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Inchoate Liability and the Espionage Act: The Statutory Framework and the Freedom of the Press

Stephen I. Vladeck*

The debate over the proper balance between national security and freedom of the press has traditionally focused on the media's potential criminal liability for publishing sensitive information, as was threatened after the *New York Times* and the *Washington Post* disclosed the U.S. government's secret and warrantless wiretapping of domestic phone calls.¹ With the issue of press liability for the publication of national security information, however, comes a bevy of difficult questions concerning the scope of the protections afforded to the press under the First Amendment.² Those questions are made all the more difficult by the absence of an overarching framework statute, akin to England's Official Secrets Act,³ that in clear and sweeping terms specifies the means and manner in which the press may be held criminally liable for publishing sensitive information. Instead, historically the U.S. Congress has focused its attention on more discrete targets, punishing the dissemination of very specific types of sensitive governmental information, and, in many cases, by very specific classes of individuals. As such, the statutory framework governing the complicated balance between governmental secrecy and the freedom of the press in the United States is little more than a disorganized amalgamation of unconnected statutes. Some of the provisions overlap each other and border on redundancy. Others are difficult to parse, and cannot possibly prohibit what their plain language appears to suggest. Still others, when read together, seem to promote mutually inconsistent policy goals.

In his comprehensive and thought-provoking essay, Professor Stone articulates a vision of what the underlying constitutional principles *should* be in striking the proper balance between governmental secrecy and free-

* Associate Professor, University of Miami School of Law. My thanks to Floyd Abrams, Scott Armstrong, Sandra Baron, Susan Buckley, Ronald Collins, Robert Corn-Revere, Lucy Dalglish, Harold Edgar, Lee Levine, Paul McMasters, Jeffrey Smith, and Geoffrey Stone for their participation in a very insightful discussion of these issues at the First Amendment Center, and to Becca Steinman for research assistance.

¹ See Nicholas D. Kristof, *Don't Turn Us into Poodles*, N.Y. TIMES, July 4, 2006, at A15. For a background of the disclosures and the legal issues arising from the surveillance program, see *ACLU v. NSA*, 438 F. Supp. 2d 754 (E.D. Mich. 2006).

² For a survey that remains relevant today, see Melville B. Nimmer, *National Security Secrets v. Free Speech: The Issues Left Undecided in the Ellsberg Case*, 26 STAN. L. REV. 311 (1974).

³ Official Secrets Act, 1911, 1 & 2 Geo. 5, c. 28 (Eng.); see also Official Secrets Act, 1989, c. 6 (Eng.); Official Secrets Act, 1920, 10 & 11 Geo. 5, c. 75 (Eng.).

dom of the press, especially vis-à-vis media disclosures of classified national security information. Thus, Professor Stone proposes, inter alia, “to hold that the government cannot constitutionally punish journalists for encouraging public employees unlawfully to disclose classified information, unless the journalist (a) expressly incites the employee unlawfully to disclose classified information, (b) knows that publication of this information would likely cause imminent and serious harm to the national security, and (c) knows that publication of the information would not meaningfully contribute to public debate.”⁴

I do not disagree with Professor Stone that there are compelling (and constitutionally based) policy arguments in favor of such a rule. But a closer look at the applicable statutory framework reveals a far darker picture of the reality that would confront a reporter accused of soliciting the disclosure of classified national security information. That is to say, whereas Professor Stone correctly notes that “[t]he laws currently on the books are all over the lot,”⁵ it is at best unclear whether the normative constitutional principles on which Professor Stone relies would truly militate against inchoate liability for news gatherers under the Espionage Act.⁶

To the contrary, although the statutory framework is not necessarily coherent, recent cases, in particular the AIPAC case in the U.S. District Court for the Eastern District of Virginia,⁷ testify to the importance of understanding the different statutory components in their entirety. Indeed, the

⁴ Geoffrey R. Stone, *Government Secrecy vs. Freedom of the Press*, 1 HARV. L. & POL’Y REV. 185, 213 (2006). Professor Stone thus embraces a view of the constitutional issues that is dependent upon the special role of the press, notwithstanding the extent to which “American free speech doctrine has never been comfortable distinguishing among institutions.” Frederick Schauer, *The Supreme Court, 1997 Term—Comment: Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 84 (1998). As I suggest in this Essay, Professor Stone’s view necessarily rests on a rather novel view of the Press Clause—as extending special protection to aspects of the newsgathering process wholly separate from the actual act of publication—which has long been the target of calls for special constitutional protections for the press. Compare, e.g., David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455 (1983) (suggesting that the Press Clause may in fact be open to such a reading), and Randall P. Bezanson, *The New Free Press Guarantee*, 63 VA. L. REV. 731 (1977) (same), with David Lange, *The Speech and Press Clauses*, 23 UCLA L. REV. 77 (1975) (taking the opposite view).

⁵ Stone, *supra* note 4, at 207.

⁶ There are two separate questions necessarily subsumed within this larger inquiry. First, does the First Amendment protect the publication of sensitive national security information, such as the disclosure of the Terrorist Surveillance Program (“TSP”) by the *New York Times* and the *Washington Post*? Second, even if it does, does that protection extend to the instrumentalities of journalism—to the reporting and the newsgathering? Or is the protection specific to the publication—to the speech act itself? It is this second question that has been dramatically understudied. For two attempts see Timothy B. Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 STAN. L. REV. 927 (1992) and Note, *The Rights of the Public and the Press To Gather Information*, 87 HARV. L. REV. 1505 (1974).

⁷ See *United States v. Rosen*, 445 F. Supp. 2d 602 (E.D. Va. 2006). See generally Nat Hentoff, *Bush Revives Espionage Act*, VILLAGE VOICE, Nov. 10, 2006, http://www.villagevoice.com/news/0646_hentoff.75002.6.html (noting the dangerous implications of the decision in *Rosen*).

lack of clarity notwithstanding, there are numerous statutes under which the press may find itself liable for the gathering and reporting of stories implicating governmental secrecy, especially as courts increasingly embrace theories of third-party inchoate liability under the Espionage Act, as in the AIPAC case.

Thus, this Essay both surveys the statutory framework applicable in cases involving the publication of classified national security information and suggests that, should the government begin to prosecute members of the press for soliciting violations of these statutes on theories of inchoate liability, the constitutional principles invoked by Professor Stone may not provide as complete a defense as many would hope. That there is a pronounced gap between the theory and the reality in this field is hardly surprising. Understanding the scope of that gap, however, is essential. As I suggest below, the application of theories of inchoate liability to the ambiguous language of the Espionage Act might render members of the media subject to criminal liability for acts of *newsgathering* wholly separate from acts of publication, and therefore less likely to fall within the umbrella of the press protections enmeshed within the First Amendment.

I. THE ESPIONAGE ACT

To assess the force of Professor Stone's constitutional arguments, I begin with the statutory framework applicable to prosecutions of news gatherers for soliciting the disclosure of classified national security information.⁸ Although Professor Stone's essay centers on statutes of general applicability, the statutes more directly targeted at national security leaks and leakers are, owing to their ambiguity and seemingly wide-ranging applicability, all the more dangerous.

From the Sedition Act of 1798,⁹ which expired in 1801, through the outbreak of the First World War, there was virtually no federal legislation prohibiting seditious expression. Nor were there laws prohibiting the dissemination or publication of information harmful to the national defense.¹⁰ Contemporaneously with the United States's entry into the war, however, Congress enacted the Espionage Act of 1917,¹¹ which, except for the amendments discussed below, remains on the books largely in its original form today at 18 U.S.C. §§ 793–799. Written largely by then-Assistant At-

⁸ The definitive academic survey of these statutes remains Harold Edgar & Benno C. Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929 (1973); see also Harold Edgar & Benno C. Schmidt, Jr., *Curtiss-Wright Comes Home: Executive Power and National Security Secrecy*, 21 HARV. C.R.-C.L. L. REV. 349 (1986) (updating their earlier analysis).

⁹ Act of July 14, 1798, ch. 74, 1 Stat. 596 (expired 1801).

¹⁰ For one of the few counterexamples, see Act of Mar. 3, 1911, ch. 226, 36 Stat. 1084 (prohibiting the disclosure of certain national defense secrets) (repealed 1917).

¹¹ Act of June 15, 1917, ch. 30, 40 Stat. 217 (codified as amended at 18 U.S.C. §§ 793 et seq.).

torney General Charles Warren, the Act included a number of seemingly overlapping and often ambiguous provisions.

A

Current 18 U.S.C. § 793(a), which derives from section 1(a) of the Espionage Act, prohibits the obtaining of information concerning a series of national defense installations—places—“with intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation.” Similarly, § 793(b) prohibits individuals with “like intent or reason to believe” from copying, taking, making, or obtaining “any sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, document, writing, or note of *anything* connected with the national defense.” Although an early legal challenge argued that the requirement that the information at issue be “connected with the national defense” was unconstitutionally vague, the Supreme Court read a scienter requirement into the statute (and thus upheld it) in *Gorin v. United States* in 1941.¹²

The Supreme Court’s decision in *Gorin* also held that the Act likely could not prohibit the collection of *public* information.¹³ Hence, § 793(a) and 793(b) are unlikely candidates for potential press liability under the Espionage Act. The mere gathering or publication of the information specified in the two provisions would only sustain charges under the Act if the reporter at issue had “intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation.”¹⁴ Thus, the scienter requirement read into these provisions in *Gorin* renders potential press liability under § 793(a) and 793(b) unlikely.

B

Section 793(c) is, in important ways, far broader. The descendant of section 1(c) of the Espionage Act, the provision creates criminal liability for any individual who “receives or obtains or agrees or attempts to receive or obtain from any person, or from any source whatever” various material related to the national defense, so long as the individual “know[s] or ha[s] reason to believe, at the time he receives or obtains [the information] . . . that it has been or will be obtained, taken, made, or disposed of by any

¹² 312 U.S. 19, 27–28 (1941) (“The obvious delimiting words in the statute are those requiring ‘intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation.’”); *see also* United States v. Truong Dinh Hung, 629 F.2d 908, 918 (4th Cir. 1980) (discussing *Gorin*’s scienter requirement); *In re Squillacote*, 790 A.2d 514, 519 (D.C. 2002) (*per curiam*) (same).

¹³ *See* 312 U.S. at 27–28; *see also* United States v. Heine, 151 F.2d 813 (2d Cir. 1945).

¹⁴ 18 U.S.C. § 793(a)–(b).

person contrary to the provisions of [the Espionage Act].” Thus, whereas § 793(a) and 793(b) prohibit the *collection* of secret information relating to the national defense, § 793(c) prohibits the *receipt* of such information, or even attempts at receipt thereof, so long as the recipient does or should have knowledge that the source, in obtaining the information, violated some other provision of the Espionage Act.

In addition, whereas § 793(d) and 793(f) prohibit the dissemination of national security information that is in the *lawful* possession of the individual who disseminates it (§ 793(d) prohibits *willful* communication; § 793(f) prohibits negligence), § 793(e)—which, like § 793(d) and 793(f), derives from section 1(d) of the Espionage Act¹⁵—prohibits the same by an individual who has *unauthorized* possession of the information at issue.

Thus, in sweeping language, § 793(e) prohibits individuals from willfully communicating—or attempting to communicate—to any person not entitled to receive it:

any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation.

Section 793(e) goes one important step farther, however, for it also prohibits the *retention* of such information and the concomitant failure to deliver such information “to the officer or employee of the United States entitled to receive it.”

Section 793(e) therefore appears to have a far more relaxed intent requirement than § 793(a) and 793(b). The provision does not require specific intent so long as the communication or retention of classified information is *willful*. From the perspective of the press, then, § 793(e) is easily one of the most significant provisions in the debate over governmental secrecy versus freedom of the press. As a result, it has received the most attention in judicial and scholarly discussions of the Act and its potential constitutional infirmities, most famously in the various opinions in the *Pentagon Papers* case.¹⁶ Largely because it lacks a specific intent requirement, it was recently described as “pretty much one of the scariest statutes around.”¹⁷

¹⁵ The three provisions were modified and separated by the Subversive Activities Control Act of 1950, Pub. L. No. 81-831, tit. I, § 18, 64 Stat. 987, 1003.

¹⁶ See *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).

¹⁷ SUSAN BUCKLEY, REPORTING ON THE WAR ON TERROR: THE ESPIONAGE ACT AND OTHER SCARY STATUTES 9 (2d ed. 2006).

The Eastern District of Virginia's recent decision in the AIPAC case may bolster such concerns over the scope of § 793(e). In the case, *United States v. Rosen*,¹⁸ the district court sustained, for perhaps the first time, the liability of *third parties* (albeit, not the press) for conspiring to violate § 793(d) and 793(e). Specifically, Steven Rosen and Keith Weissman, lobbyists for the American Israel Public Affairs Committee (AIPAC), were alleged to have received classified information about the Middle East, Iran, and terrorism from Lawrence A. Franklin, an analyst for the Department of Defense, before passing that information on to a journalist and an Israeli diplomat. With respect to Rosen, the court sustained the indictment for aiding and abetting a violation of § 793(d). As Judge Ellis noted:

Although the question whether the government's interest in preserving its national defense secrets is sufficient to trump the First Amendment rights of those not in a position of trust with the government is a more difficult question, and although the authority addressing this issue is sparse, both common sense and the relevant precedent point persuasively to the conclusion that the government can punish those outside of the government for the unauthorized receipt and deliberate retransmission of information relating to the national defense.¹⁹

Thus, "[t]he conclusion here is that the balance struck by § 793 between these competing interests is constitutionally permissible because (1) it limits the breadth of the term 'related to the national defense' to matters closely held by the government for the legitimate reason that their disclosure could threaten our collective security; and (2) it imposes rigorous scienter requirements."²⁰ By sustaining for the first time the liability of third-party intermediaries under the Espionage Act (and by affirming, in Rosen's case, the indictment for aiding and abetting a violation of the statute), the district court in *Rosen* thus acknowledged, however implicitly, the broadest source of potential press liability under the Espionage Act—third-party inchoate liability arising out of newsgathering.

C

A number of judges and scholars have argued against the applicability of § 793(e) to the press because of the absence of an express reference to the "publication" of such secret national security information. In con-

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

¹⁹ *Id.* at 637.

²⁰ *Id.* at 645 (footnote omitted).

trast, three separate provisions of the Espionage Act *do* expressly prohibit the *publication* of particular national defense information.²¹

First, § 794(b) applies to “[w]hoever, in time of war, with intent that the same shall be communicated to the enemy, collects, records, publishes, or communicates . . . [the disposition of armed forces] or any other information relating to the public defense, which might be useful to the enemy.” Although the provision might appear to turn on whether it is a “time of war,” § 798A expands § 794(b) to apply so long as various national emergencies remain in place, a condition that remains satisfied today. In addition, a court might infer the requisite intent from the act of publication itself.

Second, § 797 applies to whoever “reproduces, publishes, sells, or gives away” photographs of specified defense installations, unless the photographs were properly censored.

Third, § 798(a), which generally relates to cryptography and was passed in 1950 at least largely in response to the *Chicago Tribune* incident from World War II,²² applies to whoever “communicates, furnishes, transmits, or otherwise makes available . . . or publishes” various prohibited materials, including “classified information . . . concerning the communication intelligence activities of the United States or any foreign government.” Section 798(b) defines “classified information” as “information which, at the time of a violation of this section, is, for reasons of national security, specifically designated by a United States Government Agency for limited or restricted dissemination or distribution.”

Those who argue against the applicability of *other* provisions of the Act to the press, in addition to the three codified provisions of the Espionage Act that expressly prohibit the act of *publication*, often invoke language in one of the early drafts of the Espionage Act that was rejected by Congress. It would have provided that:

During any national emergency resulting from a war to which the United States is a party, or from threat of such a war, the President may, by proclamation, declare the existence of such emergency and, by proclamation, prohibit the publishing or communicating of, or the attempting to publish or communicate any information relating to the national defense which, in his judg-

²¹ See, e.g., *N.Y. Times*, 403 U.S. at 720–21 (Douglas, J., concurring). *But see id.* at 737–40 & nn.8–10 (White, J., concurring) (arguing that the *New York Times* and the *Washington Post* could constitutionally have been prosecuted for violating § 793(e))

²² The *Chicago Tribune* published a story shortly after the Battle of Midway suggesting that the United States had prior warning of the Japanese attack. Concerned that Japanese intelligence would correctly surmise that the Americans had broken Japanese codes, the United States prosecuted the *Tribune*. Fearful that the charges themselves would tip off the Japanese, the United States dropped the case. See Jeffrey A. Smith, *Prior Restraint: Original Intentions and Modern Interpretations*, 28 WM. & MARY L. REV. 439, 467 (1987).

ment, is of such character that it is or might be useful to the enemy.²³

As Justice Douglas noted in his concurrence in the *Pentagon Papers* case, the provision was principally rejected by the Senate on First Amendment grounds. As a result, those enacted provisions that do not expressly refer to “publishing” or to the act of *publication* should not be applied to the press.²⁴ But what Justice Douglas did not consider is perhaps the central question going forward: Are there ways in which reporters, by virtue of being reporters, are shielded from *all* liability under the Espionage Act, even for violations unrelated to publication? Put differently, does the First Amendment’s Press Clause possibly provide a defense in such cases not generally available to the public? I will return to this question shortly.

D

One other noteworthy provision of the Espionage Act is 18 U.S.C. § 794(a), which applies to “[w]hoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits . . . to any foreign government, or to any faction or party or military or naval force within a foreign country, . . . any document, . . . [other physical items], or information relating to the national defense.” Thus, there is at least a plausible argument that the publication of certain national security information would constitute the communication of such information to a foreign government, and the issue, once again, would turn solely on whether the publisher had “intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation.” Owing to the similarities in statutory language, would the scienter requirement from *Gorin* apply to a prosecution under this section?

Overlapping § 794(a) is 50 U.S.C. § 783, enacted as part of the 1950 amendments to the Espionage Act.²⁵ Section 783 also prohibits the communication of classified information by an “officer or employee of the United States” to agents or representatives of foreign governments. As with § 794(a), there is at least a colorable argument that the act of publication, because it would have the likely effect of communicating the information to agents or representatives of foreign governments, might itself violate the text of the statute, if not the spirit.

²³ 55 CONG. REC. 1763 (1917).

²⁴ *N.Y. Times*, 403 U.S. at 721–22 (citing 55 CONG. REC. 2167 (1917)).

²⁵ See *supra* note 15.

E

Finally, it is critical to note that the Espionage Act also contains two independent conspiracy provisions. Pursuant to § 793(g), “[i]f two or more persons conspire to violate any of the foregoing provisions of this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be subject to the punishment provided for the offense which is the object of such conspiracy.” Section 794(c) is to similar effect.

It is in the context of the conspiracy provisions that the potential liability of the press for the publication of governmental secrets becomes a much more troubling issue. Leaving aside the individual liability of the press for the act of *publication*, § 793(e) prohibits the unauthorized *receipt* of certain national security secrets, and other provisions of the Act prohibit, in broader strokes, the *obtaining* of such information.

Moreover, one of the central issues that may surface in a future prosecution of the press under the Espionage Act is inchoate liability—whether the reporters are liable either as co-conspirators, or for aiding and abetting the individuals who provided the protected information.²⁶ Because such liability would attach to the possession of information, and not to its publication, the potential protections of the First Amendment’s Press Clause are, at a minimum, not as clearly established²⁷ and may not provide much of a defense at all.²⁸ To the contrary, “[w]hile the Supreme Court in *Branzburg v. Hayes* recognized that ‘without some protection for seeking out the news, freedom of the press could be eviscerated,’ the Court has yet to explicitly afford special protections to the newsgathering process.”²⁹ Thus, even though the First Amendment might provide protection from restraints on publication, including, perhaps, after-the-fact criminal prosecution, there is simply no precedent for the proposition that the First Amendment provides any defense to illicit acts of *gathering* the news, especially when the story never makes it into print.

²⁶ See generally 18 U.S.C. § 2 (2000) (aiding and abetting); *id.* § 371 (conspiracy).

²⁷ See *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 799–800 (1978) (Burger, C.J., concurring) (“The Speech Clause standing alone may be viewed as a protection of the liberty to express ideas and beliefs, while the Press Clause focuses specifically on the liberty to disseminate expression broadly and ‘comprehends every sort of publication which affords a vehicle of information and opinion.’” (citation omitted) (quoting *Lovell v. Griffin*, 303 U.S. 444, 452 (1938))).

²⁸ The Press Clause arguably is implicated only when the enforcement of governmental secrecy impacts the press itself. See Louis Henkin, *The Right To Know and the Duty To Withhold: The Case of the Pentagon Papers*, 120 U. PA. L. REV. 271, 277 (1971).

²⁹ Dyk, *supra* note 6, at 928 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972)).

II. OTHER IMPORTANT STATUTES

The Espionage Act, while important, is merely one subset of a much larger range of statutes implicating the balance between governmental secrecy and freedom of the press. When considered in conjunction with the inchoate liability issue noted above, the other statutes should provide just as much cause for concern as the more open-ended provisions of the Espionage Act.

A

First, and perhaps most important, is 18 U.S.C. § 641, one of the statutes at issue (along with § 793(d) and 793(e)) in the famous case of *United States v. Morison*.³⁰ Originally enacted in 1875,³¹ § 641 applies to:

Whoever . . . knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof . . . ; or

Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted

Thus, § 641, in general terms, prohibits the conversion of any “thing of value” to the U.S. government, and also prohibits the knowing receipt of the same, “with intent to convert it to his use or gain.”

Relying on § 641, the government prosecuted Samuel Morison for transmitting photographs of a new Soviet aircraft carrier to *Jane’s Defence Weekly*, an English publisher of defense information. As the court noted:

The defendant would deny the application of [§ 641] to his theft because he says that he did not steal the material “for private, covert use in illegal enterprises” but in order to give it to the press for public dissemination and information The mere fact that one has stolen a document in order that he may deliver it to the press, whether for money or for other personal gain, will not immunize him from responsibility for his criminal act.³²

³⁰ 844 F.2d 1057 (4th Cir. 1988).

³¹ See Act of Mar. 3, 1875, ch. 144, 18 Stat. 479 (current version at 18 U.S.C. § 641 (West 2000 & Supp. 2006)).

³² See *Morison*, 844 F.2d at 1077.

In one exceptional case, a district court even held that using a government photocopier to make copies of government-owned documents could trigger liability under § 641.³³

Considered in conjunction with the discussion of inchoate liability above, the potential liability under § 641 for reporters may be just as broad, if not broader, than the liability under § 793(d) and 793(e). As Judge Winter worried in *United States v. Truong Dinh Hung*:

[B]ecause the statute was not drawn with the unauthorized disclosure of government information in mind, § 641 is not carefully crafted to specify exactly when disclosure of government information is illegal This ambiguity is particularly disturbing because government information forms the basis of much of the discussion of public issues and, as a result, the unclear language of the statute threatens to impinge upon rights protected by the first amendment. Under § 641 as it is written, . . . upper level government employees might use their discretion in an arbitrary fashion to prevent the disclosure of government information; and government employees, newspapers, and others could not be confident in many circumstances that the disclosure of a particular piece of government information was “authorized” within the meaning of § 641.³⁴

Thus, the broad discretion afforded to government officials could have a pronounced chilling effect on newsgathering concerning information that might fall within the scope of § 641. Especially because the reporter may not know whether disclosure of the information at issue is or is not “authorized,” the potential inchoate liability for conversion is massive in its breadth.

B

Also relevant to any discussion of freedom of the press and governmental secrecy are 18 U.S.C. §§ 952 and 1924. Enacted in 1933,³⁵ § 952 relates specifically to diplomatic codes and correspondence, and applies to government employees who, without authorization, publish or provide to a third-party diplomatic codes, or diplomatic correspondence “obtained while in the process of transmission between any foreign government and its diplomatic mission in the United States.”

A fair reading of the statute is that it prohibits the publication *by* the government employee, and not by an independent third-party, but incho-

³³ See *United States v. Hubbard*, 474 F. Supp. 64 (D.D.C. 1979).

³⁴ 629 F.2d 908, 924–25 (4th Cir. 1980).

³⁵ See Act of June 10, 1933, ch. 57, 48 Stat. 122, 122–23.

ate liability could still lead to liability for press reporting on encrypted communications between the United States and foreign governments or its overseas missions.

Similarly, 18 U.S.C. § 1924, enacted in 1994,³⁶ prohibits the unauthorized removal and retention of classified documents or material. It applies to:

Whoever, being an officer, employee, contractor, or consultant of the United States, and, by virtue of his office, employment, position, or contract, becomes possessed of documents or materials containing classified information of the United States, [who] knowingly removes such documents or materials without authority and with the intent to retain such documents or materials at an unauthorized location.

Both of these statutes, although they may not apply directly to reporters, would also be susceptible to theories of inchoate liability; a colorable argument could be made that a reporter using a government employee as a source would be liable if that source, in the process of disclosing information to the reporter, violated either § 952 or § 1924.

C

Three additional statutes, which regulate specific types of secret information, are also relevant to the analysis. First among these is the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011 to 2296b-7. Sections 2274, 2275, and 2277 thereof prohibit the communication, receipt, and disclosure, respectively, of “Restricted Data,” which is defined as “all data concerning (1) design, manufacture, or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy, but shall not include data declassified or removed from the Restricted Data category pursuant to section 2162 of this title.”³⁷ In the *Progressive* case, in which the U.S. government successfully enjoined the publication of an article titled *The H-Bomb Secret: How We Got It, Why We’re Telling It*, it was the potential violation of § 2274(b) that formed the basis for the injunction.³⁸

A very different statute, and one arguably of more relevance today—at least vis-à-vis the Valerie Plame affair³⁹—is the Intelligence Identities

³⁶ Intelligence Authorization Act for FY 1995, Pub. L. No. 103-359, § 808(a), 108 Stat. 3423, 3453 (1994).

³⁷ 42 U.S.C.A. § 2014(y) (2000).

³⁸ See *United States v. The Progressive, Inc.*, 467 F. Supp. 990, 993–96 (W.D. Wis.), appeal dismissed, 610 F.2d 819 (7th Cir. 1979).

³⁹ See Christopher Hitchens, *A Nutty Little Law*, SLATE, July 26, 2005, <http://www.slate.com/id/2123411>.

Protection Act of 1982, 50 U.S.C. §§ 421–426. As is now well known, conservative columnist Bob Novak disclosed the identity of CIA operative Valerie Plame in a July 14, 2003, newspaper column.⁴⁰ Novak reported that two senior administration officials, potentially in violation of the 1982 statute, had revealed Plame’s identity.⁴¹ Specifically, § 421 prohibits the disclosure of information relating to the identity of covert agents. Whereas § 421(a) and 421(b) prohibit the disclosure of such information by individuals authorized to have access to classified information identifying the agent, § 421(c) applies to anyone who “discloses any information that identifies an individual as a covert agent to any individual not authorized to receive classified information, knowing that the information disclosed so identifies such individual and that the United States is taking affirmative measures to conceal such individual’s classified intelligence relationship to the United States.” The individual must “intend[] to identify and expose covert agents and [have] reason to believe that such activities would impair or impede the foreign intelligence activities of the United States.” Importantly, though, § 421(c) “does not predicate liability on either access to or publication of classified information.”⁴²

Finally, the Invention Secrecy Act of 1951, 35 U.S.C. §§ 181–188, protects the disclosure of information relating to patents under “secrecy” orders. The statutory punishment, however, for disclosure of information relating to a patent under a secrecy order is forfeiture of the patent.⁴³ No criminal liability appears to attach to such disclosures.

III. INCHOATE LIABILITY AND THE CONSTITUTIONAL PROBLEM

As the above survey of the relevant statutes suggests, reporters involved in the disclosure of classified national security information could face criminal liability under any number of different statutes. And, as the recent AIPAC case suggests, the inchoate liability problem is not an abstract one.

The problem is simple to describe: There is a substantial argument that a reporter may be prosecuted under the Espionage Act for *receiving* certain national security information if he has reason to believe that such information is classified. There is also a colorable argument that a reporter may be prosecuted under 18 U.S.C. § 641—the statute principally at issue in the *Morison* case—or under 18 U.S.C. § 793(d) or (e), for soliciting the unlawful removal of classified governmental information. Unless the reporter can demonstrate that he did not know or have reason

⁴⁰ See Robert Novak, *The Mission to Niger*, WASH. POST, July 14, 2003, at A21.

⁴¹ For a summary of the relationship between the Act and the Plame investigation, see Adam Liptak, *Little-Tested Law Is Used Against Journalists in Leak*, N.Y. TIMES, Oct. 10, 2004, at § 1, at 33.

⁴² BUCKLEY, *supra* note 17, at 36.

⁴³ See 35 U.S.C. § 182 (2000).

to believe that the information was actually classified, and, in the latter case, unless the reporter could show that he only learned of the information anonymously and after-the-fact, the statutes appear to apply.

In broader strokes, the problem arises from the open-ended wording of the statutes surveyed in Parts I and II. Leaving aside the potential liability of newspapers for *publishing* classified national security information, there are many other moments earlier in the reporting process during which reporters might face liability. And inasmuch as the reporters may not be *directly* liable for removing or disclosing the classified national security information at issue, theories of inchoate liability would open the door to criminal liability where the reporter played *any* role in encouraging or otherwise facilitating the disclosure. The unfortunate ambiguity of the relevant statutes creates the real problem in these cases; it is at least plausible to find a violation of these provisions by even the most well-intentioned (and passive) reporters.

Two questions necessarily arise: First, does the First Amendment protect reporters from such broad theories of liability under the statutes surveyed in Parts I and II? Second, *should* it? I address these questions in turn.

A

In determining the extent of reporters' protection from liability under the statutes discussed above, there is much that is instructive in the Supreme Court's 2001 decision in *Bartnicki v. Vopper*.⁴⁴ In *Bartnicki*, which dealt with the federal wiretap statutes, the Court held that the First Amendment protected a radio station that replayed an illegally intercepted telephone call. The Court relied on three critical facts. First, the Court emphasized that the members of the media had played no role in the illegal interception of the conversation, and had, instead, learned of the interception only after it took place. Second, the radio station itself *lawfully* obtained the recording, even though the recording itself was obtained unlawfully. Third, the content of the recording was a matter of public concern. The majority was nevertheless at pains to point out that its holding did not extend to situations where the relevant information was obtained unlawfully *by the media*. Quoting *Branzburg*, the Court emphasized:

[I]t would be frivolous to assert—and no one does in these cases—that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate valid criminal laws. Although stealing documents or private wiretapping could provide newsworthy infor-

⁴⁴ 532 U.S. 514 (2001).

mation, neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news.⁴⁵

In his concurring opinion, Justice Breyer (joined by Justice O'Connor) seized on the significance of these distinctions by emphasizing the narrowness of the First Amendment right recognized in *Bartnicki*. Justice Breyer eschewed the notion that *Bartnicki* created a public interest exception to criminal liability for publishing illegally obtained information, focusing on the unique facts of the case. "Given these circumstances," he wrote, "along with the lawful nature of respondents' behavior, the statutes' enforcement would disproportionately harm media freedom."⁴⁶

In that regard, *Bartnicki* was largely a reaffirmation of the so-called "*Daily Mail* 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."⁴⁷ As Justice Marshall explained in 1989:

To the extent sensitive information rests in private hands, the government may under some circumstances forbid its nonconsensual acquisition, thereby bringing outside of the *Daily Mail* principle the publication of any information so acquired. To the extent sensitive information is in the government's custody, it has even greater power to forestall or mitigate the injury caused by its release. The government may classify certain information, establish and enforce procedures ensuring its redacted release, and extend a damages remedy against the government or its officials where the government's mishandling of sensitive information leads to its dissemination. Where information is entrusted to the government, a less drastic means than punishing truthful publication almost always exists for guarding against the dissemination of private facts.⁴⁸

Fairly read, the Supreme Court's First Amendment jurisprudence, culminating with *Bartnicki*, suggests that the First Amendment would only protect the dissemination of illegally intercepted information in cases with analogous facts, where the media had clean hands, and where the countervailing privacy interest was comparatively minor. Such cases are, to be sure, difficult to find.

⁴⁵ *Id.* at 532 n.19 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 691 (1972)).

⁴⁶ *Id.* at 540 (Breyer, J., concurring).

⁴⁷ *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979).

⁴⁸ *The Fla. Star v. B.J.F.*, 491 U.S. 524, 534 (1989); *see also id.* at 535 n.8 ("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.").

The contrasting issues that would arise in a prosecution under the Espionage Act are obvious and straightforward. For whereas the third prong, as Professor Stone suggests, could easily be satisfied in cases in which details of *unlawful* government programs are reported on, the first two prongs are far more troubling in this context.

Indeed, *even if* reporters played no role in the dissemination of classified national security information, and *even if* the subject matter of the information were a matter of public concern, the Espionage Act itself makes the reporters' *access* to the secret information a crime. And under *Bartnicki*, that reality might well be of constitutional significance. For whereas *Bartnicki* upheld a First Amendment privilege on the part of third-party media organizations to publish illegally obtained information, it does so only where it is not *also* a crime for the media to *possess* the information, and where the media had no role in obtaining the information in the first place.

And even *Bartnicki* was 6-3.

Thus, the First Amendment probably does *not* protect journalists and other news gatherers from violating the Espionage Act through the act of newsgathering itself. So long as the *retention* of classified national security information is itself unlawful, and so long as the reporters are being punished not for the act of publication itself, but for the unlawful gathering of secret information, it is impossible to find any precedent in the Supreme Court's jurisprudence that would recognize a First Amendment defense.

B

That is not to say, however, that such a defense should not exist. Scholars and courts have long debated whether any meaningful distinction exists between the communications protected by the First Amendment's "Speech" Clause, and that protected by the "Press" Clause.⁴⁹ As one recent student note put it, "[w]hile the Supreme Court has never directly addressed this theoretical question, the Court's press-related jurisprudence strongly reflects the view that the clauses are coextensive in their scope and should be read together as a general expressive right."⁵⁰ If one accepts this interpretation, then inchoate liability under the Espionage Act raises no unique constitutional problems.

The special problem of inchoate liability under the Espionage Act, however, may suggest a new medium through which to view the Press Clause as protecting different conduct and information than that governed by the Speech Clause. That is, whereas cases like *Bartnicki* might sug-

⁴⁹ See, e.g., sources cited *supra* note 4.

⁵⁰ Recent Case, 119 HARV. L. REV. 1923, 1923 (2006). See generally David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 430 & nn.2-3 (2002).

gest (correctly, I think) that there is no general First Amendment right to disseminate secret information publicly, especially secret national security information, perhaps the Press Clause could be seen as conferring at least *some* minimal privilege on reporters who are, in good faith, attempting to uncover illicit governmental activity.

Thus, we might reconceive of the Press Clause as a stopgap to prevent governmental overreaching. Whereas reporters could (and should) still be liable for *directly* violating the Espionage Act, the freedom of the press might be seen as extending to immunize at least *some* of the instrumentalities of newsgathering. The government would still have a remedy against the leaker, and the reporters would still be liable for any conduct that is expressly and directly prohibited by the Espionage Act (e.g., retaining illegally disseminated national security information that the reporter knows to be classified). But reporters would, pointedly, *not* be liable merely for attempting to uncover a story—for contacting sources, for digging into the details of secret governmental programs, or encouraging those in possession of secret information to come forward when disclosure is in the public interest.

To be sure, such a view of the Press Clause would be novel and unprecedented. Those who have argued for increased protections for the press have focused on the significance and centrality of the public discourse fomented by publication even of secret (or libelous) information.⁵¹ Few have suggested that the Press Clause might be given particular content with respect to acts of newsgathering, focusing on the chilling effect that the absence of such protections might ultimately have on free speech qua publication.⁵²

Moreover, a separate point, but one that is at least as important, is that which Chief Justice Burger emphasized a quarter-century ago: “People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.”⁵³

But if freedom of the press is to be given meaningful substantive content, it must include the freedom to *gather* the news and not just to report it. Under the current statutory regime, even skilled and capable reporters (and, perhaps, even the most fearless and reckless of reporters) would be deterred from seriously investigating stories that might implicate the Espionage Act.

For those (like me) who agree with Professor Stone’s underlying conclusions, one of the narrowest means by which the First Amendment

⁵¹ See, e.g., sources cited *supra* note 4.

⁵² For perhaps the only meaningful counterexample, see Dyk, *supra* note 6. Even Judge Dyk, however, focuses on the narrow issue of press access to governmental proceedings, and not on the broader repercussions that inchoate liability under the Espionage Act might have on the reporting of national security-related stories.

⁵³ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980) (plurality opinion).

might be reconceived to provide some protection to reporters in national security cases is through the lens of the heretofore underutilized Press Clause. For if the press is to be so broadly liable for *any* newsgathering that might in any way violate the Espionage Act, the chilling effect on speech generally, and on the importance of public debate in a free society specifically, will be manifest. As Judge Keith warned just five years ago:

Democracies die behind closed doors When government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation. The Framers of the First Amendment “did not trust any government to separate the true from the false for us.” They protected the people against secret government.⁵⁴

IV. CONCLUSION

Analysis of the statutory framework appertaining to the balance between governmental secrecy and freedom of the press, on closer scrutiny, yields far more questions than answers. Owing to the dearth of significant case law interpreting the more ambiguous—and potentially controversial—provisions of the Espionage Act, and owing to the absence of a coherent, overarching statute governing the publication of national security information generally, the statutory framework provides an unsatisfactory lens through which to understand the background legal issues.

Insofar as principal liability is concerned, the central statutes likely to be at issue are 18 U.S.C. §§ 641 and 793(e), particularly in light of the interpretation of § 793(e) adopted in the AIPAC case in August 2006. But as suggested above, the inchoate liability issues are perhaps more substantial going forward, especially to the extent that inchoate liability would arguably provide a means around the constitutional protections of the Press Clause.

Recognizing a limited Press Clause defense to prosecutions for inchoate liability under the Espionage Act is hardly a solution to the underlying tension deftly expounded by Professor Stone in his essay. Because of the extent to which the Espionage Act and the other statutes discussed herein render the *possession* and *retention* of classified national security information unlawful, inchoate liability raises a far more serious question in the context of these “communicative” crimes than it does in the context of other offenses, as in cases like *Bartnicki*. Thus, my central purpose in this Essay has been to suggest that the *real* problem insofar as the press is concerned is this facet of these statutes: that, because of their

⁵⁴ *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002) (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 773 (1972)).

open-ended language, they are easily susceptible to broad theories of inchoate liability.⁵⁵ And as *Bartnicki* suggests, the First Amendment, as currently construed, does not protect reporters from such prosecution.

Professor Stone's essay raises critically important points about the balance between governmental secrecy and freedom of the press, and underlines the fundamental constitutional principles that *should* guide our understanding (and potential resolution of) these troubling issues. The problem, however, is that the language of the statutes in their current form might allow the government to target the media in ways that would not implicate these deep constitutional tensions. That does not make the constitutional debate that both Professor Stone and I hope to catalyze any less worthwhile, just less likely to actually happen.

No one seriously contests the central and immutable importance of the press in our free society, nor the manifest necessity of protecting the press from undue governmental restriction. At the same time, I am hardly a First Amendment absolutist. There is some information, such as details on how to construct nuclear weapons, to which I recognize absolutely no public right, and with respect to the publication of which I would not argue for any First Amendment protection.⁵⁶ But especially where the *gathering* of information cannot itself pose any true threat to the nation—where only publication itself might actually harm the national security—the fundamental public values inherent in journalism outweigh the countervailing governmental interests. Put differently, the government's remedies vis-à-vis publication of national security information are, in my view, sufficient. The First Amendment should otherwise immunize reporters conducting good-faith investigations for stories of public concern, even if they might technically be held liable under a broad inchoate theory of liability under the Espionage Act. After all, as Chief Justice Warren wrote in 1967, “[i]t would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile.”⁵⁷

⁵⁵ Cf. Ira P. Robbins, *Double Inchoate Crimes*, 26 HARV. J. ON LEGIS. 1, 115 (1989) (noting the ambiguity and abstraction common to statutes punishing inchoate offenses).

⁵⁶ See *supra* note 39 and accompanying text.

⁵⁷ *United States v. Robel*, 389 U.S. 258, 264 (1967).

