 1993, an unidentified person intercepted and recorded a cellular phone call in which Bartnicki and Kane discussed the status of their negotiations with the school board. During the conversation, Kane remarked that if school board members refused to compromise "we're gonna have to go to . . . their homes" and "blow off their front porches, we'll have to do some work on some of those guys."[2]

The tape recording found its way into the mailbox of Jack Yocum, the leader of a local taxpayer's group. Yocum gave the tape to Frederick Vopper, a local radio commentator, who played the tape on his radio show. Bartnicki and Kane then sued Yocum, Vopper, and other radio stations that broadcast the tape, seeking civil damages in federal district court under state and federal wiretapping laws.[3]

Justice Stevens wrote the opinion for the six-member *Bartnicki* majority, emphasizing three facts that distinguished *Bartnicki* from other cases that have arisen under the federal wiretapping act: (1) the media defendants played no role in the initial illegal interception; (2) the media defendants obtained the information lawfully; and (3) the information contained on the tape was a "matter of public concern."[4] After acknowledging the principle that "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need . . . of the highest order," the majority proceeded to note the importance of the government's interest

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2 *Id*. at 519.

3 18 P.S. § 5725; 18 U.S.C. § 2511.

4 *Bartnicki*, 532 U.S. at 525.

in "minimizing the harm to persons whose conversations have been illegally intercepted."[5] Moreover, the opinion recognized that "fear of public disclosure of private conversations might well have a chilling effect on private speech."[6] The majority noted, however, that these privacy interests must be weighed against the media's legitimate interest in publishing matters of public concern, and ultimately concluded that, in the circumstances presented, the media's right to publish such information outweighed the privacy interests of those persons the federal wiretapping act was intended to protect.[7] In so holding, the majority was careful to state that it was not deciding whether the First Amendment protects publication of purely private matters, such as trade secrets or domestic gossip and declined to address that issue.[8]

Justices Breyer and O'Connor joined in the majority opinion, but also wrote and joined respectively in a separate concurring opinion that potentially limits the holding of the majority.[9] Specifically, the Justices agreed with the majority's "narrow" holding as limited to the facts presented by *Bartnicki*. The concurring opinion emphasized that the media acquired the tape lawfully, explaining that the media defendants had not "ordered, counseled, encouraged, or otherwise aided or abetted the interception."[10] The opinion also reasoned that Bartnicki and Kane had "little or no *legitimate* interest" in maintaining the privacy of that particular conversation because they were limited public figures who voluntarily "subjected themselves to

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5 *Id.* at 529.

6 *Id*. at 533.

7 *Id*. at 535.

8 *Id*. at 533.

9 *Id*. at 535.

10 *Id*. at 538.

somewhat greater public scrutiny."[11] Further, the opinion noted that the tapes disclosed information of "*unusual* public concern, namely a threat of potential physical harm to others."[12]

Justice Breyer explicitly stated that the Court's holding "does not imply a significantly broader constitutional immunity for the media."[13] Furthermore, his opinion suggests that he would not extend the Court's holding far beyond the specific facts of *Bartnicki*. The concurring opinion of Justice Breyer, joined by Justice O'Connor, is important because their votes were crucial to formation of the majority's voting bloc. This suggests that, taking into account the three dissenting Justices, "[a]t least five Justices appear willing to uphold a penalty imposed on the press for disclosing the fruits of someone else's illegal interception, if the circumstances are sufficiently different" from those of *Bartnicki*.[14]

III. THE IMPLICATIONS OF *BARTNICKI* FOR NEWS GATHERING

In one sense, *Bartnicki* is unusual because it involved electronically intercepted communications that are governed by state and federal criminal statutes and because such electronic interception is a particularly intrusive means of obtaining information.[15] Nevertheless, the tension referred to in *Bartnicki* between "the interest in the full and free dissemination of information concerning public issues", and "the interest in individual privacy and . . . fostering

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11 *Bartnicki*, 532 U.S. at 539.

12 *Id*. at 535 (emphasis added).

13 *Id*.

14 Paul M. Smith & Nory Miller, *When Can the Courts Penalize the Press Based on Newsgathering Misconduct?*, COMMUNICATIONS LAWYER, Summer 2001, at 28.

15 *See* Paul Smith & Leondra Kruger, *Post-Bartnicki v. Vopper: Complicity of the Press*, 2 Libel Defense Resource Center Bulletin 33, 52 (2002).

private speech"[16] both pre-dates *Bartnicki* and applies to all sorts of arguably private information. For example, this tension underlies the common law torts of intrusion and of public disclosure of private facts, both of which have been invoked against the media on many occasions. In addition, the concerns expressed in *Bartnicki* regarding acquisition of information of a private nature as well as the public interest in publishing such information apply to investigative reporting more generally.

Considered more broadly, the majority and concurring opinions in *Bartnicki* suggest three principal variables that bear on whether a given instance of news gathering involving the publication of at least arguably private information will give rise to liability – (1) the level of invasiveness typically associated with the method or means by which the information obtained, *i.e.*, a surreptitiously taped phone call versus a consensual interview; (2) the reporter's role in obtaining the information, *i.e.*, direct participation versus passive receipt; and (3) the level of public interest, or newsworthiness, of the information obtained. These variables, and the interrelationships among them, provide important considerations for media lawyers, editors, and reporters.

A. The Level of Intrusion

Some examples from *Bartnicki* and other cases are helpful in fleshing out these three variables. With respect to the first variable, both the majority and concurring opinions emphasized not only the illegality associated with taping telephone conversations, but also the private nature of these conversations, and, correspondingly, the particularly intrusive nature of wiretapping such conversations.[17] Yet another example implicating this variable was the

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16 *Bartnicki*, 532 U.S. at 518.

17 *Id.* at 531-32; *id.* at 537 (concurring opinion).

infamous Cincinnati Enquirer series in which a reporter, with assistance from a Chiquita lawyer, broke into the company's voice mail system.[18] A special prosecutor was appointed to investigate the reporter's newsgathering techniques and the newspaper. Eventually, the reporter eventually pled guilty to "one count of unlawful interception of wire communications and one count of unauthorized access to computer systems."[19] Additionally, Chiquita "filed an extensive civil complaint against the reporter . . . which was resolved as part of the criminal settlement."[20] The Cincinnati Enquirer published a front-page apology for three days and paid Chiquita ten million dollars to avert a lawsuit.[21]

By contrast to intercepted telephone calls or voicemail messages, a lower expectation of privacy appears to apply to documents, even those protected from disclosure by statutes, court orders, or doctrines like trade secrets. Thus, there is a line of Supreme Court and federal appellate cases declining to impose civil or criminal sanctions or prior restraints against reporters for obtaining and publishing such legally protected confidential information.[22] The

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18 *See* Bob Norberg, *Digital Eavesdropping; If You Think Your Cell Calls, Voice Mail and E-mail are Secure, Think Again,* THE PRESS DEMOCRAT, April 29, 2002; Henry Norr, *Voice Mail Systems Have Few Safeguards,* THE SAN FRANCISCO CHRONICLE, April 11, 2002.

19 *Reporter Pleads Guilty in Theft of Voice Mail*, The New York Times, Sept. 25, 1998, at A16.

20 *Id.*

21 Roy S. Gutterman, *Chilled Bananas: Why Newsgathering Demands More First Amendment Protection*, 50 Syracuse L. Rev. 197, 230 (2000).

22 *See Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) (publication of information regarding proceedings before state judicial review commission that were required to be kept confidential by state law; *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (declining to allow rape victim to recover against newspaper who published her name in violation of state law); *Proctor & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219 (6th Cir. 1996) (reversing prior restraint against magazine which obtained business information sealed by a protective order).

Supreme Court has also indicated that a similarly low level of privacy attaches to information that is obtained through interviews, even of people with "confidential or restricted information," because interviews are a "routine" reporting technique.[23]

These decisions, including *Bartnicki*, demonstrate that the level of privacy associated with the means by which the information is obtained is a significant determinant of risk. Yet, because *Bartnicki* itself declined to impose liability even though it involved a particularly intrusive means of obtaining of information, the decision confirms that other variables are involved in assessing news gathering liability arising out of publication of private information.

B. The Reporter's Role

A second variable, which is discussed at length in the majority and concurring opinions in *Bartnicki*, is the reporter's role in obtaining the information. *Bartnicki* tells us that a reporter's mere knowledge that a source has acquired or is going to acquire confidential information illegally or surreptitiously will not make a reporter liable for publishing the information. The *Bartnicki* Court rejected the government's argument that punishing the media for knowingly publishing illegally obtained information is necessary to "dry up the market" for such information.[24] Thus, reporters who merely receive confidential and private information, whether in the form of tapes of telephone calls or intercepted voice mail messages, or documents, are unlikely to be liable under the *Bartnicki* analysis.

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[23] *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 103 (1979); *see also Nicholson v. McClatchy Newspapers*, 223 Cal. Rptr. 58, 63-64 (Ct. App. 1986).

[24] *Id*. at 529 (explaining that "the normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it").

Behavior like that of the Cincinnati Enquirer reporter who actually assisted in breaking into the Chiquita voice mail system is considerably more problematic. The *Bartnicki* concurrence emphasized the fact that the media defendants had not "ordered, counseled, encouraged, or otherwise aided or abetted" the unlawful interception. This language derives from two related but distinct theories of criminal liability: aiding and abetting and accessory before the fact.

The term "aiding and abetting," which originated in criminal law, means "to assist the perpetrator of the crime."[25] It involves "all assistance required by acts, or words of encouragement, or support or presence, actual or constructive, to render assistance" to the perpetrator.[26] Moreover, a person who aids and abets "must play at least some knowing role and take no steps to thwart the commission of the crime, although he need not have participated in every phase of the criminal venture."[27] Mere knowledge that "a crime is going to be committed, in the absence of a duty to prevent it, does not make one guilty" of aiding and abetting.[28] Furthermore, aiding and abetting "is not shown by mere relationship among the accused, or by their mere association at a time when a crime was committed by one of them."[29]

In addition to the aiding and abetting language, Justice Breyer emphasized that the media defendants in *Bartnicki* did not order, counsel, or encourage the illegal interception. This is terminology used for the criminal concept of accessory before the fact. An accessory

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25 22 C.J.S. *Criminal Law* § 135 (1989).

26 *Id.*

27 *Id*.

28 *Id*.

29 *Id*.

before the fact is one who "counseled, procured, or commanded another to commit" a crime.[30] Three commonly cited elements make must be present to make one an accessory before the fact: (1) the defendant "advised and agreed, or urged the parties or in some way aided them" to commit the crime, (2) that the defendant was absent from the scene at the time the crime was committed, and (3) that the principal actually committed the crime. The primary distinction between the crimes of aiding and abetting and accessory before the fact is that aiding and abetting requires actual or constructive presence at the scene of the crime, while an accessory before the fact must not have been present.[31]

The Fifth Circuit, in *Peavy v. WFAA-TV, Inc.*[32], in which the Supreme Court denied certiorari post-*Bartnicki*, gave an indication of the kind of news gathering behavior that falls outside of the First Amendment protection of *Bartnicki*. In *Peavy*, Charles Harman illegally intercepted the cordless telephone conversations of his neighbor, Carver Dan Peavy. At issue in *Peavy* were the federal and Texas wiretapping acts. Peavy was an official of the Dallas Independent School District, and Harman claimed that his tapes proved that Peavy was involved in an insurance kickback scheme involving the school district.

Eventually, Harmann took the tapes to WFAA-TV and asked a reporter if he wanted copies of the tapes, as well as other tapes he might make in the future. The reporter told Harman that he would and, more importantly, told Harman "*not* to turn the tape recorder on and off while recording intercepted conversations, and *not* to edit them, so that the tapes' authenticity

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30 22 C.J.S. *Criminal Law* § 137 (1989).

31 *Id*. *See also State v. Graham*, 279 S.E.2d 588, 591 (N.C. 1981) (explaining the difference between the offenses of accessory before the fact and aiding and abetting by noting that "an accessory before the fact must be absent from the scene of the offense, while and aider and abettor must be actually or constructively present at the scene.")

32 221 F.3d 158 (2000), *cert. denied*, 532 U.S. 1051 (2001).

could *not* be challenged."[33] This kind of advice and counsel probably qualified the reporter as an accessory before the fact. The Fifth Circuit held that the reporter's dealings with Harman presented sufficient evidence to submit to the jury on the question of liability for procuring a violation of state and federal wiretapping laws.[34]

In light of the "aiding and abetting" language in *Bartnicki*, a reporter's state of mind is important. For instance, one who aids and abets must give *knowing* assistance or encouragement. Thus, the extent to which a reporter knows that a source is about to engage in criminal conduct may well be a factor in a post-*Bartnicki* analysis.

Thus, in many ways *Bartnicki* merely confirms what we already know about reporters' liability for participation in illegal newsgathering conduct—that reporters may face serious consequences, such as liability under the tort of intrusion, for their participation in such conduct. Justice Breyer's use of the "aiding and abetting" and "accessory before the fact" language, read in conjunction with the Fifth Circuit's decision in *Peavy*, clarifies the kinds of behavior that may be included under the umbrella of "participation."

In view of these decisions, media lawyers providing advice to reporters in the wake of *Bartnicki* should focus not only on the level of invasiveness associated with the means by which the information is obtained, but also on the reporter's role in obtaining that information. Moreover, *Bartnicki* and other decisions make plain that these two variables – the level of intrusion associated with the method of obtaining the information, and the reporter's role in obtaining it – must be considered together. In *Bartnicki* itself, there was no liability even though the means by which the information was obtained was highly instrusive, because the

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[33] *Id*. at 164 (emphasis in original).

[34] *Id*. at 171-72.

reporter was simply a passive recipient of the information. It is at least arguable that liability would attach for publication of information of a less private nature, such as documents containing trade secrets or court documents filed under seal, if the reporter played a more active role in obtaining the information, for example by encouraging a source to obtain the information even in violation of the law or company practices.[35]

C. Newsworthiness

A third variable affecting news gathering liability arising out of publication of private forms of information, which also figured prominently in *Bartnicki*, is the public interest, or newsworthiness, of the information itself. The *Bartnicki* majority limited its holding to media disclosure of information involving a matter of public concern. The question of whether a matter is of public concern is not new to First Amendment law. Liability for the tort of public disclosure of private facts, also referred to as invasion of privacy, turns on whether the information disclosed is a matter of public concern.[36] The elements of the tort of public disclosure of private facts are: "(1) publicity, not merely publication, (2) of private facts concerning the plaintiff, (3) which are highly offensive to a reasonable person, and (4) the subject matter of the publication must not be of legitimate concern to the public."[37]

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35 C. Thomas Dienes, Lee Levine & Robert C. Lind, *Newsgathering and the Law,* § 13-3(b) at 612-613 (1999) (noting that "courts have attempted to draw the line, however elusive it may be, between routine newsgathering on the one hand and illegal conduct on another" and citing decisions declining to impose liability on reporters for passive receipt of confidential information).

36 Patrick J. McNulty, *The Public Disclosure of Private Facts: There is Life After Florida Star*, 50 DRAKE L. J. 93, 94 (2001). *See also* 1 Slade R. Metcalf and Leonard M. Niehoff, *Rights and Liabilities of Publishers, Broadcasters and Reporters* § 2.28 (Dec. 2001 rev.).

37 Metcalf and Niehoff, *supra* note 36, at § 2.15.

The concept of "newsworthiness" or "legitimate public concern" has been widely applied by the courts to limit the right of privacy in order to protect the public's right to be informed on matters of public interest.[38] Moreover, "[t]o a considerable extent, the media, in accordance with the mores of the community, dictates what is of interest" and "[t]he public's right to receive news is nearly all encompassing."[39] Thus, the concept of newsworthiness "extends to publicity about public figures who invite public attention by their activities, those who are involuntarily placed in the public eye such as crime victims, information as hard news, and information as entertainment."[40]

The general test of whether a matter is of public concern is "whether the public interest in obtaining or having disclosed to it the information outweighs the protection of the individual's personal interest and desires."[41] Ultimately, the question of what is newsworthy or a matter of public concern turns on community mores,[42] which the Restatement refers to as a standard of "common decency,"[43] and which allows the media wide latitude in what it can publish as a matter of public concern.

This broad idea of what constitutes a matter of public concern, however, may not be what the *Bartnicki* concurrence had in mind. In his concurring opinion, joined by Justice O'Connor, Justice Breyer refers to *Bartnicki* as involving a matter of "*unusual* public concern,

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38 McNulty, *supra* note 36, at 106-07.

39 *Id*.

40 *Id*.

41 Metcalf and Niehoff, *supra* note 36, at § 2.28 (citing *Stryker v. Republic Pictures Corp.,* 238 P.2d 670, 672 (1951).

42 McNulty, *supra* note 36, at 108; Metcalf and Niehoff, *supra* note 36, at § 2.29 (citing RESTATEMENT (SECOND) OF TORTS § 652D cmt. h (1977).

43 RESTATEMENT (SECOND) OF TORTS § 652D cmt. h (1977).

namely a threat of potential physical harm to others."[44] Justices Breyer and O'Connor thus appeared to be saying they were concurring in the majority opinion only because the matter disclosed by the media defendants was a matter of very high public importance—applying in effect a heightened standard of newsworthiness. Justice Breyer's reference to the *Bartnicki* disclosure as involving a threat of physical violence is most likely just one example of something that would meet this super-newsworthy standard.[45]

Thus, *Bartnicki* suggests that the bar for what qualifies as a matter of public concern may be higher when information is obtained, at least through illegal means, or, by the same logic, through surreptitious or otherwise questionable means. In this respect, media lawyers should assess this variable not in a vacuum, but in relation to the other two variables discussed above in providing advice. In other words, when information is procured by non-intrusive and conventional means, the media has a great deal of latitude in publishing matters of public concern. Thus, the media may publish matters of public concern so long as the published facts are not "so shocking as to go beyond the limits of decency."[46] It is another story, however, when a reporter is aware that information was obtained illegally or through surreptitious means, particularly when the reporter has played some role, even if indirect, in obtaining the information. In those cases, lawyers may want to counsel their clients that only a matter of high public importance will satisfy the heightened standard of *Bartnicki*.

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44 *Bartnicki*, 532 U.S. at 536 (emphasis added).

45 *See* Gary L. Bostwick, Clay Calvert, Rex S. Heinke, Neville L. Johnson, & Lawrence B. Solum, 22 LOY. L.A. ENT. L. J. 267, 286 (2002) (discussing Justice Breyer's concurring opinion as requiring a super-newsworthy defense for the media).

46 McNulty, *supra* note 36, at 108.

This, too, represents an outgrowth of prior lower court decisions considering claims for intrusion, which have held that the level of newsworthiness can influence whether an intrusive news gathering technique will be actionable. As the Ninth Circuit recently explained in affirming summary judgment for a television station in a case involving secret videotaping at a medical laboratory, "when a member of the print or broadcast press commits an intrusion in order to gather news, the public's interest in the news may mitigate the offensiveness of the intrusion."[47] Similarly, in another action against a television station based on surreptitious recording, the California Supreme Court reasoned that "the constitutional protection of the press does reflect the strong societal interest in effective and complete reporting of events, an interest that may – as a matter of tort law – justify an intrusion that would otherwise be considered offensive."[48]

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In sum, *Bartnicki* contains significant guidance for media lawyers and reporters seeking to avoid liability for news gathering involving information obtained either in violation of law or by surreptitious means. In particular, the decision demonstrates the significance and interrelationship of three variables – the level of privacy associated with the means by which the information is obtained, the reporter's role in obtaining that information, and the public interest, or newsworthiness, associated with that information. Media lawyers and reporters should examine all three areas to provide guidance in assessing the risk associated with particular instances in which news gathering focuses on private information obtained by illegal or questionable means.

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47 *Medical Laboratory Management Consultants v. American Broadcasting Companies, Inc.*, __ F.3d __, 2002 WL 31104879, at *10 (Sept. 20, 2002).

48 *Shulman v. Group W Productions, Inc.*, 18 Cal.4th 200, 236 (1998).