2007

Citizen Journalism and the Reporter's Privilege

Mary-Rose Papandrea

Article

Citizen Journalism and the Reporter's Privilege

Mary-Rose Papandrea†

† Assistant Professor, Boston College Law School. I would like to thank David Ardia, Gregory Magarian, Larry Cunningham, Michael Cassidy, and workshop participants at Boston College Law School and Villanova Law School for helpful comments on earlier drafts of this Article. I would also like to thank Katherine Laswell, Ronaldo Rauseo-Ricupero, and Shaileen Stillmank for their outstanding research assistance. A summer research grant from the Boston College Law School Fund made this project possible.

Over the last few years, the number of subpoenas issued to journalists has risen dramatically. A flurry of high profile cases involving such subpoenas[1] has focused the public's attention on the merits of the reporter's privilege. As a result, Congress is considering federal shield law legislation, states are considering adopting or revising statutory shield laws, and courts around the nation are grappling with the scope of the reporter's privilege under the First Amendment, common law, and state statutes. In all of these contexts, one issue persists as a sticking point: whether so-called "pajama-clad bloggers" should be entitled to invoke a reporter's privilege. Some courts confronting reporter's privilege issues in cases involving traditional media entities have been so worried about the expansive scope of the privilege that they have been throwing the baby out with the bathwater and refusing to recognize the privilege at all.[2] Similarly, in Congress's most recent attempt to pass a federal shield law, the difficulty of defining who would be entitled to invoke its protections proved to be a major stumbling block.[3]

When states first began recognizing a reporter's privilege in the late nineteenth and early twentieth centuries,[4] defining

1. Mark Jurkowitz, *Journalists Push for a State Shield Law*, BOSTON GLOBE, Dec. 21, 2004, at D1 (discussing the ramifications of subpoenas issued to Judy Miller and Matthew Cooper in the Valerie Plame investigation, to various reporters in Wen Ho Lee's Privacy Act case against the Government, and to reporters who published information leaked from the BALCO steroid grand jury investigation).

2. *See, e.g.*, *In re* Grand Jury Subpoena, Judith Miller, 397 F.3d 964, 976–80 (D.C. Cir. 2005) (Sentelle, J., concurring) (noting that the difficulties of determining who qualifies as a reporter counsel against recognizing a First Amendment or federal common law privilege and expressing special concern about whether "the stereotypical 'blogger' sitting in his pajamas at his personal computer posting on the World Wide Web" would be entitled to invoke the privilege); Lee v. Dep't of Justice, 401 F. Supp. 2d 123, 139–40 (D.D.C. 2005) (refusing to recognize a reporter's privilege under federal common law in part due to the difficulties of defining who qualifies as a reporter). Scholars and media lawyers have expressed concern that the viability of the reporter's privilege is in danger if everyone can claim its protection. Floyd Abrams Explains Why He Should Lose, http://instapundit.com/archives/019677.php (Dec. 6, 2004, 12:44 EST) ("'If everybody's entitled to the privilege, nobody will get it.'" (quoting renowned media attorney Floyd Abrams)).

3. *See* Posting of Declan McCullagh to News.Com, http://news.com.com/2061-10796_3-5892666.html (Oct. 10, 2005, 16:20 PDT).

4. The first state shield law was enacted in Maryland on April 2, 1896, in response to the imprisonment of a *Baltimore Sun* reporter for refusing to reveal a confidential source to a grand jury. Act of Apr. 2, 1896, ch. 249, 1896 Md. Laws 437 (codified at MD. CODE ANN., CTS. & JUD. PROC. § 9-112 (Lex-

who was a member of the media entitled to invoke it was a relatively easy task. Generally speaking, states limited the privilege's protections to full-time employees of established mainstream media entities. Although in more recent decades courts have been forced to consider the scope of the reporter's privilege in cases involving freelance reporters and book authors,[5] the development of the Internet and online publications have raised a host of new, perplexing questions about the purpose and scope of the privilege.

Courts have just begun to address cases involving nonprofessional journalists seeking the protections of the reporter's privilege. California courts recently confronted a case in which Apple Computer sought to subpoena the names of sources and documents relating to confidential information about a new Apple product posted on two websites devoted to discussion of Macintosh computers and related products.[6] The trial court assumed, without deciding, that the website editors were journalists but held that the California shield law did not apply because they had divulged trade secrets.[7] The appellate court reversed, holding that the petitioners were covered under the California shield law. The court rejected Apple's arguments that the petitioners were not engaged in "legitimate journalism" and that their websites did not constitute publications

isNexis 2002)); *see also* C. THOMAS DIENES ET AL., NEWSGATHERING AND THE LAW § 15-1 (2d ed. 1999); Bruce L. Bortz & Laurie R. Bortz, *"Pressing" Out the Wrinkles in Maryland's Shield Law for Journalists*, 8 U. BALT. L. REV. 461, 462 n.10 (1979). Other states followed suit in the 1930s. *See, e.g.*, Act of Aug. 21, 1935, No. 253, 1935 Ala. Laws 649 (codified at ALA. CODE § 12-21-142 (LexisNexis 2005)); Act of Mar. 4, 1937, ch. 25, 1937 Ariz. Sess. Laws 45 (codified at ARIZ. REV. STAT. ANN. § 12-2237 (2003)); Initiated Act No. 3, § 15, 1937 Ark. Acts 1391 (codified at ARK. CODE ANN. § 16-85-510 (2005)); Act of July 15, 1935, ch. 532, § 6, 1935 Cal. Stat. 1608, 1610 (currently codified at CAL. EVID. CODE § 1070 (West 1995)); Act of Feb. 26, 1936, ch. 29, 1936 Ky. Acts 73 (codified at KY. REV. STAT. ANN. § 421.100 (LexisNexis 2005)); Act of May 12, 1933, ch. 167, 1933 N.J. Laws 349 (codified at N.J. STAT. ANN. § 2A:84A-21 (West 1994)); Act of June 25, 1937, no. 433, 1937 Pa. Laws 2123 (codified at 42 PA. CONS. STAT. ANN. § 5942(a) (West 2003)).

5. *See infra* Part III.

6. O'Grady v. Superior Court, 139 Cal. App. 4th 1423, 1432 (Ct. App. 2006).

7. Apple Computer, Inc. v. Doe 1, No. 1-04-CV-032178, 2005 WL 578641, at *8 (Cal. Super. Ct. Mar. 11, 2005) (denying a request for a protective order), *rev'd sub nom. O'Grady*, 139 Cal. App. 4th 1423.

covered by the California shield law statute.[8] Although the Apple case was the first to confront the applicability of the reporter's privilege a website, it will not be the last.

State legislatures have also struggled to define who is entitled to shield law protection. Although over thirty states have shield laws, most states need to update their statutes to reflect the changing nature of journalism and the technology used to publish it. Statutory shield laws often limit their application to people who have a professional affiliation with a media entity or require "regular" employment as a journalist, and some laws even exclude broadcast and electronic media. In the Apple case, for example, the appellate court was forced to engage in an extensive statutory analysis of the California shield law in order to hold that an online publication constituted a "newspaper, magazine, or other periodical publication" entitled to protection, because the state law had not been amended since 1974, long before Internet publications existed.[9]

The difficulties new media pose for defining who should be entitled to invoke a reporter's privilege should not doom the privilege's very existence. The struggle to define who should be entitled to claim the privilege is not new; the development of the Internet as a new medium of communication poses many of the same challenges to the scope of the reporter's privilege that state legislatures and state and federal courts have been grappling with ever since the privilege was first recognized. Courts have struggled in past years with cases involving pay-per-view wrestling commentators,[10] investigative book authors,[11] freelance writers,[12] documentary filmmakers,[13] academics,[14] and

8. *See O'Grady*, 139 Cal. App. 4th at 1456–58 (quoting Real Party in Interest, Apple Computer, Inc.'s Response to Briefs of Amici Curiae (1) Jack M. Balkin et al., (2) The Reporters Committee for Freedom of the Press et al., (3) Bear Flag League, and (4) United States Internet Industry Association and NetCoalition at 5, *O'Grady*, 139 Cal. App. 4th 1423 (No. H028579), 2006 WL 2155499).

9. *See id.* at 1459–66 (quoting CAL. CONST. art. I, § 2(b); CAL. EVID. CODE § 1070(a) (West 1995)).

10. *See* Titan Sports, Inc. v. Turner Broad. Sys. (*In re* Madden), 151 F.3d 125, 126–27 (3d Cir. 1998) (holding that the privilege was not applicable).

11. *See, e.g.*, Shoen v. Shoen, 5 F.3d 1289, 1290–91 (9th Cir. 1993) (holding that a qualified reporter's privilege applied to an author's newsgathering resources); von Bulow v. von Bulow, 811 F.2d 136, 138–40, 147 (2d Cir. 1987) (holding that the privilege was not applicable).

12. *See* People v. Von Villas, 13 Cal. Rptr. 2d 62, 78–79 (Ct. App. 1992) (holding that a California statutory privilege applied to an individual who had

independent research consultants,[15] concluding more often than not that such individuals are entitled to invoke the privilege. Because state shield laws have existed since 1896,[16] throughout the last century state legislators have often had to decide whether to expand the scope of shield laws beyond "newsmen" working on daily papers to people working in magazines, television, and radio.[17]

This history of the reporter's privilege demonstrates that the medium of communication should not determine whether the privilege should apply. Instead, the focus must be on the underlying purposes for the privilege: increasing the amount of information in the public domain without turning all of those who engage in such an enterprise into investigators for the government and private parties.[18] Given this broad conception

been a freelance author for thirteen years); Northside Sanitary Landfill, Inc. v. Bradley, 462 N.E.2d 1321, 1325 (Ind. Ct. App. 1984) (holding that the Indiana statutory shield law did not apply to a freelance reporter who was not working for the television station and collected information out of a personal interest in environmental issues).

13. *See* Silkwood v. Kerr-McGee Corp., 563 F.2d 433, 436–37 (10th Cir. 1977) (holding that a privilege applied to a documentary filmmaker whose "mission in this case was to carry out investigative reporting for use in the preparation of a documentary film," who had "spent considerable time and effort in obtaining facts and information of the subject matter in this lawsuit," and whose intention was "to make use of this in preparation of the film").

14. *See* Cusumano v. Microsoft Corp., 162 F.3d 708, 714 (1st Cir. 1998) (holding that professors are entitled to invoke a First Amendment reporter's privilege); Wright v. Jeep Corp., 547 F. Supp. 871, 876 (E.D. Mich. 1982) (holding that an academic researcher cannot assert a reporter's privilege when the identity of a confidential source is not at issue).

15. *See* Summit Tech., Inc. v. Healthcare Capital Group, Inc., 141 F.R.D. 381, 384 (D. Mass. 1992) (holding that an independent research consultant was "engaged in the dissemination of investigative information to the investing business community" on "matters of public concern," and was therefore "entitled to raise the claim of privilege . . . as would any other media reporter," but explicitly not deciding "[w]hether or not [the consultant] is a member of the 'organized press' *per se*" (quoting Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758 (1985))).

16. *See supra* note 4.

17. *See, e.g.*, Act of Mar. 30, 1960, ch. 116, 1960 Ariz. Sess. Laws 241 (codified at ARIZ. REV. STAT. ANN. § 12-2237 (2003)) (amending the law to cover broadcast as well as print media); Act of Mar. 20, 1952, ch. 121, 1952 Ky. Acts 313 (codified at KY. REV. STAT. ANN. § 421.100 (LexisNexis 2005)) (adding radio and television as protected media).

18. *See* Branzburg v. Hayes, 408 U.S. 665, 744 n.34 (Stewart, J., dissenting) (cautioning that the majority opinion "annex[es] the press as an investigative arm [for the government]").

of the purpose behind the reporter's privilege, the privilege should not be limited to those who are serving as traditional journalists; rather, it should extend to anyone who is contributing to the marketplace of ideas by disseminating information to the public.

Most courts and commentators considering the issue have expressed deep concern about the notion that bloggers[19] and other citizen journalists should be entitled to the privilege.[20] As a result, these courts and commentators have developed awkward, difficult-to-implement rules in an effort to limit the class of those entitled to invoke the privilege. These various approaches, however, are all fundamentally flawed,[21] and, more importantly, fail to reconceptualize the scope of the privilege in light of the expanding number of individuals and entities entitled to its protections.[22]

It is neither possible nor prudent to limit a reporter's privilege to professional journalists. Instead, a qualified privilege should apply to anyone disseminating information to the public who is called to testify in a judicial or administrative proceeding. In addition, the legal system should adopt several exceptions to the privilege to cover those circumstances in which countervailing societal interests outweigh any societal interest in preserving the privilege. These exceptions should include the following situations: (1) when the subpoena is directed to someone who witnessed or participated in criminal or tortious activity (the definition of crime, however, should exclude "leaks" of classified or national security information); (2) when a direct and imminent threat to national security warrants compelling testimony; and (3) when the subpoena is directed to someone who engaged in publication solely in an effort to avoid a subpoena. In addition, plaintiffs suing an individual who dissemi-

19. Defining what counts as a "blog" is not an easy task. Some say that a blog has three main features: the postings appear in reverse chronological order, the content is unfiltered, and it permits comments from readers. *See, e.g.*, Posting of Michael Conniff to Online Journalism Review, *Just What Is a Blog, Anyway?*, http://www.ojr.org/ojr/stories/050929/print.htm (Sept. 29, 2006). In addition, a blog often contains links to other websites and copies of text from other sources. *Id.* But many websites considered to be blogs do not contain all of these features, and many commentators have argued that a comprehensive definition is neither possible nor necessary. *Id.*

20. *See supra* note 2; *infra* Part III.C.1.

21. *See infra* Parts III.B, III.C.

22. *See infra* Part III.C.

nates information to the public (or that individual's publisher) should first be required to survive a motion to dismiss, as well as to demonstrate the importance of the testimony and the inability to obtain the information from alternative sources. This safeguard would protect against frivolous defamation suits brought solely to obtain a source's identity.

I. THE CHANGING NATURE OF JOURNALISM

In many ways, the definition of "journalism" has now come full circle. When the First Amendment was adopted, "freedom of the press" referred quite literally to the freedom to publish using a printing press, rather than the freedom of organized entities engaged in the publishing business.[23] The printers of 1775 did not exclusively publish newspapers; instead, in order to survive financially, they dedicated most of their efforts to printing materials for paying clients.[24] The newspapers and pamphlets of the American Revolutionary era were predominantly partisan and their successors became even more so through the turn of the century. These publications engaged in little newsgathering and instead were principally vehicles for opinion.[25]

The term "journalism" passed into common usage in the 1830s, at roughly the same time that newspapers, using high-speed rotary steam presses, began mass circulation throughout the eastern United States.[26] Using the printing press, publishers could distribute exact copies to large numbers of readers at a low incremental cost.[27] In addition, the rapidly increasing demand for advertising brand-name products fueled the creation of publications subsidized in large part by advertising revenue.[28] It was not until the late nineteenth century that the concept of the "press" morphed into a description of individuals and companies engaged in an often competitive commercial

23. David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 446–47 (2002).

24. TIMOTHY W. GLEASON, THE WATCHDOG CONCEPT 11 (1990).

25. *See id.* (describing the growth of the partisan press during the American Revolution).

26. John E. Newhagen & Mark R. Levy, *The Future of Journalism in a Distributed Communication Architecture*, *in* THE ELECTRONIC GRAPEVINE: RUMOR, REPUTATION, AND REPORTING IN THE NEW ON-LINE ENVIRONMENT 9, 12 (Diane L. Borden & Kerric Harvey eds., 1998).

27. *Id.* at 12–13.

28. Anderson, *supra* note 23, at 447.

media enterprise.[29] For most of the twentieth century, professional journalists working in television, radio, and print media dominated the gathering and dissemination of news and information.

The Supreme Court has often recognized the important role the mainstream media plays in our democracy. In 1931 the Court commented in *Near v. Minnesota ex rel. Olson* that the growing complexity of government and concomitant opportunities for crime and malfeasance "emphasize[] the primary need of a vigilant and courageous press."[30] In *Estes v. Texas*, the Court noted that the press "has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences."[31] The First Amendment, the Court has said, helps "preserve an untrammeled press as a vital source of public information."[32] In *New York Times Co. v. Sullivan*, the Supreme Court recognized the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,"[33] and accordingly held that even false statements about public officials were constitutionally protected absent evidence that the statements were made with actual malice.[34]

At the same time, the Court has rejected arguments of the institutional press that its role as the "fourth estate," with its unique abilities to gather and disseminate news about matters of public concern, entitled it to special constitutional protection.[35] Since the 1970s the Court has routinely rejected claims that the press was entitled to any special First Amendment protections that the public at large did not equally enjoy.[36]

29. *See id.*

30. 283 U.S. 697, 719–20 (1931).

31. 381 U.S. 532, 539 (1965).

32. Grosjean v. Am. Press Co., 297 U.S. 233, 250 (1936).

33. 376 U.S. 254, 270 (1964).

34. *Id.* at 279–80.

35. *See* GLEASON, *supra* note 24, at 4–6 (citing case law, attorneys, and journalism literature for the contention that the institutional press is "the 4th Estate" and an "independent watchdog[]").

36. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580–81 (1980) (plurality opinion) (recognizing a "public" right of access to criminal trials, rather than a right of the press); Houchins v. KQED, Inc., 438 U.S. 1, 11 (1978) (plurality opinion) (stating that the media has no right of "special access to information not available to the public generally" (quoting Branzburg v. Hayes, 408 U.S. 665, 684 (1972))); Pell v. Procunier, 417 U.S. 817, 834

Perhaps the Court's reluctance to hold that the press has special constitutional rights was remarkably (although unintentionally) prescient. As means of communication become more interactive and accessible to the public, the "press" of the twenty-first century is rapidly becoming more difficult to define.[37] With the traditional media of newspapers, radio, and television, there was a natural physical limit to the space and time available for individual participation. With the Internet, these spatial and temporal barriers no longer exist. As a result, more people are able to contribute their ideas and opinions to the public discourse.[38] The numbers of people contributing information on the Internet have been rapidly expanding. The number of blogs (and blog-readers) has jumped dramatically in the last few years. At last count, there were roughly 34.5 million blogs, and the number increases every day.[39] Technorati.com, which tracks trends in the "blogosphere," reports that 75,000 new blogs are created daily, roughly one every second.[40]

One main reason blogs have proliferated is the absence of barriers to entry: a website can be created in minutes at little or no cost. Blogs cover every sort of imaginable issue. Although many of these millions of blogs are simply online diaries, political blogs are some of the most popular and well-known contributors to the public debate. Some blogs provide readers with original research; others consist primarily of categorized and digested links to other news sources. One of the benefits of some blogs is that readers are able to hear directly from experts who would ordinarily be quoted by mainstream media. In addition, the creativity, knowledge, and expertise of bloggers often dwarf that of journalists in traditional media outlets.[41]

(1974) (rejecting the claim that the press is entitled to a greater right of access than the general public); *see also* Anderson, *supra* note 23, at 449–50 (noting that, by the 1970s, the Supreme Court refused to recognize special rights under the Press Clause).

37. *See* Apple Computer, Inc. v. Doe 1, No. 1-04-CV-032178, 2005 WL 578641, at *4 (Cal. Super. Ct. Mar. 11, 2005), *rev'd sub nom.* O'Grady v. Superior Court, 139 Cal. App. 4th 1423, 1432 (Ct. App. 2006).

38. Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805, 1846–47 (1995).

39. Posting of Dave Sifry to Technorati, *State of the Blogosphere, April 2006 Part I: Blogosphere Growth*, http://www.technorati.com/weblog/2006/04/96.html (Apr. 17, 2006).

40. *Id.*

41. *See* Daniel W. Drezner & Henry Farrell, The Power and Politics of

The influence of blogs on both the traditional mainstream media and the public discourse cannot be overestimated. Online contributors have broken a number of stories that the mainstream media originally either ignored or downplayed. Matt Drudge, author of the controversial online Drudge Report, has led the way in providing influential Internet journalism.[42] Although Drudge does not consider himself a journalist—in fact, he bristles at the suggestion[43]—his blog revealed that *Newsweek* had pulled a story reporting on President Clinton's affair with Monica Lewinsky.[44] Drudge also was the first to report that Bob Dole had chosen Jack Kemp as his running mate in the 1996 presidential election, that *Newsweek* had withheld a story that Clinton had fondled White House staff member Kathleen Willey, and that CBS had fired Connie Chung.[45]

Blogs have continued to drive the national conversation. The mainstream media did not pick up on Mississippi Senator Trent Lott's controversial comments at Strom Thurmond's one-hundredth birthday celebration; instead blogger Atrios, Joshua Micah Marshall on TalkingPointsMemo.com, and University of Tennessee law professor Glenn Reynolds on Instapundit.com pressed the issue until the mainstream media paid attention and Lott resigned his position as Senate Majority Leader.[46] Several blogs, including Buckhead, InstaPundit, Little Green

Blogs, Presentation at the 2004 American Political Science Association Annual Meeting 4, 16 (July 2004), *available at* http://www.utsc.utoronto.ca/~farrell/blogpaperfinal.pdf.

42. *See* Todd S. Purdum, *The Dangers of Dishing Dirt in Cyberspace*, N.Y. TIMES, Aug. 17, 1997, at E3.

43. *See id.*

44. The Drudge Report broke this story on January 17, 1998. Seth Schiesel, *Cyberspace Is on Alert for More Scandal News*, N.Y. TIMES, Jan. 26, 1998, at A14. Soon thereafter *Newsweek* published its report, and the road to Clinton's impeachment hearings began. Howard Fineman & Karen Breslau, *Sex, Lies and the President*, NEWSWEEK, Feb. 2, 1998, at 20.

45. Howard Kurtz, *Clinton Scoop So Hot It Melted*, WASH. POST, Jan. 22, 1998, at C1; Purdum, *supra* note 42.

46. Oliver Burkeman, *Bloggers Catch What the Washington Post Missed*, GUARDIAN (London), Dec. 21, 2002, at 13, *available at* http://www.guardian.co.uk/international/story/0,3604,863964,00.html; Paul Krugman, *The Other Face*, N.Y. TIMES, Dec. 13, 2002, at A39 ("Joshua Marshall, whose talkingpointsmemo.com is must reading for the politically curious, . . . [is,] more than anyone else, . . . responsible for making Trent Lott's offensive remarks the issue they deserve to be."); Drezner & Farrell, *supra* note 41, at 3; Noah Shactman, *Blogs Make the Headlines*, WIRED, Dec. 23, 2004, http://www.wired.com/news/culture/0,1284,56978,00.html.

Footballs, Powerline, and TalkingPointsMemo are credited for pressing the investigation into the authenticity of CBS news anchor Dan Rather's documents concerning President George W. Bush's National Guard service.[47] Bloggers also forced the mainstream media to acknowledge and assess questions raised by a group called Swift Boat Veterans for Truth regarding Democratic presidential nominee John Kerry's military service in Vietnam.[48] In July 2005, bloggers pointed out that the mainstream media gave significantly more coverage to the disappearance of white women than to minorities and pressured cable news outlets to cover the disappearance of a young black pregnant woman in Philadelphia with the same depth as they did the murder of Laci Peterson.[49] In January 2006, bloggers revealed that James Frey fictionalized significant portions of his memoir.[50] The blog stopsexpredators.com was the first to reveal the contents of inappropriate e-mails former Representative Mark Foley sent to House pages.[51]

Many have argued that the rise of bloggers is due in no small part to the public's diminished confidence in mainstream journalism, which has been plagued by scandals for the last several years.[52] A survey conducted by the Pew Research Center for the People and the Press revealed that fifty-three percent of Americans do not trust what they hear and read in the news.[53] Another survey showed that only thirty-three percent

47. Jonathan V. Last, *What Blogs Have Wrought*, WKLY. STANDARD, Sept. 27, 2004, at 27 *available at* http://www.weeklystandard.com/Utilities/printer_preview.asp?idArticle=4640&R=ED37D7; *see also* Marianne M. Jennings, *Where Are Our Minds and What Are We Thinking? Virtue Ethics for a Perfidious Media*, 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 637, 693 (2005) (discussing the bloggers' role in "Dan Rather's Memogate").

48. Gene Edward Veith & Lynn Vincent, *Year of the Blog*, 19 WORLD MAG., Dec. 4, 2004, http://www.worldmag.com/articles/10018.

49. Allison Keyes, *Bloggers Gain Attention for Missing Woman*, NAT'L PUB. RADIO, July 29, 2005, http://www.npr.org/templates/story/story.php?storyId=4776486.

50. Tom Zeller, Jr., *Link by Link: Before the Fame, a Million Little Skeptics*, N.Y. TIMES, Jan. 23, 2006, at C3.

51. *See* Peter Hamby, *Mysterious Blog Scooped Media on Foley Message*, CNN.COM, Oct. 5, 2006, http://www.cnn.com/2006/POLITICS/10/04/foley.internet.

52. *See* Thomas J. Johnson & Barbara K. Kaye, *Wag the Blog: How Reliance on Traditional Media and the Internet Influence Credibility Perceptions of Weblogs Among Blog Users*, 81 JOURNALISM & MASS COMM. Q. 622, 624–25 (2004).

53. THE PEW RES. CTR. FOR THE PEOPLE AND THE PRESS, NEWS AUDI-

believe that "the news media tries to report the news without bias."[54] Critics complain that media conglomerations are too close to the corporations and politicians they cover to be trusted as watchdogs.[55] Some point to the widespread failure of the press to challenge the Bush Administration's rush to war in Iraq as proof positive that mainstream journalists have fallen down on the job.[56]

Perhaps what is most revolutionary about Internet journalism is that it is often interactive. Although the first blogs (like the Drudge Report) most often simply posted links to other mainstream media websites, over time bloggers began to offer their own insights and commentary.[57] More recently, many blogs have become interactive by permitting their readers to respond with their own comments, criticism, and information.[58] Indeed, it was the readers and outside contributors to blogs who uncovered that Dan Rather's documents about Bush's National Guard service were forged.[59] The interactive nature of the Internet permitted hundreds, if not thousands, of experts to use computers to coordinate their activities and findings like a network of virtual detectives on a case.[60]

Blogging is only one facet of the new journalism that has developed in recent years. Other forms of "citizen journalism"[61] publications, compiling contributions from ordinary people, have also proliferated. These online publications run the gamut from those with editors suggesting story ideas and reviewing contributions for style, grammar, and content, to those with no editors at all.[62] For example, Backfence.com, the brainchild of a former *Washington Post* journalist, provides residents of Dis-

ENCES INCREASINGLY POLARIZED (2004), http://people-press.org/reports/display.php3?ReportID=215.

54. Rachel Smolkin, *A Source of Encouragement*, AM. JOURNALISM REV., Aug.–Sept. 2005, at 30, 31.

55. *See* Barb Palser, *Journalism's Backseat Drivers*, AM. JOURNALISM REV., Aug.–Sept. 2005, at 43, 43.

56. *Id.* at 44.

57. Veith & Vincent, *supra* note 48.

58. *Id.*

59. *Id.*

60. *Id.*

61. There are many other names for this new form of journalism, including "open source journalism," "citizen media," "we media," "participatory media," and "networked journalism."

62. *See* Ariana Eunjung Cha, *This Just in: Do-It-Yourself Journalism Spreads on Web*, BOSTON GLOBE, July 24, 2005, at A14.

trict of Columbia suburbs with a public forum on issues such as the best plumber in town, new housing developments, and school plays.[63] Contributors agree to abide by certain guidelines, such as telling the truth, respecting others' privacy, and limiting indecent or offensive language, but stories are not edited.[64] The *Melrose Mirror*, an Internet publication and creation of MIT's Media Lab, is written and edited by a staff of senior citizens in Melrose, Massachusetts.[65] The website and weekly newspaper *Your Mom* has only one staff member who is a journalist; about forty unpaid teenagers draft all the content, which is edited only for indecency and profanity.[66] In contrast, at *New West*, an online newspaper that covers a wide range of issues in the Rocky Mountain area, a full slate of editors reviews contributions from citizen editors before publication.[67] *New West* seeks to compete directly with the mainstream media.[68]

Other experiments with citizen or participatory journalism are larger in scope and focus on a broad range of political, social, and economic issues. In South Korea, the *OhMyNews* website claims over thirty-nine thousand ordinary citizens as contributors and is credited with helping Roh Moo Hyun win that nation's presidency.[69] Wikimedia is an umbrella company that houses several collaborative online ventures, including the four-year-old Wikipedia, which contains more than 1.5 million encyclopedia-style articles and almost three million registered users.[70] Wikinews is a more recent project that began in December 2004.[71] It aims to use collaborative reporting from its

63. Backfence.com, About Backfence, http://www.backfence.com/about/index.cfm?page=/members/aboutUs&mycomm=MC (last visited Nov. 30, 2006).

64. Backfence.com, Community Rules, http://www.backfence.com/about/index.cfm?page=/members/commRules&mycomm=MC (last visited Nov. 30, 2006).

65. Melrose Mirror Front Page, http://melrosemirror.media.mit.edu (last visited Nov. 30, 2006).

66. Cha, *supra* note 62.

67. *Id.*; *see also* New West Network, About New West, http://newwest.net/index.php/plain/entry/13/ (last visited Nov. 30, 2006).

68. Cha, *supra* note 62.

69. *Id.*

70. Wikipedia, Statistics, http://en.wikipedia.org/wiki/Special:Statistics (last visited Nov. 30, 2006); *see also* Aaron Weiss, *The Unassociated Press*, N.Y. TIMES, Feb. 10, 2005, at G5.

71. Wikinews, http://www.wikinews.org (last visited Nov. 30, 2006).

users to summarize the news on all subjects.[72] The policy guidelines for Wikinews emphasize neutrality, and all editing mechanisms are designed to be completely transparent.[73] At any time a user can compose a new article or edit an existing one and see the trail of prior edits.[74] The project founders hope that the readers and contributors will serve as fact-checkers and promote the accuracy of the articles.[75]

Many have been quick to argue that bloggers and other citizen journalists are not actually engaged in journalism. Elizabeth Osder, a visiting professor at the University of Southern California's School of Journalism, stated that "[b]loggers are navel-gazers" who are "about as interesting as friends who make you look at their scrap books."[76] Echoing the most common criticism of bloggers, she added that blogs consist of "opinion without expertise, without resources, without reporting."[77] Another journalist complained that "[a] professional journalist's No. 1 obligation is to be accurate. A citizen journalist's No. 1 obligation is to be interesting."[78] David Shaw of the *Los Angeles Times* said that unlike traditional journalists, who must pass their work through layers of filters before publication, bloggers thrive on dispensing unfiltered, raw information to the public.[79] He charges that "[m]any bloggers—not all, perhaps not even most—don't seem to worry much about being accurate. Or fair. They just want to get their opinions—and their 'scoops'—out there as fast as they pop into their brains."[80] Another scholar has noted that the low costs involved in setting up a blog "reduce[] the quality of each individual blog as compared with traditional media, and can make it hard for readers to find the accurate blogs or identify the inaccurate ones."[81]

72. *See* Wikinews, http://meta.wikimedia.org/wiki/Wikinews (follow "Mission Statement" hyperlink) (last visited Nov. 30, 2006).

73. *See id.* (follow "Ensuring Neutrality" and "Article Stages" hyperlinks).

74. *See id.* (follow "Article Stages" hyperlink).

75. *See id.* (follow "Frequently Asked Questions" hyperlink).

76. Shactman, *supra* note 46.

77. *Id.*

78. Fred Brown, *'Citizen' Journalism Is Not Professional Journalism*, QUILL, Aug. 2005, at 42, 42.

79. *See* David Shaw, *Media Matters: Do Bloggers Deserve Basic Journalistic Protections?*, L.A. TIMES, Mar. 27, 2005, at E14.

80. *Id.*

81. Larry E. Ribstein, *Initial Reflections on the Law and Economics of*

In response, citizen journalists are quick to point out that their mistakes are corrected as quickly as they are posted. Jeff Jarvis, a blogger on Buzzmachine.com, told a *Wall Street Journal* reporter that "[w]hen I make a mistake, people jump on me like white blood cells on a germ. If I don't correct it, my reputation's going to suffer."[82] One scholar argued that the blogosphere capitalizes on what James Surowiecki has labeled "the wisdom of crowds"[83] by drawing on the expertise and knowledge of literally millions of people.[84] In addition, the low costs of operating a website allow those with very specific interests to publish material that might be too narrowly focused for more traditional media.[85]

A recent Wikipedia scandal involving the defamation of a former journalist has led many to question the reliability of open-source journalism,[86] but the many defamation lawsuits filed against major media companies demonstrate that online publications do not have a monopoly on error.[87] Furthermore, a recent analysis by the journal *Nature* concluded that Wikipedia's scientific entries had an average of four "inaccuracies" (defined as factual errors, critical omissions, or misleading statements) per entry as compared with *Encyclopedia Britannica*'s three errors per entry.[88] This study demonstrates that Wikipedia's error rate may not be significantly greater than that of a publication whose content is provided by paid experts.[89]

Blogging 3 (Univ. of Ill. Coll. of Law, Working Paper No. 25, 2005); *see also* CASS SUNSTEIN, REPUBLIC.COM 56–60, 75–77 (2001) (expressing concern that the growth of the new media will fracture the common discourse).

82. Jessica Mintz, *When Bloggers Make News*, WALL ST. J., Jan. 21, 2005, at B1.

83. *See* JAMES SUROWEICKI, THE WISDOM OF CROWDS, at xi–xxi (2004).

84. Ribstein, *supra* note 81, at 7.

85. *Id.*

86. *See* John Seigenthaler, *A False Wikipedia 'Biography*,*'* USA TODAY, Nov. 30, 2005, at A11 (criticizing Wikipedia for allowing the publication of a biography of Seigenthaler that falsely stated that he was involved with the Kennedy assassinations).

87. *See, e.g.*, Pam Belluck, Boston Herald *Is Told to Pay $2 Million for Libel*, N.Y. TIMES, Feb. 19, 2005, at A10; Reed Irvine & Cliff Kincaid, *Costly Tailwind Bedevils CNN*, MEDIA MONITOR, Sept. 1, 1999, http://www.aim.org/media_monitor/3231_0_2_0_C/.

88. Gregory M. Lamb, *Online Wikipedia Is Not Britannica—But It's Close*, CHRISTIAN SCI. MONITOR, Jan. 5, 2006, at 13.

89. *Id.*

In addition, even mainstream journalism publications are regarded with different levels of trust. Readers may trust the *Los Angeles Times* more than they trust the *National Enquirer*, but the reporters working for either publication equally claim the title of "journalist." Courts have long resisted attempts to segregate the media into tiers based on perceived quality or trustworthiness.[90] At the same time, it is important to keep in mind that defamatory statements are actionable as long as a plaintiff can prove the appropriate level of fault.[91] Although the Communications Decency Act (CDA) protects Internet service providers against lawsuits,[92] it does not shelter primary content providers like bloggers and other citizen journalists from defamation claims.[93] This threat of litigation, with its attendant costs and inconvenience, has a "civilizing influence"[94] on Internet communications by improving the quality of the discourse.[95]

Despite its criticism of bloggers, the mainstream media have found themselves borrowing from the blogger's bag of tricks.[96] Many reporters have their own blogs.[97] *Newsweek* has

90. Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 905–07 (2000).

91. *See id.* at 905–15 (discussing the standards applicable to Internet speech); *see also* Eric P. Robinson, *Libel and Related Lawsuits Against Bloggers*, MEDIA L. RES. CTR., Aug. 10, 2005, http://www.medialaw.org/Content/Navigation-Menu/Member_Resources/Litigation_Resources/Materials_by_Issue/Lawsuits_Against_Bloggers/Lawsuits_Against_Bloggers.htm (compiling a list of lawsuits against bloggers).

92. *See* 47 U.S.C. § 230(c)(1) (2000) ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.").

93. *See* Zeran v. Am. Online, Inc., 129 F.3d 327, 330–31 (4th Cir. 1997) (noting that nothing in the CDA permits the "original culpable party who posts defamatory messages [to] . . . escape accountability"; instead, it simply prevents plaintiffs from "imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages"); *see also* Lidsky, *supra* note 90, at 868–72 (explaining that under the CDA, an allegedly defamed plaintiff must sue the originator of the defamatory statements).

94. Lidsky, *supra* note 90, at 886.

95. *Id.* at 885–92 (explaining how litigation chills speech on the Internet).

96. For a list of sample blogs supported by mainstream media outlets, see Matt Welch, *The Media Go Blogging, in Blogworld and Its Gravity*, COLUM. JOURNALISM REV., Sept.–Oct. 2003, at 21, 23. This list includes, among many others, the *Boston Globe*, the *Christian Science Monitor*, the *New Republic*, the *Wall Street Journal*, ABC, FOX, and MSNBC.

97. *See* Cyberjournalist.net, J-Blog List, http://www.cyberjournalist.net/

teamed with blog-tracker Technorati to provide direct links to comments bloggers are making about *Newsweek*'s stories (which appear both online and in print).[98] In January 2006, the *New York Times* launched "The Opinionator," a blog featured on the online version of its opinion page, that provides links to surveys and blogs as well as daily responses to opinion blogs.[99] The site gives roughly equal weight and treatment to the views of major bloggers and those of the editorial pages of major American newspapers.[100] In May 2006, the Associated Press (AP) teamed up with Technorati to make blogger commentary on AP news stories available to AP member websites.[101]

Several newspapers have been rapidly embracing the concept of citizen journalism by encouraging ordinary members of the public to contribute stories for publication. In London, the *Guardian* and the BBC actively seek photographs and video images of newsworthy events from their readers, and other mainstream media outlets are poised to follow their lead.[102] Soon after the July 7, 2005, terrorist attacks in London, cell phone images taken by commuters dominated the news coverage.[103] CNN followed suit and encouraged viewers to submit pictures and video images of Hurricane Dennis, and many submissions ultimately ended up on CNN's website.[104] Executives at CBS and ABC report that they are also working on ways to make it easier for viewers to submit content for publication.[105] As a start, NBC has given camera phones to all of its

cyberjournalists.php (last visited Nov. 30, 2006) (listing blogs posted on mainstream media websites or by journalists independently).

98. Cyberjournalist.net, Online News, http://www.cyberjournalist.net/news/002787.php (last visited Nov. 30, 2006) (noting *Newsweek*'s new feature).

99. *See* The Opinionator, http://opinionator.blogs.nytimes.com (last visited Nov. 30, 2006).

100. *See id.*

101. Posting of Peter Hirshberg to Technorati, http://technorati.com/weblog/2006/05/107.html (May 23, 2006).

102. *See* Daithi O Hanluain, *Forget F-Stops: These Cameras Have Area Codes*, N.Y. TIMES, July 3, 2003, at G1; Joe Light, *Lessons of the Internet Age: Citizen Journalism Shows How Firms Have Learned to Quickly Embrace New Technologies*, BOSTON GLOBE, July 16, 2005, at A13.

103. Torin Douglas, *How 7/7 'Democratised' the Media*, BBC NEWS, July 4, 2006, http://news.bbc.co.uk/2/hi/uk_news/5142702.stm.

104. Light, *supra* note 102.

105. *Id.*

staff members—not just the journalists—in case they happen to come across a news story.[106]

Some mainstream media entities are using citizen journalists to provide not just visual footage but also written content. In November 2006, Gannett, which owns ninety newspapers around the country, announced that not only was it officially merging its online and print staffers—the first mainstream media institution to take such a step—but it was also planning to use "non-journalists" to develop content for its publications.[107] Gannett announced these radical changes as part of a conscious effort to boost its circulation numbers by capitalizing on the popularity of blogs and community e-mail groups.[108] The *Denver Post* also publishes reader-contributed stories and photographs in local print editions.[109]

Although for the last hundred years professional journalists have been the primary purveyors of information to the public, this function is not one that has historically belonged exclusively to them. Journalism evolved in the past century with the development of radio and television; the invention of the Internet can easily be seen as just another, albeit more revolutionary, step in this process.

II. SOURCES AND CONTOURS OF THE REPORTER'S PRIVILEGE

Given the growing reluctance of courts to recognize a reporter's privilege, no discussion of who might be entitled to invoke the privilege can begin without an explanation of its history, purpose, and current scope. This section will demonstrate that despite the popular perception that the reporter's privilege is dying a slow (or not-so-slow) death, the reports of the privilege's demise are greatly exaggerated. Over thirty states have statutory shield laws, and no efforts are underway to repeal them. In fact, in 2006 the State of Connecticut passed its first statutory shield law.[110] In addition, although the existence of

106. *Id.*

107. *See* Frank Ahrens, *Gannett to Change Its Papers' Approach*, WASH. POST, Nov. 7, 2006, at D1.

108. *See id.*

109. James Nash, *Papers Preparing Web Innovations*, L.A. BUS. J., July 25, 2005, at 17.

110. Act of June 6, 2006, No. 06-140, 2006 Conn. Pub. Acts 140 (effective Oct. 1, 2006); *see also* Editorial, *An Important Media Moment*, HARTFORD COURANT, Aug. 22, 2006, at A6.

First Amendment privilege in the context of grand jury proceedings appears questionable, many circuits continue to recognize a First Amendment privilege in the context of criminal and civil proceedings, and a federal common law privilege is gaining traction. Furthermore, although the Judith Miller fiasco managed to turn public opinion against the existence of a reporter's privilege, other recent revelations based on secret sources demonstrate that the public's interest in the privilege is stronger than ever.

A. HISTORY AND PURPOSE OF THE PRIVILEGE

1. History of the Privilege

Journalists have been asserting their right to keep their sources confidential since colonial times, long before judicial or statutory recognition of any such right. Benjamin Franklin's brother was imprisoned in 1732 when he refused to divulge to a legislative commission the name of the author of an article in his newspaper.[111] In 1734, John Peter Zenger refused to reveal the names of his sources when he was accused of libeling the Governor of New York and was jailed for a month (he was later tried and acquitted).[112] In 1812, Congress issued a contempt citation to an editor for the *Alexandria Herald* who refused to identify the sources of a news story.[113] The first reported case concerning an asserted reporter's privilege was in 1848, when a court upheld the Senate's contempt citation for *New York Herald* reporter John Nugent.[114] Nugent had refused to disclose who had given him a copy of a draft of a proposed treaty to end the Mexican-American War that the Senate was then secretly debating.[115] A *New York Times* correspondent refused to comply with a House committee's request for the names of the Con-

111. BENJAMIN FRANKLIN, AUTOBIOGRAPHY 69 (Leonard W. Labaree et al. eds., Yale Univ. Press 1964) (1793).

112. LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 37–45 (1985).

113. *See* Peri Z. Hansen, *"According to an Unnamed Official": Reconsidering the Consequences of Confidential Source Agreements When Promises Are Broken by the Press*, 20 PEPP. L. REV. 115, 125 (1992).

114. *See Ex parte* Nugent, 18 F. Cas. 471, 493 (C.C.D.C. 1848) (No. 10,375). For one month, Nugent spent his days locked in a committee room in the Senate and his nights at the home of the Senate's Sergeant at Arms. The Senate eventually released him for "health reasons." Mark Bowden, *Lowering My Shield*, COLUM. JOURNALISM REV., July–Aug. 2004, at 24, 28.

115. *See Nugent*, 18 F. Cas. at 471–72.

gressmen who had told him that some House members were taking bribes.[116] Throughout the nineteenth century, similar cases involving legislative and judicial subpoenas to journalists arose with some frequency.[117]

In early cases, journalists asserted a wide-variety of legal grounds for protecting their sources. Some argued that revealing their sources would violate the ethical cannon of journalism or offend their employers' regulations.[118] Others were even more creative, suggesting that the subpoena offended their right against self-incrimination[119] or constituted an unjustified "forfeiture of an estate."[120] A handful of journalists argued that the press clause of either the federal or state constitution protected them against forced disclosure.[121] The courts unanimously rejected these arguments, claiming that the rule of law must prevail over ethical rules.[122]

Moreover, courts were slow to recognize any sort of constitutional or common law reporter's privilege. Instead, state legislatures led the way with the adoption of statutory shield laws. In 1896, Maryland became the first state to pass such a law, in reaction to the jailing of a *Baltimore Sun* reporter who refused to disclose to a grand jury the identity of the source who had provided information regarding that body's confidential proceedings.[123] Although it took until 1933 for another state to

116. 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE & PROCEDURE: FEDERAL RULES OF EVIDENCE § 5426, at 715 (1980).

117. *See* CHARLES W. WHALEN, JR., YOUR RIGHT TO KNOW 21–25 (1973).

118. *See id.* at 36 (noting that in 1933 a reporter for the *Philadelphia Record* refused to testify in a civil proceeding about his source for a story regarding a secret hearing of the State Alcohol Permit Board on the ground that testifying could cost him his job; he was not required to testify).

119. *See* United States v. Burdick, 211 F. 492, 494 (S.D.N.Y. 1914), *rev'd*, 236 U.S. 79 (1915); WHALEN, *supra* note 117, at 35–36 (noting that George Burdick and William Curtin of the *New York Tribune* pleaded the Fifth Amendment as the basis for their refusal to divulge their sources for a front-page story reporting that a wealthy former congressman and his wife were under investigation for smuggling jewels into the country).

120. *See, e.g.*, Plunkett v. Hamilton, 70 S.E. 781, 785 (Ga. 1911) (rejecting a reporter's argument that to reveal a police source would "cause him the forfeiture of an estate, to wit, it would cause him to lose his means of earning a livelihood" (quoting the reporter's argument)).

121. *See* 23 WRIGHT & GRAHAM, *supra* note 116, § 5426, at 716.

122. *See, e.g.*, People *ex rel.* Phelps v. Fancher, 2 Hun. 226, 230 (N.Y. App. Div. 1874); *see also* Talbot D'Alemberte, *Journalists Under the Axe: Protection of Confidential Sources of Information*, 6 HARV. J. ON LEGIS. 307, 317 (1969).

123. Note, *The Right of a Newsman to Refrain from Divulging the Sources*

adopt a shield law, from that point onward the number of similar statutes increased dramatically.[124] The issue of reporters preserving the confidentiality of their sources came to the forefront during the Great Depression, when the publication of stories on municipal corruption and labor unrest brought reporters to the witness stand and prompted several states to adopt statutory protections for reporters.[125] In at least one state, the adoption of a shield law was regarded as a necessary component of a larger criminal law reform, based on the hope that with this new protection reporters would be more willing to publish stories revealing criminal activity.[126] The states' enthusiasm for shield laws suggests that such laws enhance rather than detract from the ability of law enforcement to fight crime. Currently thirty-two states and the District of Columbia have statutes recognizing some form of a reporter's privilege, and almost half of them submitted an amicus curiae brief to the Supreme Court of the United States in a recent reporter's privilege case, arguing that the privilege serves the public's interest.[127]

2. Purpose of the Privilege

The goal of the reporter's privilege, like the attorney/client and doctor/patient privileges, is to increase the flow of information in circumstances in which society wishes to encourage open communication. The reporter's privilege seeks to protect the flow of information into the public discourse. The reporter's

of His Information, 36 VA. L. REV. 61, 61 (1950).

124. *See supra* note 4.

125. *See* 23 WRIGHT & GRAHAM, *supra* note 116, § 5426, at 718 n.31.

126. *See* Robert A. Leflar, *The Criminal Procedure Reforms of 1936—Twenty Years After*, 11 ARK. L. REV. 117, 126 (1957).

127.

> The States care about this case . . . because they care about the reporter's privilege. They recognize that the free flow of information is vital to the workings of a healthy democracy; that journalists play a crucial role in gathering and reporting such information; that the most important information must often come from sources who need or prefer to remain confidential; and that without the confidentiality guaranteed by the reporter's privilege, the sources will remain silent and their information secret.

Brief of the States of New York, et al. as Amici Curiae in Support of the Petitions for Writs of Certiorari, Drogin v. Wen Ho Lee, 126 S. Ct. 2351 (Apr. 5, 2006) (No. 05-969), *and* Thomas v. Wen Ho Lee, 126 S. Ct. 2373 (Apr. 5, 2006) (No. 05-1114), *denying cert. to* Lee v. Dep't of Justice, 413 F.3d 53 (2005).

privilege protects two different sets of information: (1) the identity of confidential sources and (2) newsgathering materials. Although the protection of both kinds of information is important, the protection of confidential sources is at the center of the reporter's privilege debate.

The public's interest in protecting the identity of confidential sources is essential to preserve the dissemination of information to the public. Because many people who provide information to the press would face serious personal, professional, and possibly legal consequences if their identities were discovered, a privilege protecting their identities is vital for maintaining the flow of information to the press (and in turn to the public).[128]

Some scholars have noted that confidential sourcing is an essential component in journalists' ability to obtain information from the government.[129] As Justice Douglas warned in his dissent in *Branzburg v. Hayes*, without a reporter's privilege, "the reporter's main function in American society will be to pass on to the public the press releases which the various departments of government issue."[130] Indeed, even the Justice Department's internal guidelines on subpoenaing the press recognize that forcing reporters to reveal their sources can "impair the news gathering function."[131]

The most famous whistleblower and secret source in American history, Deep Throat, is a classic example of a person who would not have divulged confidences to a reporter without a promise of anonymity.[132] W. Mark Felt, a former top FBI official, helped *Washington Post* reporters Bob Woodward and Carl Bernstein uncover the Watergate scandal that ultimately led to

128. In this way, the reporter's privilege is closely analogous to the government informant's privilege. *See* Carl C. Monk, *Evidentiary Privilege for Journalists' Sources: Theory and Statutory Protection*, 51 MO. L. REV. 1, 5 n.18 (1986). Of course the reporter's privilege promotes society's interest in the free flow of ideas, which is at the very least implicitly based in the First Amendment. *See id.* The government informant's privilege has no such constitutional pedigree. *See id.*

129. *See* Monica Langley & Lee Levine, Branzburg *Revisited: Confidential Sources and First Amendment Values*, 57 GEO. WASH. L. REV. 13, 25–26 (1988).

130. Branzburg v. Hayes, 408 U.S. 665, 722 (1922) (Douglas, J., dissenting).

131. 28 C.F.R. § 50.10 (2006).

132. BOB WOODWARD, THE SECRET MAN: THE STORY OF WATERGATE'S DEEP THROAT 39–40 (2005) (noting Felt's insistence on confidentiality).

the appointment of a special criminal prosecutor, an impeachment inquiry in the House of Representatives, President Nixon's resignation, and the imprisonment of many of his top aides.[133]

Since September 11, 2001, government employees have played an especially important role in revealing government corruption, illegality, and incompetence. Thanks to anonymous sources, the public has learned that the United States is holding detainees in "black sites" around the globe;[134] that soldiers and military contractors were abusing detainees held at Abu Ghraib prison in Iraq;[135] that the Executive Branch has been engaging in domestic wiretapping without the oversight of the FISA court;[136] that counterterrorism officials have been monitoring the international financial transactions of thousands of U.S. nationals without judicial supervision;[137] and that a former Army intelligence program code-named "Able Danger" had identified Mohammed Atta and three other hijackers as potential al Qaeda terrorists prior to September 11, but that government lawyers prevented the operation from passing this information along to the FBI.[138] Without information from government and military officials, the government's illegal be-

133. *See* David Von Drehle, *FBI's No. 2 Was 'Deep Throat*,*'* WASH. POST, June 1, 2005, at A1.

134. *See* Dana Priest, *Foreign Network at Front of CIA's Terror Fight: Joint Facilities in Two Dozen Countries Account for Bulk of Agency's Post-9/11 Successes*, WASH. POST, Nov. 18, 2005, at A1; Josh White, *Prisoner Accounts Suggest Detention at Secret Facilities: Rights Group Draws Link to the CIA*, WASH. POST, Nov. 7, 2005, at A11.

135. In late April 2004, CBS's *60 Minutes II* broadcasted photographs of torture at Abu Ghraib and presented interviews with military officials on the subject. *See Abuse of Iraqi POWs by GIs Probed*, CBS NEWS, April 28, 2004, http://www.cbsnews.com/stories/2004/04/27/60II/main614063.shtml. Shortly thereafter the *New Yorker* obtained a copy of a secret report by Major General Antonio M. Taguba concluding that systematic and illegal torture was occurring at Abu Ghraib. *See* Seymour M. Hersh, *Torture at Abu Ghraib*, NEW YORKER, May 10, 2004, at 42, 43. In May 2004 the *Wall Street Journal* released a confidential report by the International Committee of the Red Cross detailing abuse of Iraqi prisoners. *See* David S. Cloud et al., *Red Cross Found Widespread Abuse of Iraqi Prisoners*, WALL ST. J., May 7, 2004, at A1.

136. *See* James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

137. Eric Lichtblau & James Risen, *Bank Data Sifted in Secret by U.S. to Block Terror*, N.Y. TIMES, June 23, 2006, at A1.

138. Philip Shenon, *Officer Says Military Blocked Sharing of Files on Terrorists*, N.Y. TIMES, Aug. 16, 2006, at A12.

havior and incompetence may have never come to light. Confidential sources have been instrumental in revealing corruption, fraud, and waste in the private sector as well.[139]

Some have questioned whether the privilege actually serves to increase the number of sources willing to speak to the media, often pointing to the lack of empirical data demonstrating the link. This criticism is odd because it flies in the face of common sense and is inconsistent with the Court's approach to other privileges. The Court has never required hard statistical evidence to justify its recognition of other privileges, such as the attorney/client and doctor/patient privileges. In fact, scholars and social science researchers have cast doubt on the suggestion that people would not be forthcoming with their doctors and lawyers if these communications were not privileged.[140]

Although it is empirically difficult, if not impossible, to determine whether shield laws render sources more willing to speak to journalists, human nature indicates that they do.[141]

139. *See In re* Grand Jury Subpoenas, Mark Fainaru-Wada and Lance Williams, 438 F. Supp. 2d 1111, 1113–14 (N.D. Cal. 2006) (denying a motion to quash subpoenas to *San Francisco Chronicle* reporters who revealed the existence of a grand jury investigation into the use of steroids in baseball); Laura R. Handman, *Protection of Confidential Sources: A Moral, Legal, and Civic Duty*, 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 573, 576 (2005) (mentioning the pivotal role confidential sources have played in revealing the Enron accounting fraud scandal and wrongdoing by tobacco companies and by fertility clinics); John E. Osborn, *The Reporter's Confidentiality Privilege: Updating the Empirical Evidence After a Decade of Subpoenas*, 17 COLUM. HUM. RTS. L. REV. 57, 73–74 (1985) (discussing survey findings that reporters use confidential sources most often in government, crime, and political reporting, but also for a wide-range of other issues, including stories on the Roman Catholic Church, toxic waste disposal, and nursing home fraud).

140. *See* Stephen A. Saltzburg, *Privileges and Professionals: Lawyers and Psychiatrists*, 66 VA. L. REV. 597, 617 & nn.72–73 (1980); Daniel W. Shuman & Myron F. Weiner, *The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege*, 60 N.C. L. REV. 893, 926 (1982) (noting that patients rely more strongly on a therapist's ethics than on the existence of a statutory privilege); Myron F. Weiner & Daniel W. Shuman, *Privilege—A Comparative Study*, 12 J. PSYCHIATRY & L. 373, 373 (1984) (comparing states with a therapist/patient privilege and those without one and concluding that the existence of a privilege has little impact on patient's willingness to seek treatment).

141. *See* Laurence B. Alexander, *Looking out for the Watchdogs: A Legislative Proposal Limiting the Newsgathering Privilege to Journalists in the Greatest Need of Protection for Sources and Information*, 20 YALE L. & POL'Y REV. 97, 104 (2002) ("Sources often seek confidentiality to escape harm, embarrassment, or legal entanglement."); Monk, *supra* note 128, at 5.

Many sources providing sensitive information to journalists would not do so if they were not protected.[142] It is easier to ask reporters how often they rely on confidential sources than to determine whether sources would come forward regardless of the confidentiality promise. Some researchers have attempted to generate empirical evidence on this point,[143] and anecdotal evidence abounds.[144] Given the inherent difficulties of studying the importance of a promise of confidentiality, requiring empirical proof of this common-sense notion would be akin to rejecting it outright. The plentiful testimony of journalists that sources do indeed rely on the privilege should be more than sufficient proof of its need.[145] In addition, the Court has frequently relied on common-sense notions lacking empirical proof in concluding that other forms of government action would chill protected First Amendment activities.[146]

In recent years, the use of anonymous sources has come under heavy fire due to high-profile incidents involving journalists at well-regarded publications who fabricated sources for fictitious stories. Jayson Blair at the *New York Times*, Stephen Glass at the *New Republic*, Patricia Smith and Michael Barnicle from the *Boston Globe*, Jack Kelley from *USA Today*, and Janet Cooke of the *Washington Post* are some of the more prominent journalists giving the profession a bad name. But of course these few examples represent a very small percentage of all journalistic activity.

142. *See, e.g.*, Vince Blasi, *The Newsman's Privilege: An Empirical Study*, 70 MICH. L. REV. 229, 247, 284 (1971) (finding that newspaper reporters rely on regular confidential sources 22.2% of the time); Eric Black, *Making the Case for a Federal Shield Law to Protect Journalists*, STAR TRIB. (Minneapolis, Minn.), Oct. 26, 2005, at A4; Editorial, *Protecting the Public's Need to Know*, CHRISTIAN SCI. MONITOR, June 12, 2006, at 8; Editorial, *Reporters and Sources: Congress Considers a Federal Shield Law*, WASH. POST, June 15, 2006, at A26.

143. *See, e.g.*, Blasi, *supra* note 142.

144. *See, e.g.*, BOB WOODWARD & CARL BERNSTEIN, *Dedication*, *in* ALL THE PRESIDENT'S MEN (1974) ("To the President's other men and women—in the White House and elsewhere—who took risks to provide us with confidential information. Without them there would have been no Watergate story told by the *Washington Post*.").

145. *See, e.g.*, Osborn, *supra* note 139, at 75 (noting that over seventy percent of journalists said that they could not do their jobs as effectively if the reporter's privilege ceased to exist).

146. Donna M. Murasky, *The Journalist's Privilege:* Branzburg *and Its Aftermath*, 52 TEX. L. REV. 829, 853–54 (1974).

A weightier concern is that such sourcing will lead to "lazy journalism"—journalists who do not make the extra effort for an additional on-the-record source—and will undermine the credibility of reporting because readers will be unable to evaluate the motives and knowledge of the sources.[147] Indeed, major media entities such as the *New York Times* and the *Washington Post* have revised their editorial policies so that reliance on anonymous sourcing is strongly discouraged and is the exception rather than the rule.[148]

Others have contended that reporters are too willing to promise confidentiality. Norman Pearlstine, the editor-in-chief of Time, Inc., said that *Time*'s Matthew Cooper (who ultimately complied with a grand jury subpoena in the Valerie Plame leak investigation) should not have promised confidentiality to Karl Rove.[149] Pearlstein stated that "[a] 90-second conversation with the president's spin doctor, who was trying to undermine a whistle-blower, probably didn't deserve confidential source status."[150] Floyd Abrams, a prominent First Amendment lawyer who represented Judith Miller, recently noted that journalists frequently promise confidentiality before they even know

147. *See* Monk, *supra* note 128, at 7–8. According to a June 2005 Washington Post-ABC News poll, nearly two out of three individuals polled stated that reporters use unnamed sources either the right amount or not often enough. Richard Morin, *Anonymous Approval*, WASH. POST, June 5, 2005, at B5. The First Amendment Center conducted a national survey in October 2004 and found that seventy-two percent of those surveyed agreed with the statement that "journalists should be allowed to keep a news source confidential." Press Release, First Amendment Ctr., 2004 Confidential-Source Survey, http://www.firstamendmentcenter.org/about.aspx?item=2004_confidential_sources (last visited Nov. 30, 2006). Fifty-two percent also agreed, however, that "news stories that rely on unnamed sources should not be published in the first place." *Id.*

148. The *New York Times*' most recent policy statement on the use of anonymous sources is posted online. New York Times Company, Confidential News Sources (Feb. 25, 2004), http://www.nytco.com/company-properties-times-sources.html. The newspaper's public editor wrote several articles criticizing the use of anonymous sources. *See, e.g.*, Daniel Okrent, *An Electrician from the Ukrainian Town of Lutsk*, N.Y. TIMES, June 13, 2004, § 4, at 2 (urging the paper to "turn the use of unidentified sources into an exceptional event"); Daniel Okrent, *Weapons of Mass Destruction? Or Mass Distraction?*, N.Y. TIMES, May 30, 2004, § 4, at 2 (expressing concern that at times a promise of confidentiality is a license to lie).

149. David Caruso, *Time Editor Says Rove Tip Wasn't Worth Confidentiality Pledge*, PHILA. INQUIRER, Aug. 17, 2005, at A2.

150. *Id.*

what the source is going to say, and that "the information, very often . . . is not worth anything."[151] But eliminating the reporter's privilege would not necessarily cure sloppy journalism, and would instead punish careful journalists as well.[152]

Another oft-voiced objection to the privilege is that it obstructs the way to the truth and undermines law enforcement efforts and criminal prosecutions. As University of Chicago Law School Professor Geoffrey Stone recently argued before the Senate Judiciary Committee, the focus should instead be on all of the criminal investigations that would never have begun absent a news article that relied on confidential sources. Professor Stone persuasively argued that in evaluating the costs of the privilege, one should focus on the moment the source speaks to the journalist, not on the time the privilege is invoked.[153] Like the attorney/client privilege, the reporter's privilege actually generates more, not less, information.[154] As one commentator said with respect to the attorney/client privilege, "[b]ecause the same information might not exist were it not for the privilege, any loss of information when the privilege is upheld may be more imagined than real."[155] As a result, it is easy to see how the total cost of a reporter's privilege would be significantly less than other privileges courts readily recognize. Studies comparing criminal prosecutions in states that recognize a strong reporter's privilege with states that do not have failed to demonstrate a noticeable difference in the effectiveness of law enforcement.[156] Indeed, as mentioned earlier, some states

151. *Id.*

152. *See* Handman, *supra* note 139, at 579; Monk, *supra* note 128, at 8–9.

153. *Reporters' Shield Legislation: Issues and Implications: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 5 (2005) [hereinafter *Professor Stone's Testimony before the S. Judiciary Comm.*] (testimony of Geoffrey Stone, Professor, University of Chicago Law School); *see also* Bob Dole, *The Underprivileged Press*, N.Y. TIMES, Aug. 16, 2005, at A15 (noting that the argument that the privilege would make it harder to prosecute crimes "ignores the dozens of whistle-blowers who would not share information about government wrongdoing with the press unless they felt reporters could protect their identities").

154. Saltzburg, *supra* note 140, at 610 (noting that those who argue that the attorney/client privilege results in a loss of information to the court "misconstrue[] a key point about the privilege—the privilege is intended to generate information").

155. *Id.*

156. *Professor Stone's Testimony before the S. Judiciary Comm.*, *supra* note 153, at 6; *see also* James A. Guest & Alan L. Stanzler, *The Constitutional Ar-*

passed shield laws for the very purpose of increasing their ability to fight crime.[157] In addition, there is no indication that the U.S. Department of Justice (DOJ) Guidelines discouraging subpoenas to journalists[158] have harmed DOJ's law enforcement efforts,[159] even though in the past fifteen years DOJ has approved only thirteen requests for media subpoenas.[160]

In the context of the debate concerning a proposed federal shield law pending before Congress, some have expressed concern that the law could undermine national security. Porter Goss made this argument in a February 2006 op-ed piece in the *New York Times*.[161] To support his point, Goss pointed to a leak revealing that the CIA was tapping Osama bin Laden's satellite phone; soon after this information was published, the phone went dead. (Blaming the American press for this intelligence loss is questionable. Osama bin Laden had stopped using his satellite phone before any U.S. publication mentioned the surveillance.[162]) Goss also noted that officials in other countries have questioned whether they can trust the United States, given the apparent inability of its citizens to keep a secret.[163]

Unfortunately, however, leaks have become an important part of how this country learns about what its elected leaders are doing in the name of "national security." The Congressional Research Service released a report in December 2005 demonstrating that one reason federal employees leak information to

gument for Newsmen Concealing Their Sources, 64 NW. U. L. REV. 18, 38 & n.105 (1969) (noting that attorneys general and police chiefs from states with shield laws largely believe that the laws have not interfered with law enforcement or undermined criminal prosecutions).

157. *See* Leflar, *supra* note 126, at 126.

158. 28 C.F.R. § 50.10 (2006) (barring subpoenas to journalists unless information is "essential" and officials have balanced "the public's interest in the free dissemination of ideas and information and the public's interest in effective law enforcement and the fair administration of justice").

159. *Reporters' Privilege Legislation: Preserving Effective Federal Law Enforcement: Hearing on S. 2831 Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Theodore B. Olson, Partner, Gibson, Dunn & Crutcher LLP).

160. *Id.* (statement of Paul J. McNulty, United States Attorney for the Eastern District of Virginia).

161. Porter Goss, Op-Ed., *Loose Lips Sink Spies*, N.Y. TIMES, Feb. 10, 2006, at A25.

162. Glenn Kessler, *File the Bin Laden Phone Leak Under 'Urban Myths*,' WASH. POST, Dec. 22, 2005, at A2.

163. Goss, *supra* note 161.

the press is that the government has failed to provide adequate protection for whistleblowers.[164] Although federal employees are encouraged to report their concerns to officials in their chain of command, the Inspector General's Office, or the relevant Congressional oversight committee, in practice the current environment does not invite whistleblowing.[165] In fact, it may actually discourage it. Congress has failed to provide adequate and effective protection for whistleblowers, who suffer a grave risk of retaliation if they come forward.[166] The problem is exacerbated for whistleblowers in the intelligence community. The existing and proposed whistleblower statutes explicitly deny protection to these individuals, and they suffer the additional risk of being stripped of their security clearances, a decision that is generally not subject to independent judicial review.[167]

The reporter's privilege also often protects the materials collected in the course of newsgathering, such as notes, tapes, outlines, photographs, and videos. This prong of the privilege frequently shields such materials regardless of whether the subject of these materials was published. The justification for protecting newsgathering materials from disclosure is conceptually different from the rationale for the protection of confidential sources.[168] Although in this context the privilege also serves to protect the flow of information to the public, the primary justifications for protecting nonconfidential information are to safeguard journalistic autonomy and independence and to limit unnecessary burdens on the limited time and resources of the press.[169] One author aptly compared this prong of the re-

164. LOUIS FISHER, CONG. RESEARCH SERV., NATIONAL SECURITY WHISTLEBLOWERS 12–16 (2006), *available at* http://www.fas.org/sgp/crs/natsec/RL33215.pdf.

165. *See, e.g.*, Jane E. Kirtley, *Transparency and Accountability in a Time of Terror: The Bush Administration's Assault on Freedom of Information*, 11 COMM. L. & POL'Y 479, 479–81 (2006).

166. *See National Security Whistleblowers: Hearing Before the Subcomm. on Nat'l Sec., Emerging Threats, and Int'l Relations of the H. Comm. on Gov't Reform*, 109th Cong. (2006) (statement of Beth Daley, Senior Investigator, Project on Gov't Oversight).

167. *See id*. (statement of Mark S. Zaid, Managing Partner, Krieger & Zaid, PLLC (citing Dep't of Navy v. Egan, 484 U.S. 518, 529 (1988) (holding that the predicative judgment involved in determining security clearance determinations were best left to the Executive))).

168. *See* Jaynie Randall, Comment, *Freeing Newsgathering from the Reporter's Privilege*, 114 YALE L.J. 1827, 1831–32 (2005).

169. *Id.*

porter's privilege to the attorney work-product privilege.[170] Just as the work-product privilege allows attorneys to develop litigation strategies and to evaluate the strengths and weaknesses of their cases without fear that their work would be disclosed to their adversaries, a privilege for newsgathering materials helps protect editorial discretion and allows reporters to conduct investigations without fearing governmental intrusion.[171]

One of the most important consequences of the reporter's privilege is that it causes lawyers to think twice before subpoenaing journalists. Given the broad definition of "relevance" for discoverable information, a journalist's testimony could be sought in almost every case. In many of the cases in which a party seeks confidential sources or newsgathering materials from a journalist, the requesting party has not sufficiently sought the same information from other non-press sources, or the requested information is not essential for the underlying case.[172] Recognizing a reporter's privilege helps curb discovery abuses, especially when that discovery would be a tremendous burden on a journalist. Rather than having to testify only in the rare case where the necessity for their testimony is demonstrated, reporters would be forced to spend hours testifying in depositions and at trials. Without a privilege, lawyers will have no reason to treat the discovery they can obtain from journalists any differently from discovery from any other non-party

170. *Id*. at 1830–31.

171. *Id*. at 1831.

172. *See, e.g.*, LaRouche v. Nat'l Broad. Co., 780 F.2d 1134, 1139 (4th Cir. 1986) (stating that the district court concluded the defamation plaintiff had not exhausted other reasonable alternative means of obtaining information); Condit v. Nat'l Enquirer, Inc., 289 F. Supp. 2d 1175, 1180–81 (E.D. Cal. 2003). In *Condit*, the Eastern District of California rejected a motion to compel disclosure of the name of a reporter's DOJ source when the plaintiff had not taken a single deposition of DOJ officials. 289 F. Supp. 2d at 1180–81. The court noted that "[p]laintiff is not required to depose everyone in the Justice department to locate the source, but plaintiff must make some reasonable attempt to exhaust that alternative source." *Id*.; *see also* Rogers v. Home Shopping Network, Inc., 73 F. Supp. 2d 1140, 1144–46 (C.D. Cal. 1999) (holding that the defamation plaintiff had failed to demonstrate that compelling testimony from the reporter was necessary for her case or that she had exhausted other available resources); Foretich v. Advance Magazine Publishers, Inc., 765 F. Supp. 1099, 1111 (D.D.C. 1991) (rejecting a motion to compel disclosure of the identity of a source because the testimony of the source was not relevant to trial); United States v. Vastola, 685 F. Supp. 917, 925 (D.N.J. 1988) (concluding that compelling testimony from reporters would not help the defendant).

person or entity.[173] In those cases where subpoenaing the media is appropriate, the reporter's privilege encourages subpoenaing parties to negotiate with the media to modify the scope of the subpoena. To the extent the government is concerned about cracking down on leaks of confidential or even classified information, existing laws permit prosecutors to go after the leakers themselves.[174]

B. STATE SHIELD LAWS

Currently thirty-two states and the District of Columbia have statutory shield laws.[175] A number of state courts have also recognized a privilege based on their state constitutions,

173. *Cf.* Saltzburg, *supra* note 140, at 618–19 n.74 (making this same argument with respect to the doctor/patient privilege). Saltzburg notes that the very existence of a privilege—even one riddled with exceptions—has a deterrent effect on discovery. *Id.*

174. *See* JENNIFER K. ELSEA, CONG. RESEARCH SERV., PROTECTION OF NATIONAL SECURITY INFORMATION 2–13 (2006), *available at* http://www.fas.org/sgp/crs/secrecy/RL33502.pdf (summarizing existing statutes and regulations prohibiting the disclosure of classified information).

175. ALA. CODE § 12-21-142 (LexisNexis 2005); ALASKA STAT. § 09.25.310 (2004); ARIZ. REV. STAT. ANN. § 12-2237 (2003); CAL. EVID. CODE § 1070(a) (West 1995); COLO. REV. STAT. § 13-90-119 (2005); Act of June 6, 2006, No. 06-140, 2006 Conn. Pub. Acts 140 (effective Oct. 1, 2006); DEL. CODE ANN. tit. 10, §§ 4320–26 (1999); D.C. CODE §§ 16-4701 to -4704 (2001); FLA. STAT. § 90.5015 (2005); GA. CODE ANN. § 24-9-30 (1995); 735 ILL. COMP. STAT. ANN. 5/8-901 to -909 (West 2003); IND. CODE ANN. §§ 34-46-4-1 to -2 (LexisNexis 1998); KY. REV. STAT. ANN. § 421.100 (LexisNexis 2005); LA. REV. STAT. ANN. §§ 45:1451 to :1459 (1999); MD. CODE ANN., CTS. & JUD. PROC. § 9-112 (LexisNexis 2002); MICH. COMP. LAWS § 767.5a (2006); MINN. STAT. § 595.021–.024 (2004); MONT. CODE ANN. §§ 26-1-902 to -903 (2005); NEB. REV. STAT. §§ 20-144 to -147 (1997); NEV. REV. STAT. § 49.275 (2005); N.J. STAT. ANN. § 2A:84A-21 (West 1994); N.M. STAT. ANN. § 38-6-7 (West 2003), *invalidated by* Ammerman v. Hubbard Broad., Inc., 551 P.2d 1354, 1359 (N.M. 1976); N.Y. CIV. RIGHTS LAW § 79-h (McKinney 1992); N.C. GEN. STAT. § 8-53.11 (2005); N.D CENT. CODE § 31-01-06.2 (1996); OHIO REV. CODE ANN. §§ 2739.11–.12 (LexisNexis 2000); OKLA. STAT. ANN. tit. 12, § 2506 (West 1993); OR. REV. STAT. §§ 44.520–.530 (2005); 42 PA. CONS. STAT. ANN. § 5942 (West 2000); R.I. GEN. LAWS §§ 9-19.1-1 to -3 (1997); S.C. CODE ANN. § 19-11-100 (1976); TENN. CODE ANN. § 24-1-208 (2000). The New Mexico Supreme Court held that the state shield law was unconstitutional because only the court, and not the legislature, has the authority to pass laws regarding the rules of evidence and procedure. *Ammerman*, 551 P.2d at 1359. In response, the New Mexico court promulgated an evidentiary rule for journalists. *See* N.M. R. EVID. ANN. 11-514 (West 2006).

common law, or the First Amendment.[176] The scope of protection varies dramatically from state to state.

1. Proceedings Where the Privilege Attaches

Several states recognize an absolute privilege for a reporter's sources and newsgathering materials in all proceedings, whether in a civil or criminal case or before an administrative agency or grand jury.[177] More commonly, state

176. Conn. State Bd. of Labor Relations v. Fagin, 370 A.2d 1095, 1097 (Conn. 1976) (recognizing a qualified privilege based on the First Amendment); *In re* Contempt of Wright, 700 P.2d 40, 43–46 (Idaho 1985) (recognizing a qualified privilege based on the First Amendment, the Idaho Constitution, and state common law); Waterloo/Cedar Falls Courier v. Hawkeye Cmty. Coll., 646 N.W.2d 97, 101–02 (Iowa 2002) (recognizing a privilege based on federal and state constitutions); State v. Sandstrom (*In re* Pennington), 581 P.2d 812, 814 (Kan. 1978) (recognizing a qualified reporter's privilege); *In re* Letellier, 578 A.2d 722, 726–27 (Me. 1990) (recognizing a qualified privilege based on federal and state constitutions); *In re* Roche, 411 N.E.2d 466, 475 (Mass. 1980) (stating that judges managing discovery must consider the First Amendment implications of motion to compel); *In re* Photo Mktg. Assoc. Int'l, 327 N.W.2d 515, 517 (Mich. Ct. App. 1982) (recognizing a qualified privileged under the First Amendment); State v. Siel, 444 A.2d 499, 502–03 (N.H. 1982) (recognizing a qualified privilege under the First Amendment and the New Hampshire Constitution); O'Neill v. Oakgrove Constr., Inc., 523 N.E.2d 277, 277–78 (N.Y. 1988) (recognizing a privilege for nonconfidential materials under the New York Constitution); Zelenka v. State, 266 N.W.2d 279, 286–87 (Wis. 1978) (recognizing a privilege under the Wisconsin Constitution).

177. *See* ALA. CODE § 12-21-142 (stating that a reporter has an absolute privilege as long as the information from the source has been published, broadcast, or televised); ARIZ. REV. STAT. ANN. § 12-2237 (recognizing an absolute privilege against being compelled to testify "before any jury, inquisitorial body or commission, or before a committee of the legislature, or elsewhere" about any information "procured or obtained by him for publication"); CAL. EVID. CODE § 1070(a) (providing a privilege against being held in contempt "by a judicial, legislative, administrative body, or any other body having the power to issue subpoenas" for refusing to disclose a source or unpublished information); D.C. CODE §§ 16-4702(1), -4703(b); IND. CODE ANN. § 34-46-4-2 (providing an absolute protection for the identity of a source); KY. REV. STAT. ANN. § 421.100 (recognizing an absolute protection for the identity of a source); MONT. CODE ANN. § 26-1-902 (providing for an absolute privilege for a source's identity or information obtained in the course of gathering, receiving, or processing news); NEB. REV. STAT. §§ 20-144 to -147 (providing an absolute protection for a source's identity and for all unpublished information); NEV. REV. STAT. § 49.275 (providing an absolute protection for a source's identity and all unpublished information); OR. REV. STAT. § 44.520(1) (creating an absolute privilege in all proceedings for the source of published or unpublished information and for any unpublished information, except when a person claiming privilege is believed to have committed or is about to commit a crime); 42 PA.

privileges are qualified, forcing the reporter's privilege to give way when the party seeking the information has demonstrated that (1) the desired information is important to the suit; (2) that other means of obtaining the information have proven inadequate; and (3) the balance of interests favors disclosure.[178]

Other state statutes recognize the privilege in only certain proceedings. In California, for instance, the shield law is most effective in civil lawsuits in which the media is not a party; in such suits, the private interests at stake are generally deemed insufficient to outweigh the public's interest in confidential

CONS. STAT. ANN. § 5942. *But see* Diaz v. Eighth Judicial Dist. Court, 993 P.2d 50, 59 (Nev. 2000) ("[A]lthough the [Nevada] news shield statute provides an absolute privilege to reporters engaged in the newsgathering process, there may be certain situations, e.g., when a defendant's countervailing constitutional rights are at issue, in which the news shield statute might have to yield so that justice may be served.").

178. *See* COLO. REV. STAT. § 13-90-119(3) (setting out a three-part test); GA. CODE ANN. § 24-9-30 (same); 735 ILL. COMP. STAT. ANN. 5/8-906 to -907 (same); LA. REV. STAT. ANN. § 45:1459 (requiring an inquiry in cases seeking unpublished information); MD. CODE ANN., CTS. & JUD. PROC. § 9-112(d)(1) (same); MICH. COMP. LAWS § 767.5a (providing for a qualified privilege before a grand jury when an inquiry is for a crime punishable by life in prison); MINN. STAT. § 595.024 (setting forth conditions necessary for overriding the privilege); *In re Contempt of Wright*, 700 P.2d at 44–45 (recognizing a qualified privilege under the First Amendment, the Idaho Constitution, and common law, and applying a balancing test); Lamberto v. Bown, 326 N.W.2d 305, 308–09 (Iowa 1982) (recognizing a qualified privilege subject to a three-factor inquiry); *Sandstrom*, 581 P.2d at 814 (recognizing a qualified privilege); State *ex rel.* Classic III, Inc. v. Ely, 954 S.W.2d 650, 653 (Mo. Ct. App. 1997) (recognizing a qualified privilege under the First Amendment); *cf. In re Letellier*, 578 A.2d at 726–27 (holding that a case-by-case balancing test, rather than a three-factor test, applied); *Siel*, 444 A.2d at 503 (recognizing a three-part test for overcoming a qualified privilege). Other state statutes provide more simply that the privilege applies unless non-disclosure "will cause a miscarriage of justice" or will be "contrary to the public interest." *See, e.g.*, ALASKA STAT. § 09.25.310(b) (providing that a court may deny a privilege if withholding testimony would "result in a miscarriage of justice or the denial of a fair trial to those who challenge the privilege" or "be contrary to the public interest"); LA. REV. STAT. ANN. § 45:1453 (requiring a finding that "disclosure is essential to the public interest"); N.D. CENT. CODE § 31-01-06.2. One state statute provides that the privilege applies in all proceedings unless it can be shown that the publication was made "in bad faith, with malice, and not in the interest of the public welfare." ARK. CODE ANN. § 16-85-510 (2005). Although the statute specifically mentions only grand juries, the Supreme Court of Arkansas has construed the statutory language "to any other authority" to include civil proceedings as well. *See* Saxton v. Ark. Gazette Co., 569 S.W.2d 115, 117 (Ark. 1978).

sources.[179] The privilege is often overcome in criminal matters, however, especially when the defendant has issued the subpoena.[180] In such cases, courts frequently conclude that the defendant's interest in a fair trial often outweighs the reporter's interest in confidentiality.[181]

Some states explicitly reject the privilege when a media entity is a party to the litigation, a situation that typically occurs in defamation cases.[182] Other states provide the media with some protection by requiring a plaintiff to demonstrate that the information is important for her case and that she has attempted to obtain the information through other means.[183] Some states have imposed additional requirements, such as requiring a plaintiff to demonstrate the "probable falsity" of the challenged statements[184] or to present a "prima facie case" of defamation.[185]

179. *See* N.Y. Times v. Superior Court, 796 P.2d 811, 816 (Cal. 1990).

180. *See, e.g.*, Delaney v. Superior Court, 789 P.2d 934, 945–51 (Cal. 1990) (balancing the defendant's need for the information against alternative sources for that information).

181. *See* State v. Davis, 720 So. 2d 220, 227 (Fla. 1998) (noting that a court must take into account a defendant's due process rights). The California Supreme Court has noted that there are no conflicting rights when the prosecution seeks the information. *See* Miller v. Superior Court, 986 P.2d 170, 179 (Cal. 1999).

182. *See, e.g.*, GA. CODE ANN. § 24-9-30 (1995) (barring assertion of the privilege by a party to the litigation); Downing v. Monitor Publ'g Co., 415 A.2d 683, 685–86 (N.H. 1980) (rejecting the privilege in a libel case in which the media was a party).

183. *See, e.g.*, Prentice v. McPhilemy, 27 Media L. Rep. (BNA) 2377, 2383 (D.C. Sup. Ct. 1999) (determining that the District of Columbia's shield law protections apply equally in defamation actions: the identity of sources receives absolute protection, while a qualified privilege applies to other unpublished information); *In re Contempt of Wright*, 700 P.2d at 44 (explaining that refusing to honor the privilege in libel cases "could be viewed not as exceptions to a general rule of privilege, but as circumstances in which the balancing favors disclosure, since the source or information at issue may be so relevant and material as to be at the very heart of the claim").

184. *See, e.g.*, 735 ILL. COMP. STAT. 5/8-904 (West 2003) (requiring plaintiffs in defamation actions to make "a prima facie showing of falsity of the alleged defamation and actual harm or injury due to the alleged defamation"); Gordon v. Boyles, 9 P.3d 1106, 1109 (Colo. 2000) (interpreting the Colorado shield law to require a trial court to make a "preliminary determination of whether the plaintiff has made a satisfactory showing of probable falsity").

185. *See* Classic III Inc. v. Ely, 954 S.W. 2d 650, 655 (Mo. Ct. App. 1997).

2. Covered Information

There is also some disagreement among the states regarding whether shield laws should protect the identity of both nonconfidential sources and confidential sources; whether the privilege should extend to newsgathering materials; and whether publication is required before the protection can be invoked. In addition, some states exclude from protection eyewitness observations of criminal or tortious conduct.[186]

While some states protect only the identity of confidential sources,[187] other states protect both confidential and nonconfidential sources,[188] although states in the latter category frequently give less protection to nonconfidential sources.[189] The majority of states with shield laws also extend the privilege to newsgathering material, such as unpublished notes, tapes, and any other data.[190] The rationale for a broader privilege is the

186. *See, e.g.*, COLO. REV. STAT. § 13-90-119(2)(d) (2005) (creating an exception to the privilege for "[n]ews information based on a newsperson's personal observation of the commission of a class 1, 2, or 3 felony"); DEL. CODE ANN. tit. 10, § 4320(7) (1999) (creating an exception to the shield law in "any situation in which the reporter is an eyewitness to or participant in an act involving physical violence or property damage"); FLA. STAT. § 90.5015(2) (2005) (stating that privilege applies "only to information or eyewitness observations obtained within the normal scope of employment [of a professional journalist] and does not apply to physical evidence, eyewitness observations, or visual or audio recording of crimes"); Pankratz v Dist. Court, 609 P.2d 1101, 1103 (Colo. 1980) (en banc) (holding that the Colorado privilege did not protect a reporter who was a "first-hand observer of criminal conduct"); *In re* Grand Jury Proceedings (Ridenhour), 520 So. 2d 372, 376 (La. 1988) (suggesting that the state shield law does not apply when "a reporter has witnessed criminal activity or has physical evidence of a crime").

187. *See* ALA. CODE § 12-21-142 (LexisNexis 2005); ALASKA STAT. § 09.25.300 (2004); ARK. CODE ANN. § 16-85-510 (2005); IND. CODE ANN. § 34-46-4-2 (LexisNexis 1998); KY. REV. STAT. ANN. § 421.100 (LexisNexis 2005). The Alabama, Arkansas, and Kentucky statutes apply only if the information provided by the confidential sources has been published.

188. *See, e.g.*, D.C. CODE § 16-4702 (2001); MD. CODE ANN., CTS. & JUD. PROC. § 9-112(c) (LexisNexis 2002).

189. *See, e.g.*, N.Y. CIV. RIGHTS LAW §§ 79-h(b), (c) (McKinney 1992) (giving absolute protection to the identity of confidential sources but only qualified protection for sources who did not give information in confidence).

190. *See, e.g.*, CAL. EVID. CODE § 1070(c) (West 1995); COLO. REV. STAT. § 13-90-119(1)(b) (2005); DEL. CODE ANN. tit. 10, § 4320(2) (1999); D.C. CODE § 16-4702; FLA. STAT. § 90.5015(2) (2005); MICH. COMP. LAWS ANN. § 767.5a(1) (West 2000); MINN. STAT. § 595.023 (2004); MONT. CODE ANN. § 26-1-902(1) (2005); NEB. REV. STAT. § 20-146(1) (1997); NEV. REV. STAT. § 49.275 (2005); N.J. STAT. ANN. § 2A:84A-21 (West 1994); N.M. STAT. ANN. § 38-6-7 (West 2003); N.Y. CIV. RIGHTS LAW § 79-h(b); N.C. GEN. STAT. § 8-53.11(b) (2005);

concern that the otherwise "autonomous press" would become an investigative arm for the government and private litigants.[191] One court has noted that journalists frequently gather information about accidents and crimes; as a result, discovery requests to journalists could easily impose a heavy burden on their time and resources and disrupt their newsgathering activities.[192] Some states limit this protection to unpublished information,[193] reasoning that requiring reporters to testify about published information, which typically requires them only to authenticate the publications, "should have no 'chilling effect' on the free flow of information."[194] Other states draw a distinction between information received in confidence and nonconfidential information, on the grounds that requiring a journalist to reveal confidential information is more likely to curtail her ability to conduct newsgathering in the future.[195]

The privilege appears to be the weakest when a journalist witnesses criminal or tortious activity without any pre-existing promise of confidentiality, such as when she is on the scene of a car accident or an illegal arrest.[196] Several state statutes explicitly carve out an exception to the privilege under such circumstances;[197] in other states, the matter is handled on a case-by-case basis, with the probative and irreplaceable value of the reporter's testimony weighing in favor of disclosure.[198] In a similar vein, Oregon's statute makes clear that its otherwise abso-

N.D. CENT. CODE § 31-01-06.2 (1996); OKLA. STAT. ANN. tit. 12, § 2506(B) (West 1993); OR. REV. STAT. § 44.520(1) (2005); R.I. GEN. LAWS § 9-19.1-2 (1997); TENN. CODE ANN. § 24-1-208(a) (2000); *see also* CAL. CONST. art. 1, § 2(b); N.M. R. EVID. 514(b).

191. O'Neill v. Oakgrove Constr., Inc., 523 N.E.2d 277, 279 (N.Y. 1988).

192. *See id.*

193. *See, e.g.*, COLO. REV. STAT. §§ 13-90-119(2)(b), 24-72.5-103(1)(b) (2005); D.C. CODE § 16-4702(2) (2001); MD. CODE ANN., CTS. & JUD. PROC. § 9-112(c)(2) (LexisNexis 2002); MINN. STAT. § 595.023 (2004); NEB. REV. STAT. § 20-146(2) (1997); N.M. STAT. ANN. § 38-6-7(A)(2) (West 2003); OKLA. STAT. ANN. tit. 12, § 2506(B)(2) (West 1993); OR. REV. STAT. § 44.520(1)(b) (2005); R.I. GEN. LAWS § 9-19.1-3(a) (1997).

194. *In re* Morris Commc'ns Co., 573 S.E.2d 420, 421 (Ga. Ct. App. 2002).

195. Delaney v. Superior Court, 789 P.2d 934, 949 (Cal. 1990).

196. Handman, *supra* note 139, at 582–83.

197. *See supra* note 186.

198. *See Delaney*, 789 P.2d at 952–53 (requiring reporters who had accompanied a police patrol to give eyewitness testimony of a search and seizure the police conducted in the reporters' presence); Bartlett v. Superior Court, 722 P.2d 346, 351–52 (Ariz. Ct. App. 1986) (holding that the necessary showing had been made to require a reporter to produce a videotape of a car accident).

lute shield law does not apply when there is "probable cause" to believe that the person asserting the privilege "has committed, is committing or is about to commit a crime."[199]

C. THE FIRST AMENDMENT

The first case to suggest that the First Amendment provides reporters with protection from subpoenas was the Second Circuit's decision in *Garland v. Torre*, in which the actress Judy Garland sued CBS for defamation.[200] Garland had subpoenaed a reporter who had quoted an unnamed CBS executive as saying that Garland was depressed because she was getting fat.[201] The court stated that it would "accept at the outset the hypothesis that compulsory disclosure of a journalist's confidential sources of information may entail an abridgment of press freedom by imposing some limitation upon the availability of news."[202] The Second Circuit went on to add, however, that "freedom of the press, precious and vital though it is to a free society, is not an absolute."[203] The court ultimately concluded that the "obligation of a witness to testify and the correlative right of a litigant to enlist judicial compulsion of testimony" outweighed any First Amendment interest in confidentiality because the questioning "went to the heart of the plaintiff's claim."[204]

The Supreme Court did not address the viability of a First Amendment reporter's privilege until 1972, in a case that raised more questions than it answered. In *Branzburg v. Hayes*, the Court decided four separate cases that involved reporters' invocation of the privilege before state or federal grand juries.[205] Two of these cases involved Paul Branzburg, a reporter for a daily newspaper in Kentucky.[206] He had written articles about the sale and use of drugs, which he had observed firsthand after promising not to reveal the identity of any of the individuals involved.[207] The other two cases involved reporters

199. OR. REV. STAT. § 44.520(2) (2005).
200. 259 F.2d 545, 547 (2d Cir. 1958).
201. *Id.*; *see also* Bowden, *supra* note 114, at 28.
202. *Garland*, 259 F.2d at 548.
203. *Id.*
204. *Id.* at 549–50.
205. *See* 408 U.S. 665, 667–79 (1972).
206. *See id.* at 667–69.
207. *Id.*

who had spent time with the Black Panthers; these reporters were Paul Pappas, a television reporter subpoenaed by a Massachusetts grand jury, and *New York Times* reporter Earl Caldwell, who was challenging a federal grand jury subpoena.[208]

Justice Bryon White's 5-4 majority opinion in *Branzburg* appeared to sound the death knell for a constitutional reporter's privilege, at least in the context of grand jury subpoenas. Throughout the majority opinion, Justice White emphasized the important role the grand jury plays in the American criminal system,[209] explaining that the public's interest in prosecuting crime outweighed reporters' concerns that testifying would harm their relationships with confidential sources and their ability to collect information.[210] In addition, the Court noted that the majority of States had not enacted shield laws—only seventeen had at that time—and that Congress on several occasions had failed to pass proposed federal shield statutes.[211]

The *Branzburg* Court also took great pains to question the need for a reporter's privilege, emphasizing the lack of—and the impossibility of ever obtaining—empirical data showing that sources would not speak to reporters without a privilege, or that the free flow of information to the public would be affected in any significant way.[212] The Court noted that the relationship between reporters and their sources is frequently "symbiotic," in that "often . . . informants are members of a minority political or cultural group that relies heavily on the media to propagate their views, publicize their aims, and magnify

208. *See id*. at 672–79.

209. *See id*. at 695.

210. *See id*.

211. *Id*. at 689 n.28. In 2005 and 2006, Congress considered, but failed to pass, two proposed federal shield law statutes. The Free Flow of Information Act of 2006, S. 2831, 109th Cong. (2006); *See* The Free Flow of Information Act of 2005, H.R. 3323, 109th Cong. (2005).

212. *See Branzburg*, 408 U.S. at 693–94 ("Estimates of the inhibiting effect of such subpoenas on the willingness of informants to make disclosures to newsmen are widely divergent and to a great extent speculative."). In 2005, the District Court for the District of Columbia echoed this concern in a case rejecting a federal common law privilege. *See* Lee v. Dep't of Justice, 401 F. Supp. 2d 123, 141 (D.D.C. 2005) (explaining that"[t]he right to keep confidential an anonymous source is not 'transcendent' in the same sense" as other privileges recognized at common law, such as the attorney/client privilege and the doctor/patient privilege, because "[a]nonymous sources are not a *sine qua non* of journalism but only an important and useful tool").

their exposure to the public."[213] Justice White also questioned how valuable a qualified privilege would be. Given the ad hoc approach that a qualified privilege requires, the Court was skeptical that an uncertain privilege could be meaningful for "sensitive" sources.[214]

When the *Branzburg* decision was first released, many media lawyers justifiably regarded it as a catastrophic blow to reporters.[215] Until very recently, however, most lower courts did not construe *Branzburg* as rejecting a constitutional reporter's privilege. This response was based on several factors. First, in Justice White's majority opinion, the Court made clear that the press "'has no special immunity from the application of general laws'"[216] and no greater right of access to information than the public,[217] but then went on to say that "without some [constitutional] protection for seeking out the news, freedom of the press could be eviscerated."[218] Given this statement, a few courts claiming to reject a constitutional privilege have, at the same time, emphasized that judges should review subpoenas to the media with a "heightened sensitivity" to First Amendment concerns and limit or refuse to enforce subpoenas that are not directly relevant to a good faith claim or seek information obtainable from a less sensitive source.[219]

213. *Branzburg*, 408 U.S. at 694–95.

214. *Id.* at 702 ("If newsmen's confidential sources are as sensitive as they are claimed to be, the prospect of being unmasked whenever a judge determines the situation justifies it is hardly a satisfactory solution to the problem.").

215. *See, e.g.*, Marie Brenner, *Lies and Consequences: Sixteen Words That Changed the World*, VANITY FAIR, April 2006, at 204, 258 (summarizing the adverse reaction of former *New York Times* general counsel James Goodale); Norman Issacs, *Beyond the* 'Caldwell' *Decision: 1*, COLUMB. JOURNALISM REV., Sept.–Oct. 1972, at 18, 20 (arguing that after *Branzburg*, "[t]he best hope for new sources now appears to lie in the passage of federal and state 'shield' laws"); A.M. Rosenthal, *The Press Needs a Slogan: "Save the First Amendment!,"* N.Y. TIMES MAG., Feb. 11, 1973, at 16, 49 ("[T]here is serious question as to whether the press will be able to function as it has in the past, not simply in the investigation of wrongdoing but in inquiry into Government process.").

216. *Branzburg*, 408 U.S. at 683 (quoting Associated Press v. NLRB, 301 U.S. 103, 132–33 (1937)).

217. *See id.* at 684 (citing Zemel v. Rusk, 381 U.S. 1, 16–17 (1965); N.Y. Times Co. v. United States, 403 U.S. 713, 728–30 (1971) (Stewart, J., concurring)).

218. *Branzburg*, 408 U.S. at 681.

219. *See In re* Special Proceedings, 373 F.3d 37, 45 (1st Cir. 2004); United States v. Smith, 135 F.3d 963, 971 (5th Cir. 1998); Scarce v. United States (*In*

Causing by far the most confusion, however, has been Justice Powell's concurring opinion in *Branzburg*. Although Justice Powell cast the fifth vote in support of Justice White's majority opinion, his concurrence emphasized what he viewed as the "limited nature" of the Court's opinion.[220] Justice Powell wrote that "[t]he Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources,"[221] and suggested that courts use a balancing test to determine whether to recognize a privilege:

> [T]he asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.[222]

Because Justice Powell cast the deciding vote in *Branzburg*, many courts and commentators have read his concurring opinion as the controlling opinion in the case.[223] The

re Grand Jury Proceedings), 5 F.3d 397, 400 (9th Cir. 1993) (rejecting the privilege in a grand jury context); *In re* Shain, 978 F.2d 850, 852 (4th Cir. 1992); Storer Commc'ns Inc. v. Giovan (*In re* Grand Jury Proceedings), 810 F.2d 580, 586 (6th Cir. 1987); Atlanta Journal-Constitution v. Jewell, 555 S.E.2d 175, 180 (Ga. Ct. App. 2001) ("[A]lthough there is no federal or state constitutional privilege, legislative act, or common law which protects against the disclosure of confidential sources [in defamation cases], there is a strong public policy in favor of allowing journalists to shield the identity of their confidential sources unless disclosure is necessary in order to meet other important purposes of the law."); Marketos v. Am. Employers Ins. Co., 460 N.W.2d 272, 280 (Mich. Ct. App. 1990).

220. *Branzburg*, 408 U.S. at 709 (Powell, J., concurring).

221. *Id.*

222. *Id.* at 710.

223. *See, e.g.*, United States v. Model Magazine Distrib. Inc., (*In re* Grand Jury 87-3 Subpoena Duces Tecum), 955 F.2d 229, 232 (4th Cir. 1992); *In re* Petroleum Prod. Antitrust Litig., 680 F.2d 5, 8 n.9 (2d Cir. 1982); ROBERT D. SACK, SACK ON DEFAMATION § 14.3.2, at 14-13 to -14 (3d ed. 2001) ("Because Justice White's plurality opinion was rather enigmatic and Justice Powell's was the pivotal fifth vote, his concurring opinion has been treated as authoritative."); 1 JOHN W. STRONG, MCCORMICK ON EVIDENCE § 76.2, at 288 (5th ed. 1999) (stating that in *Branzburg*, the rejection of the First Amendment reporter's privilege "did not command an absolute majority of the Court"); Potter Stewart, *"Or of the Press,"* 26 HASTINGS L.J. 631, 635 (1975) ("[In *Branzburg*], the Court rejected the [reporters'] claims by a vote of five to four, or, considering Mr. Justice Powell's concurring opinion, perhaps by a vote of four and a half to four and a half."). Indeed, some courts and commentators erroneously interpreted Justice White's opinion to be a plurality opinion. *See, e.g.*, James

four dissenting Justices in *Branzburg* would have held that a privilege applied.[224] Justice Douglas, standing alone, stated that journalists were entitled to an absolute privilege.[225] Justice Stewart, writing for himself and Justices Marshall and Brennan, claimed that the reporters were entitled to a qualified privilege that could be overcome only if the government meets the following standard:

> [T]he government must (1) show that there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of the law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.[226]

Other courts have refused to construe Justice Powell's concurring opinion as embracing a First Amendment privilege; instead, these courts explain, Justice Powell simply suggested that the First Amendment provides protection when a subpoena has been issued in bad faith or for harassing purposes.[227] In the last few years, the minority view that Powell's concurring opinion is largely irrelevant has been gaining ground.[228]

C. Goodale, Branzburg v. Hayes *and the Developing Qualified Privilege for Newsmen*, 26 HASTINGS L.J. 709, 715 (1975); *see also Smith*, 135 F.3d at 968–69; Delaney v. Superior Court, 789 P.2d 934, 938 n.3 (Cal. 1990); Conn. State Bd. of Labor Relations v. Fagin, 370 A.2d, 1095, 1097 (Conn. 1976); State v. Salsbury, 924 P.2d 208, 209 (Idaho 1995).

224. *See Branzburg*, 408 U.S. at 711 (Douglas, J., dissenting); *id.* at 725 (Stewart, J., dissenting).

225. *Id.* at 712 (Douglas, J., dissenting).

226. *Id.* at 743 (Stewart, J., dissenting).

227. *See, e.g.*, McKevitt v. Pallasch, 339 F.3d 530, 533 (7th Cir. 2003) (stating that First Amendment concerns come into play only if a subpoena is intended to harass or to interfere with a reporter's relationship with sources); *Smith*, 135 F.3d at 969 (asserting that Justice Powell was concerned about harassment of the press); Storer Commc'ns Inc. v. Giovan (*In re* Grand Jury Proceedings), 810 F.2d 580, 584 (6th Cir. 1987) (stating that recognizing a privilege after *Branzburg* would be "tantamount to our substituting, as the holding of *Branzburg*, the dissent . . . for the majority opinion").

228. *See* N.Y. Times Co. v. Gonzales, 459 F.3d 160, 173–74 (2d Cir. 2006) ("*Branzburg* itself involved a grand jury subpoena, is concededly the governing precedent, and none of the opinions of the Court, save that of Justice Douglas, adopts a test that would afford protection against the present investigation."); *In re* Grand Jury Subpoena, Judith Miller, 438 F.3d 1141, 1149 (D.C. Cir. 2006) ("[W]hatever Justice Powell specifically intended, he joined the majority. Not only did he join the majority in name, but because of his joinder with the rest of a majority, the Court reached a result that rejected First Amendment privilege not to testify before the grand jury for reporters situated precisely

Even if *Branzburg* is correctly read to reject a constitutional reporter's privilege to refuse to testify before a grand jury,[229] it still remains unclear whether such a privilege exists in criminal and civil proceedings. Some have argued that the reasoning of *Branzburg* applies equally to criminal trials as to grand juries because, as one court explained, "[s]urely the public has as great an interest in convicting its criminals as it does in indicting them."[230] Other courts have read *Branzburg* as limited to grand jury proceedings and have held that a First Amendment privilege applies in both civil and criminal proceedings.[231] Noting that it would be inappropriate to assume that a criminal defendant's Sixth Amendment and due process rights always outweigh the First Amendment interests at stake, these courts instead recognize a qualified privilege that permits a defendant's interests in a fair trial and due process to be taken into account in the balance.[232]

like those in the present case."); *McKevitt*, 339 F.3d at 533 ("It seems to us that rather than speaking of privilege, courts should simply make sure that a subpoena duces tecum directed to the media, like any other subpoena duces tecum, is reasonable in the circumstances, which is the general criterion for judicial review of subpoenas."). The First Circuit has been reluctant to recognize a "privilege" for reporters, but has recognized that a special "balancing test" should be applied in press cases in light of First Amendment concerns. *See* Cusumano v. Microsoft Corp., 162 F.3d 708, 716 (1st Cir. 1998).

229. *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d at 1147–49 (holding that no First Amendment privilege exists in the grand jury context); *Storer Commc'ns Inc.*, 810 F.2d at 583–86 (noting that the majority in *Branzburg* rejected the existence of a First Amendment privilege before a grand jury); Lewis v. United States, 517 F.2d 236, 238 (9th Cir. 1975) ("[T]he first amendment does not afford a reporter a privilege to refuse to testify before a federal grand jury as to information received in confidence."); Pankratz v. District Court, 609 P.2d 1101, 1102 (Colo. 1980) (en banc) ("In determining that there is no privilege under the First Amendment, we need only cite the language of the United States Supreme Court in *Branzburg* . . . .").

230. *Smith*, 135 F.3d at 971.

231. Price v. Time, Inc., 416 F.3d 1327, 1343 (11th Cir. 2005) (recognizing a privilege in civil cases); United States v. Caporale, 806 F.2d 1487, 1504 (11th Cir. 1986) (recognizing a privilege in a criminal case); United States v. Burke, 700 F.2d 70, 77 (2d Cir. 1983) (recognizing a privilege in both criminal and civil cases); United States v. Cuthbertson, 630 F.2d 139, 147 (3d Cir. 1980) (recognizing a privilege in criminal cases); Riley v. City of Chester, 612 F.2d 708, 715 (3d Cir. 1979) (recognizing a privilege in civil cases); Baker v. F&F Inv., 470 F.2d 778, 784 (2d Cir. 1972) (recognizing a privilege in a civil case).

232. *Cuthbertson*, 630 F.2d at 147; Farr v. Pitchess, 522 F.2d 464, 468–69 (9th Cir. 1975) (holding that a defendant's right to a fair trial outweighed a reporter's First Amendment privilege to withhold disclosure of the names of

Many courts have expressly held that a First Amendment privilege exists in civil cases.[233] In civil cases, the interests favoring disclosure are often much less weighty, particularly when the press is not a party to the litigation.[234] The courts disagree, however, whether nonconfidential materials should be given the same protection.[235] Although some courts extend the protection to nonconfidential material on the grounds that the disclosure of such materials constitutes a worrisome intrusion into the newsgathering and editing process, most recognize that "the lack of a confidential source may be an important

sources who violated a court's gag order).

233. Lee v. Dep't of Justice, 413 F.3d 53, 56–58 (D.C. Cir. 2005), *cert. denied*, 126 S. Ct. 2351 (2006), *and cert denied*, 126 S. Ct. 2372 (2006), *and cert. denied*, 126 S. Ct. 2373 (2006) (citing Zerilli v. Smith, 656 F.2d 705 (D.C. Cir. 1981)); *Smith*, 135 F.3d at 968–72; Shoen v. Shoen, 5 F.3d 1289, 1295–96 (9th Cir. 1993); LaRouche v. Nat'l Broad. Co., 780 F.2d 1134, 1139 (4th Cir. 1986); Silkwood v. Kerr-McGee Corp., 563 F.2d 433, 436–38 (10th Cir. 1977).

234. *See, e.g.*, *Zerilli*, 656 F.2d at 712 ("[I]n the ordinary case the civil litigant's interest in disclosure should yield to the journalist's privilege."); *Riley*, 612 F.2d at 716 ("[A] case-by-case analysis is mandated even more in civil cases than in criminal cases, for in the former the public's interest in casting a protective shroud over the newsmen's sources and information warrants an even greater weight than in the latter." (quoting Altemose Constr. v. Bldg. & Constr. Trade Council, 443 F. Supp. 489, 491 (E.D. Penn. 1977) (internal quotations omitted))); *Baker*, 470 F.2d at 784–85 (noting that *Branzburg*, which was concerned with the integrity of the grand jury proceeding, does not control the outcome in criminal proceedings, much less civil proceedings, where the public's interest in disclosure is often less weighty); Rosato v. Superior Court, 124 Cal. Rptr. 427, 444 n.14 (Ct. App. 1975) ("[I]n a civil discovery proceeding there is not a sufficient compelling state or public interest to outweigh the conditional First Amendment right not to disclose sources.").

235. *See, e.g.*, Gonzales v. Nat'l Broad. Co., 194 F.3d 29, 35–36 (2d Cir. 1999) (extending a privilege to nonconfidential materials); *Shoen*, 5 F.3d at 1295–96 ("[T]he journalist's privilege applies to a journalist's resource materials even in the absence of the element of confidentiality."); Church of Scientology Int'l v. Daniels, 992 F.2d 1329, 1335 (4th Cir. 1993) (recognizing a journalist's privilege regarding defamatory statements published about the Church of Scientology); *Cuthbertson*, 630 F.2d at 147 (holding that the First Amendment protects newsgathering materials). *But see* McKevitt v. Pallasch, 339 F.3d 530, 533 (7th Cir. 2003) (suggesting that the First Amendment privilege, if it exists at all, does not cover nonconfidential information); United States v. Jennings, No. 97 CR 765, 1999 WL 438984, at *3–4 (N.D. Ill. June 21, 1999) (rejecting a privilege for nonconfidential materials); Bartlett v. Superior Court, 722 P.2d 346, 350–51 (Ariz. Ct. App. 1986) (denying a motion to quash in a personal injury case and finding that a subpoena for nonconfidential materials does not threaten relationships with sources or interfere with the newsgathering or editing process).

element in balancing the defendant's need for the material sought against the interest of the journalist in preventing production in a particular case."[236]

In addition, courts reviewing First Amendment privilege claims have noted that in civil cases in which the reporter or his employer are parties, the balance is more likely—but not necessarily—going to tip in favor of disclosure so that the plaintiff can establish the relevant level of fault, whether negligence or actual malice.[237] When courts have recognized a First Amendment privilege in defamation cases, they have recognized it as a qualified, not absolute, privilege, adopting Justice Stewart's three-part test in his *Branzburg* dissent.[238]

Courts are also hesitant to extend First Amendment protection to a journalist who has witnessed a crime. These courts rest their analysis largely on the fact that *Branzburg* itself held that reporter Paul Branzburg could not avoid a subpoena to testify before the grand jury after he observed the making of hashish.[239]

Although the *Branzburg* majority invited Congress "to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned . . . as experience . . . may dictate,"[240] Congress has yet to take the Court up on this suggestion.[241]

236. Wolf v. United States, No. 06-16403, 2006 WL 2631398, at *2 & n.1 (9th Cir. Sept. 8, 2006) (mem.) (noting that even if a qualified privilege applied in the grand jury context, the blogger world would be forced to comply with subpoenas for videotape footage of public events); *Cuthbertson*, 630 F.2d at 147; *see also* United States v. LaRouche Campaign, 841 F.2d 1176, 1180–82 (1st Cir. 1988).

237. *See, e.g.*, Price v. Time, Inc. 416 F.3d 1327, 1343–48 (11th Cir. 2005) (rejecting the invocation of the privilege by a party to a defamation action); *cf.* Herbert v. Lando, 441 U.S. 153, 175 (1979) (holding that the First Amendment does not bar discovery into the editorial process in defamation actions because the plaintiff has the burden of proving fault).

238. *See, e.g.*, *LaRouche*, 780 F.2d at 1139; *In re* Petroleum Prods. Antitrust Litig., 680 F.2d 5, 7 (2d Cir. 1982); Miller v. Transamerican Press, Inc., 621 F.2d 721, 726 (5th Cir. 1980), *modified*, 628 F.2d 932 (5th Cir. 1980); Mitchell v. Superior Court, 690 P.2d 625, 631–35 (Cal. 1984).

239. *See, e.g.*, *In re* Ziegler, 550 F. Supp. 530, 532 (W.D.N.Y. 1982) (relying on *Branzburg* in a decision requiring a reporter to testify about an assault he witnessed outside a courtroom); *Ex parte* Grothe, 687 S.W.2d 736, 738–39 (Tex. Crim. App. 1984) (relying on *Branzburg* in compelling a photographer to produce photographs he took during a public protest).

240. Branzburg v. Hayes, 408 U.S. 665, 706 (1972).

241. The Senate Judiciary Committee last considered proposed federal

D. FEDERAL COMMON LAW

Given the current tendency of courts to reject a First Amendment privilege, courts have started to examine the possibility of a privilege based on Federal Rule of Evidence 501. Rule 501 provides that judges can decide whether a witness is entitled to a privilege under "the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."[242] In granting courts broad latitude to recognize privileges, Congress rejected the original proposal of the Advisory Committee on Rules of Evidence, recommending the adoption of nine enumerated privileges.[243] Although the journalist's privilege was not among the nine enumerated privileges, the open-ended Rule 501 that Congress ultimately adopted allows courts to adopt such a privilege "in light of reason and experience."[244] Indeed, the principal draftsman of Rule 501, Representative William Hungate, specifically noted that the flexible language of Rule 501 "cannot be interpreted as a congressional expression in favor of having no such privilege, nor can the conference action be interpreted as denying to newspeople any protection they may have from State newsperson's privilege laws."[245]

In *Jaffee v. Redmond*, the Supreme Court stated that three principles governed the recognition of privileges under Rule

shield law legislation in 2006. The Supreme Court has not heard any cases involving a First Amendment reporter's privilege since *Branzburg*. It recently denied petitions for certiorari in the Judith Miller and Matthew Cooper cases, Miller v. United States, 125 S. Ct. 2977 (2005); Cooper v. United States, 125 S. Ct. 2977 (2005). In the Wen Ho Lee case, Lee v. Dep't of Justice, 413 F.3d 53 (D.C. Cir. 2005), *cert. denied*, 126 S. Ct. 2351 (2006), *and cert denied*, 126 S. Ct. 2372 (2006), *and cert. denied*, 126 S. Ct. 2373 (2006), the Supreme Court denied the media's petition for certiorari raising both the First Amendment and federal common law reporter's privilege issue after the parties settled. Many have urged the Court to take a reporter's privilege case again, especially in light of the growing numbers of subpoenas to journalists in the last few years. *See, e.g.*, Nathan Siegel, *Our History of Media Protection*, WASH. POST, Oct. 3, 2005, at A17.

242. FED. R. EVID. 501.

243. The nine enumerated privileges were (1) required reports; (2) attorney/client; (3) psychotherapist/patient; (4) husband/wife; (5) communications to clergymen; (6) political vote; (7) trade secrets; (8) state secrets; and (9) confidential informants. *See* Michael H. Graham, HANDBOOK OF FEDERAL EVIDENCE § 501.1 (5th ed. 2001) (citing H.R. REP. NO. 93-650, at 8 (1973), *reprinted in* 1974 U.S.C.C.A.N. 7075, 7082).

244. FED. R. EVID. 501; *see also* Graham, *supra* note 243, § 501.1.

245. 120 CONG. REC. 30, 40,891 (1974).

501: (1) the significant public and private interests that would be served by any proposed privileges; (2) the balance of the public and private interest in the privilege against the burden on truth-seeking that the privilege would impose; and (3) "reason and experience" based on state recognition of the privilege.[246]

In *Jaffee*, the Court held that these three considerations supported the recognition of a psychotherapist/patient privilege. The Court first noted that the public and private interest in the mental health of citizens requires "[e]ffective psychotherapy," which in turn "depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears."[247] The Court held that the public interest in effective mental health treatment outweighed the loss of probative evidence that recognition of the privilege might entail because without the privilege, patients would be less likely to divulge the very confidential information at issue.[248] Finally, the Court found it persuasive that all fifty states and the District of Columbia recognized some form of the privilege.[249]

The relatively few courts to address whether Federal Rule of Evidence 501 supports a reporter's privilege have reached mixed results. At least two courts that were asked to recognize a privilege refused to do so because the material sought was not confidential.[250] Some courts have held that, at least with respect to grand jury proceedings, the Supreme Court already conducted the relevant balancing inquiry in the *Branzburg* decision, where it concluded that the public's right to evidence outweighed the interest in continued confidentiality.[251] The

246. 518 U.S. 1, 11–13 (1996).

247. *Id.* at 10.

248. *Id.* at 11–12.

249. *Id.* at 12–13.

250. United States v. Hively, 202 F. Supp. 2d 886, 892–93 (E.D. Ark. 2002) (refusing to recognize a federal common law privilege to protect a reporter from a subpoena asking her to testify about the truth and accuracy of her articles when there was no claim that in so testifying she would be forced to reveal confidential sources or documents); *In re* Application of Dow Jones & Co., No. 98 MISC. 8-85 (PKL), 1998 WL 883299, at *4–6 (S.D.N.Y. Dec. 17, 1998) (refusing to recognize a federal common law privilege when a subpoena sought nonconfidential information).

251. Scarce v. United States (*In re* Grand Jury Proceedings), 5 F.3d 397, 402–03 (9th Cir. 1993) (holding that *Branzburg* indicated that common law provided no privilege to journalists); *In re* Special Counsel Investigation, 338 F. Supp. 2d 16, 18–19 (D.D.C. 2004) (holding that federal common law did not

District Court of the District of Columbia rejected the existence of a federal common law privilege in a civil case as well.[252]

Other courts have held that the federal common law does provide a privilege. The Third Circuit has recognized a federal common law privilege in criminal and civil proceedings.[253] Although the D.C. Circuit was asked in the Judith Miller litigation to recognize a common law privilege, the panel was unable to reach a decision on whether to do so.[254] The Second Circuit also ducked the issue in *Gonzales v. New York Times*, holding that even if such a privilege existed, it would be qualified, and that the government had made a sufficient showing in the case under review to overcome it.[255]

The application of the *Jaffee* factors appears to support the existence of a federal common law reporter's privilege. With respect to the first *Jaffee* prong, a privilege supports the press's truth-seeking function. Just as the lack of a privilege would chill communications between psychologists and their patients and prevent the information litigants seek from ever coming into evidence, the lack of a journalist privilege will chill com-

provide a basis for quashing a subpoena to a journalist to testify before a grand jury); *In re* Grand Jury Subpoenas, Mark Fainaru-Wada and Lance Williams, 438 F. Supp. 2d 1111, 1119 (N.D. Cal. 2006) (refusing to recognize a federal common law privilege "unless and until the Supreme Court states that a common law reporter's privilege exists, or unless Congress enacts such a privilege"). *But see In re* Williams, 766 F. Supp. 358, 367 (W.D. Pa. 1991) (holding that a qualified common law privilege applies in a grand jury setting), *aff'd en banc*, 963 F.2d 566 (3d Cir. 1992); *In re* John Doe Grand Jury Investigation, 574 N.E.2d 373, 375–77 (Mass. 1991) (applying a qualified common law privilege to quash a subpoena).

252. Lee v. Dep't of Justice, 401 F. Supp. 2d 123, 137–42 (D.D.C. 2005) (denying both a First Amendment and a federal common law reporter's privilege).

253. United States v. Cuthbertson, 630 F.2d 139, 146–47 (3d Cir. 1980) (criminal proceedings); Riley v. City of Chester, 612 F.2d 708, 713–16 (3d Cir. 1979) (civil proceedings).

254. *See In re* Grand Jury Subpoena, Judith Miller, 397 F.3d 964, 973 (D.C. Cir. 2005) ("The Court is not of one mind on the existence of a common law privilege . . . . However, all believe that if there is any such privilege, it is not absolute and may be overcome by an appropriate showing."). The D.C. Circuit dodged another opportunity to address this issue in the Wen Ho Lee litigation. *See* Lee v. Dep't of Justice, 413 F.3d 53, 57–64 (D.C. Cir. 2005), *aff'g on other grounds* 401 F. Supp. 2d 123 (D.D.C. 2005), *cert. denied*, 126 S. Ct. 2351 (2006), *and cert denied*, 126 S. Ct. 2372 (2006), *and cert. denied*, 126 S. Ct. 2373 (2006).

255. N.Y. Times Co. v. Gonzales, 459 F.3d 160, 169 (2d Cir. 2006).

munications from sources.[256] As one court explained, "[u]nless potential sources are confident that compelled disclosure is unlikely, they will be reluctant to disclose any confidential information to reporters,"[257] and "'the flow of information to the public will be diminished regardless of whether disclosure could have actually been compelled.'"[258] In addition, reporters fearing a subpoena may be reluctant to publish information obtained from confidential sources.[259]

The second *Jaffee* prong is also satisfied because the evidentiary benefit that would be lost from the privilege is minimal when compared to the loss of information to the public.[260] Journalists have relied on confidential sources to report not only on government misconduct, but also on organized crime, environmental and nuclear safety issues, and many other matters of indisputable public interest.[261] Recognizing the federal common law privilege as qualified, rather than absolute, helps strike a proper balance between the competing public interests in those cases where the need for the journalist's testimony and evidence is compelling.[262]

The third *Jaffee* consideration is easily met because thirty-two states and the District of Columbia have statutory shield laws and fourteen additional states have recognized a privilege through judicial decision.[263] Because most states recognize a reporter's privilege, failing to recognize a federal common law privilege would in many cases "frustrate the purposes of the state legislation that was enacted to foster these confidential communications."[264]

256. *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d at 991 (Tatel, J., concurring).

257. Zerilli v. Smith, 656 F.2d 705, 712 (D.C. Cir. 1981).

258. *Id.* at 712–13 n.46 (quoting Note, *Reporters and Their Sources: The Constitutional Right to a Confidential Relationship*, 80 YALE L.J. 317, 336 (1970) (footnote omitted)).

259. N.Y. Times Co. v. Gonzales, 382 F. Supp. 2d 457, 497 (S.D.N.Y. 2005), *rev'd on other grounds*, 459 F.3d 160.

260. *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d at 991 (Tatel, J., concurring).

261. *N.Y. Times Co.*, 382 F. Supp. 2d at 498–99.

262. *See id.* at 501.

263. *See supra* notes 175–77 and accompanying text.

264. Jaffee v. Redmond, 518 U.S. 1, 13 (1996) (noting, with respect to the psychotherapist/patient privilege, that "any State's promise of confidentiality would have little value if the patient were aware that the privilege would not be honored in a federal court").

The courts holding that a federal common law privilege exists have held that it is a qualified privilege that can be overcome with a showing of materiality and exhaustion.[265] Judge Tatel's concurring opinion in the Judith Miller case, in which he reasoned that a qualified privilege existed under federal common law, added a suggestion that in cases where the government is investigating a leak, the court must also conduct a balancing test:

> In leak cases . . . courts applying the privilege must consider [1] not only the government's need for the information and exhaustion of alternative sources, but also [2] the two competing public interests lying at the heart of the balancing test. Specifically, the court must weigh the public interest in compelling disclosure, measured by the harm the leak caused, against the public interest in newsgathering, measured by the leaked information's value. That framework allows authorities seeking to punish a leak to access key evidence when the leaked information does more harm than good . . . while preventing discovery when no public interest supports it . . . .[266]

Judge Tatel argued that in leak cases a balancing test was essential because the necessity and exhaustion requirements would be easily met in every case.[267] Thus, for example, Judge Tatel argued in his dissent from the denial of the rehearing en banc petition in Wen Ho Lee's Privacy Act case that the court should have balanced the plaintiff's interest in receiving compensation from the government for leaking personal information about him against the public's interest in obtaining information about what was at the time believed to be nuclear espionage.[268] Some have criticized Judge Tatel's proposed test because it puts the courts in the awkward and difficult position

265. *See, e.g.*, Riley v. City of Chester, 612 F.2d 708, 716–17 (3d Cir. 1979); *N.Y. Times Co.,* 382 F. Supp. 2d at 501–02, 510.

266. *In re* Grand Jury Subpoena, Judith Miller, 397 F.3d 964, 997–98 (D.C. Cir. 2005) (Tatel, J., concurring). In a civil case, the balancing requirement would weigh a private litigant's interest in compelling disclosure against the public's interest in newsgathering. *See* Lee v. Dep't of Justice, 401 F. Supp. 2d 123, 138 & n.20 (D.D.C. 2005) (noting that Judge Tatel's balancing test would have to be altered if applied in civil cases where there is no identifiable public interest in disclosure).

267. *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d at 997 (Tatel, J., concurring); Lee v. Dep't of Justice, 428 F.3d 299, 302 (D.C. Cir. 2005) (Tatel, J., dissenting from denial of rehearing en banc), *cert. denied*, 126 S. Ct. 2351 (2006), *and cert denied*, 126 S. Ct. 2372 (2006), *and cert. denied*, 126 S. Ct. 2373 (2006).

268. *Lee*, 428 F.3d at 302.

of determining what is sufficiently "newsworthy" to outweigh the subpoenaing party's interests.[269]

III. SCOPE OF THE PRIVILEGE AND TO WHOM IT ATTACHES

Although many states have passed statutory shield laws, no federal shield law exists. Very few state statutes limit the shield based on the intent of individuals claiming protection. Instead, statutes tend to focus on more objective factors and limit their coverage to specific types of media entities or require that individuals have regular work as journalists. Without amendment, many of these statutes will not cover bloggers and other citizen journalists who do not use television, radio, or newspapers to disseminate their ideas and are not employed as journalists for mainstream media companies.

A. STATE DEFINITIONS

Many state statutory shield laws list specific types of media in their provisions. Those passed in the 1930s initially included only newspapers and had to be amended to include other forms of media, such as radio, television, and magazines.[270] Those that have not been amended since the 1940s still do not cover television.[271] Several other states have similar statutes that include only reporters who publish on television or radio or in a newspaper.[272] Very few statutes explicitly in-

269. *See, e.g.*, *Lee*, 401 F. Supp. 2d at 139–40 ("Courts are ill-suited to decide the degree to which information is beneficial or unimportant to the common weal.").

270. *See, e.g.*, IND. CODE ANN. § 34-46-4-1 (LexisNexis 1998) (applying the privilege to newspapers and "other periodical[s] issued at regular intervals and having a regular circulation," news wire services and press associations, and licensed television and radio stations); MONT. CODE ANN. § 26-1-902 (2005) (applying the shield law to a "newspaper, magazine, press association, news agency, news service, radio station, television station, or community antenna television service" and its employees).

271. *See, e.g.*, ARK. CODE ANN. § 16-85-510 (2005) (covering newspaper and radio but not television). The Arkansas statute has not been amended since 1949. *See id.* (indicating that the statute was last amended in 1949). *But see* Williams v. Am. Broad. Cos., 96 F.R.D. 658, 665 (W.D. Ark. 1983) (stating in dicta that the court did not "have any doubt" that the state shield law "would be extended to television reporters").

272. *See, e.g.*, ALA. CODE § 12-21-142 (LexisNexis 1975) (providing an absolute privilege for individuals "engaged in, connected with or employed on any newspaper, radio broadcasting station or television station, while engaged in a

clude electronic news media.[273] More modern statutes cover a broader range of media, although it is not clear whether many of these statutes would cover publications that appear solely on the Internet.[274]

Courts have strictly construed statutory restrictions on what types of media are entitled to invoke the privilege. In 2005, the Eleventh Circuit confronted this issue in *Price v. Time, Inc.*,[275] holding that Alabama's shield statute did not

news-gathering capacity"); KY. REV. STAT. ANN. § 421.100 (LexisNexis 2005) (applying the privilege to those "engaged or employed" by newspaper, radio, or television stations).

273. New Jersey's shield law is one of the rare exceptions. *See* N.J. STAT. ANN. § 2A:84A-21a (West 1994) (defining "[n]ews media" entitled to invoke the privilege as "newspapers, magazines, press associations, news agencies, wire services, radio, television or other similar printed, photographic, mechanical or electronic means of disseminating news to the general public"); *see also* N.C. GEN. STAT. § 8-53.11(a)(3) (2005) (defining "[n]ews medium" as "[a]ny entity regularly engaged in the business of publication or distribution of news via print, broadcast, or other electronic means accessible to the general public").

274. COLO. REV. STAT. § 13-90-119(1)(a) (2005) (applying the statute to "mass medium," defined as "any publisher of a newspaper or periodical; wire service; radio or television station or network; news or feature syndicate; or cable television system"); GA. CODE ANN. § 24-9-30 (1995) (allowing the privilege to be invoked by "[a]ny person, company, or other entity engaged in the gathering and dissemination of news for the public through a newspaper, book, magazine, or radio or television broadcast"); LA. REV. STAT. ANN. § 45:1451 (1995) (defining "news media" to include "newspaper[s] or other periodical[s] issued at regular intervals and having a paid general circulation," as well as television, radio, press associations, and wire services). *But see* D.C. CODE § 16-4701 (2001) (defining "news media" to include "[a]ny printed, photographic, mechanical, or electronic means of disseminating news and information to the public"); MONT. CODE ANN. § 26-1-902 (2005) (applying the privilege to "any newspaper, magazine, press association, news agency, news service, radio station, television station, or community antenna television service"); N.M. STAT. ANN. § 38-6-7(B)(2) (West 2003) (defining the phrase "medium of communication" as "any newspaper, magazine, press association, news service, wire service, news or feature syndicate, broadcast or television station or network, or cable television system"); N.C. GEN. STAT. § 8-53.11(a)(3) (defining "[n]ews medium" broadly).

275. 416 F.3d 1327, 1346 (11th Cir.), *as modified on denial of reh'g*, 425 F.3d 1292 (11th Cir. 2005). In *Price*, the Eleventh Circuit found that the plaintiff had to make "reasonable" efforts to determine the identity of *Sports Illustrated*'s confidential source. *Id.* The circuit court originally ordered the counsel for *Sports Illustrated* to inform the district court if one of the four women deposed lied about being the source for an allegedly defamatory article in the magazine, *id.* at 1347, but the court later amended its opinion to hold that *Sport Illustrated*'s counsel had no obligation to report perjury to the court as long as his client ultimately revealed the identity of its source or sources.

cover a reporter from *Sports Illustrated* because the statute was limited to persons "engaged in, connected with, or employed on any newspaper, radio broadcasting station or television station . . . ."[276] This case suggests that "citizen journalists" seeking protection under a state shield law listing specific covered media have little hope of success, given the tendency of state courts to interpret shield law statutes strictly.[277]

Some state shield laws apply only to individuals employed by an established media entity;[278] some specifically require "regular" or "frequent" employment. For example, the Arizona shield law applies to "[a] person engaged in newspaper, radio, television or reportorial work, or connected with or employed by a newspaper, radio or television station,"[279] and courts have limited its application to those "engaged in the gathering and dissemination of news to the public on a regular basis."[280] Alaska, Illinois, Louisiana, Kentucky, and Oklahoma similarly require journalists to be "regularly engaged" in the business or activities of journalism.[281] Given that citizen journalists are not

Price, 425 F.3d at 1294.

276. *Price*, 416 F.3d at 1335, 1341.

277. *Id.* at 1337–38; *see also* Cepeda v. Cohane, 233 F. Supp. 465, 472 (S.D.N.Y. 1964) (holding that California privilege law, which on its face applied only to "newspapers," did not apply to other periodicals); Deltec, Inc. v. Dun & Bradstreet, Inc., 187 F. Supp. 788, 789–90 (N.D. Ohio 1960) (rejecting the attempts of a bi-monthly publication to invoke statutory privilege applicable only to "newspapers and press associations").

278. CAL. EVID. CODE § 1070 (West 1995) (applying privilege to those "connected with or employed" by a "newspaper, magazine, or other periodical publication, or by a press association or wire service," or by a radio or television station).

279. ARIZ. REV. STAT. ANN. § 12-2237 (2003).

280. Matera v. Superior Court, 825 P.2d 971, 973–75 (Ariz. Ct. App. 1992) (construing the shield law to exclude an investigatory book author).

281. ALASKA STAT. § 09.25.390(4) (2004) (applying the shield law to reporters and defining a "reporter," as "a person regularly engaged in the business of collecting or writing news for publication, or presentation to the public, through a news organization"); 735 ILL. COMP. STAT. ANN. 5/8-902(a) (defining a "reporter" covered under the statute as "any person regularly engaged in the business of collecting, writing or editing news for publication through a news medium on a full-time or part-time basis"); KY. REV. STAT. ANN. § 421.100 (LexisNexis 2005) (applying the privilege to those "engaged or employed" by newspaper, radio, or television stations); LA. REV. STAT. ANN. § 45:1451 (1999) (defining a reporter as "any person regularly engaged in the business of collecting, writing or editing news for publication through a news media"); OKLA. STAT. ANN. tit. 12, § 2506 (West 1993) (including in the definition of a news-

employed by a media entity, much less "regularly" employed by such a company, these state statutes would offer no protection to even the most widely read blogger.

Other states are more specific in defining what constitutes regular employment. Delaware's shield law applies to all reporters—defined rather broadly as "any journalist, scholar, educator, polemicist, or other individual"[282]—but requires that anyone invoking the privilege must have earned their "principal livelihood by, or in each of the preceding 3 weeks or 4 of the preceding 8 weeks [to have] spent at least 20 hours engaged in the practice of, obtaining, or preparing information for dissemination . . . to the general public."[283] Those seeking protection under Indiana's statute must prove that they have "received income from legitimate gathering, writing, editing and interpretation of news."[284] These statutes similarly have the effect of excluding most bloggers and other citizen journalists. Although some bloggers do make money from advertising, and many spend at least twenty hours a week at their computer, many others do not, particularly those operating more scholarship-oriented blogs. Many serious bloggers have full-time jobs that would prohibit them from spending the required twenty hours a week to qualify under the Delaware statute.

This is not to say that citizen journalists would be out of luck in every state. In Minnesota, for example, the shield law applies to any "person who is or has been directly engaged in the gathering, procuring, compiling, editing, or publishing of information for the purpose of transmission, dissemination or publication to the public."[285] Minnesota's statute is not limited to certain types of news media or to individuals who are employed as reporters. New Jersey's shield law is similarly broad, protecting the confidentiality of "an author . . . from or through whom any information was . . . supplied [or] furnished."[286] Although to date no cases have applied these state shield laws to citizen journalists using the Internet, these laws appear on their face to apply to such individuals.

---

man the condition that he must be "regularly engaged obtaining, writing, reviewing, editing, or otherwise preparing news").

282. DEL. CODE ANN. tit 10, § 4320(4) (1999).

283. *Id.* § 4320(3)(a).

284. IND. CODE ANN. § 34-46-4-1 (LexisNexis 1998).

285. MINN. STAT. § 595.023 (2004).

286. N.J. STAT. ANN. § 2A:84A-21(a) (West 1994).

B. THE FIRST AMENDMENT

Justice White expressed concern in his majority opinion in *Branzburg* that recognizing a First Amendment privilege would necessarily require the Court to determine who was entitled to invoke the privilege.[287] Justice White declared, "We are unwilling to embark the judiciary on a long and difficult journey to such an uncertain destination."[288] Although in the thirty years since *Branzburg* most circuits have not been afraid to grapple with this issue—most commonly embracing an intent standard not grounded in a particular type of medium—in the past two years some courts have used the uncertain scope of the privilege as a reason for rejecting its existence entirely under the First Amendment or federal common law.[289]

When the Court decided *Branzburg*, bloggers did not exist, but the Court was concerned for the "lonely pamphleteer who uses carbon paper or a mimeograph . . . ."[290] The Court said that the freedom of the press was not limited to "the large metropolitan publisher" but "'necessarily embraces pamphlets and leaflets'" and "'every sort of publication which affords a vehicle of information and opinion.'"[291] The Court recognized that "[t]he informative function asserted by representatives of the organized press in the present cases is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists."[292] In rejecting the privilege, the *Branzburg* majority commented:

> Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege—a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large, metropolitan publisher . . . .[293]

In the over thirty years since *Branzburg*, several courts have attempted to define who qualifies as a journalist under the First Amendment. Three circuits have held that the medium should be irrelevant in determining whether the privilege applies.[294] Although none of these cases involved bloggers or

287. Branzburg v. Hayes, 408 U.S. 665, 703 (1972).

288. *Id.*

289. *See supra* note 2 and accompanying text.

290. 408 U.S. at 704.

291. *Id.* (quoting Lovell v. Griffin, 303 U.S. 444, 452 (1938)).

292. *Id.* at 705.

293. *Id.*

294. *See In re* Madden, 151 F.3d 125, 129–30 (3d Cir. 1998); Shoen v.

the Internet, they are useful starting points and appear to represent the current state of the law with respect to the First Amendment privilege.

In *von Bulow v. von Bulow*, the Second Circuit held that the First Amendment privilege applied only to persons who have the intent at the inception of the information-gathering process to disseminate information to the public.[295] In this case, Andrea Reynolds was a third-party witness subpoenaed in a civil action brought by Martha von Bulow (through her children) against her husband Claus.[296] Reynolds had been the constant companion of Claus von Bulow as he was tried on criminal charges for killing his wife.[297] During the trials, she took notes and later wrote a book manuscript that had not been published at the time of the lawsuit.[298] The court ultimately rejected Reynolds's attempts to claim the protection of the reporter's privilege, but it first emphasized that the medium used for the dissemination (here, a book) did not matter: "The intended manner of dissemination may be by newspaper, magazine, book, public or private broadcast medium, handbill, or the like, for '[t]he press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.'"[299] In addition, the court, reciting *Branzburg*'s observation, noted that an individual need not be a member of the institutionalized press to invoke the reporter's privilege because "'[t]he informative function asserted by representatives of the organized press . . . is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists.'"[300] The court also held that the privilege was not necessarily limited to those who have a demonstrated history of journalism, but "prior experience as a professional journalist may be persuasive evidence of present intent to gather for the purpose of dissemination."[301] The court ultimately concluded that, even though the witness subsequently undertook the writing of a manuscript, her materials were still discoverable because she

Shoen, 5 F.3d 1289, 1293 (9th Cir. 1993); von Bulow v. von Bulow, 811 F.2d 136, 142–43 (2d Cir. 1987).

295. *Von Bulow*, 811 F.2d at 144.

296. *Id.* at 138.

297. *Id.*

298. *Id.* at 138, 145–46.

299. *Id.* at 144 (quoting Lovell v. Griffin, 303 U.S. 444, 452 (1938)).

300. *Id.* at 144–45 (quoting Branzburg v. Hayes, 408 U.S. 665, 705 (1972)).

301. *Id.* at 144.

did not have the intention of disseminating information to the public at the time she gathered them.[302]

In *Shoen v. Shoen*, the Ninth Circuit found *von Bulow* persuasive and extended a qualified First Amendment privilege to a non-fiction writer of investigative books.[303] The court explained that "[t]he journalist's privilege is designed to protect investigative reporting, regardless of the medium used to report the news to the public. Investigative book authors, like more conventional reporters, have historically played a vital role in bringing to light 'newsworthy' facts on topical and controversial matters of great public importance."[304] As examples, the Ninth Circuit cited Lincoln Stefens, Upton Sinclair, Rachel Carson, Ralph Nader, Jessica Mitford, and Bob Woodward.[305] The Ninth Circuit concluded that the Second Circuit had set forth the relevant inquiry: Whether the person seeking to invoke the privilege had the intent at the time of information-gathering to disseminate the information to the public.[306]

The First Circuit also has adopted the *von Bulow* intent test. In *Cusumano v. Microsoft Corp.*, the court held:

> Whether the creator of the materials is a member of the media or of the academy, the courts will make a measure of protection available to him as long as he intended "at the inception of the newsgathering process" to use the fruits of his research "to disseminate information to the public."[307]

The court applied the privilege to professors who had written a book of interest to Microsoft in its litigation against Net-

302. *Id.* at 145–46 ("An individual's 'memories' are not privileged by virtue of the First Amendment merely because, at a later date, those memories are committed to writing."). A district court in New York applied *von Bulow* in holding that a reporter for a law school newspaper was entitled to a qualified privilege even though the reporter was not a professional reporter and was not compensated for his work on the school paper. *See* Blum v. Schlegel, 150 F.R.D. 42, 44–45 (W.D.N.Y. 1993) ("[W]hether a person is a professional journalist is irrelevant. The question is how the person asserting the privilege intended to use the information gathered.").

303. 5 F.3d 1289, 1293 (9th Cir. 1993); *see also* Alexander v. Fed. Bureau of Investigation, 186 F.R.D. 21, 50 (D.D.C. 1998) (applying the *von Bulow* test in holding that George Stephanopoulos was entitled to invoke the reporter's privilege).

304. *Shoen*, 5 F.3d at 1293.

305. *Id.*

306. *Id.* at 1293–94.

307. Cusumano v. Microsoft Corp., 162 F.3d 708, 714 (1st Cir. 1998) (quoting *von Bulow*, 811 F.2d at 144).

scape.[308] The court explained that academic researchers deserve the benefit of the reporter's privilege because "[they] too are information gatherers and disseminators."[309] The court continued, "Just as a journalist, stripped of sources, would write fewer, less incisive articles, an academician, stripped of sources, would be able to provide fewer, less cogent analyses."[310]

The Third Circuit has adopted a modified, more restrictive version of the *von Bulow* test. In *In re Madden*, the court agreed that the *von Bulow* court was correct to require intent to disseminate to the public at the outset of newsgathering so that the test would not "grant status to every person with a manuscript, web page, or a film . . . ."[311] But the Third Circuit went on to add an additional element that was not explicitly required in *von Bulow*: the person claiming the privilege must be involved in "investigative reporting."[312] The Third Circuit's modification of the *von Bulow* test was very likely motivated by the facts of the case before the court. Mark Madden, the individual asserting the privilege, was a commentator for a professional wrestling promoter that produced tape-recorded commentaries replayed to callers on the promoter's 900-number hotline.[313] He admitted that although he received information from confidential sources for his commentary, his announcements "are as much entertainment as journalism."[314] The Third Circuit held that intent to disseminate to the public was an insufficient basis for the privilege, noting that Madden's activities bore little or no resemblance to the investigative reporting that the individuals in the *von Bulow* and *Shoen* cases performed.[315] The court explained that what Madden did "cannot be considered 'reporting,' let alone 'investigative reporting.' By his own admission, he is an entertainer, not a reporter, disseminating

308. *Id.* at 711, 714.

309. *Id.* at 714.

310. *Id.*; *cf.* Wright v. Jeep Corp., 547 F. Supp. 871, 876 (E.D. Mich. 1982) (holding that an academic researcher was not entitled to invoke the privilege because "[t]he court is not persuaded that the possibility of being subpoenaed will sufficiently chill writers and researchers to warrant a specific exemption from the duty to provide evidence").

311. *In re Madden*, 151 F.3d 125, 129 (3d Cir. 1998).

312. *Id.* at 129–30.

313. *Id.* at 126.

314. *Id.*

315. *Id.* at 129–30.

hype, not news."[316] The court added that Madden's only sources were executives of the promotion company, and that Madden "uncovered no story on his own nor did he independently investigate any of the information given to him by WCW executives."[317]

The "intent to disseminate" test is an attractive test in some ways. Its primary appeal lies in its focus on the purpose of the privilege—to provide protection for the unfettered dissemination of information to the public—rather than on any other formulistic hallmarks of who qualifies as a journalist.[318] But one of the weaknesses of the test is that it focuses on the intent of the reporter *at the time the information was received*. Even veteran reporters of the most established newspapers in the country would admit that many of their stories come to them when they are not even looking for them. For example, it is not clear the *von Bulow* test would cover a reporter who has a friendly conversation with an acquaintance and later decides to pursue a story based on what she learned in that conversation.[319] It is also undoubtedly true that reporters often have no idea at the time they are collecting information whether they will in fact share that information with the public.[320] In *Gastman v. North Jersey Newspapers Co.*, for example, a New Jersey court held that the state's uncharacteristically broad shield law protected the confidentiality of the author of an unsolicited letter published by a newspaper, explaining that the statute does not require that "the information obtained by the media must have been actively 'solicited' by a newsperson. The Shield Law accords confidentiality to the 'source' of news, whether or

316. *Id.* at 130.

317. *Id.*

318. *See* von Bulow v. von Bulow, 811 F.2d 136, 142 (2d Cir. 1987).

319. *See* Jeffrey G. Sherman, Comment, *Constitutional Protection for the Newsman's Work Product*, 6 HARV. C.R.-C.L. L. REV. 119, 132 (1970). This work predated the *von Bulow* decision by seventeen years, but its analysis is remarkably prescient on this point.

320. *See id.* ("[A]n ordinary conversation can—after the fact—be transformed into a protected newsman-informant conversation."). It is also not clear whether the *von Bulow* intent test would protect a conversation between a journalist and source who is giving information on "deep background" (in other words, not for public dissemination). During an interview with a deep background source, the journalist does not have the intent to disseminate the contents of that conversation to the public, even if she does have a general intent to disseminate information to the public, or information on the same topic to the public.

not the information was requested or voluntarily given."[321] The *von Bulow* test, clearly intended to screen out opportunistic individuals who "conveniently" characterize themselves as journalists to avail themselves of the privilege, could also have the effect of denying the privilege to even the most established and dedicated full-time journalists.

C. OTHER SUGGESTED APPROACHES

1. Exclude Citizen Journalists

Some have suggested that bloggers and other citizen journalists simply should be excluded from the benefits of a reporter's privilege. In an editorial in the *L.A. Times*, David Shaw argued that "the nation's estimated 8 million bloggers are not entitled to the same constitutional protection as traditional journalists—essentially newspaper, magazine, radio and television reporters and editors."[322] Shaw argued that bloggers have no journalistic training or experience, and instead "[a]ll they need is computer access and the desire to blog."[323] He complained that unlike mainstream journalists, bloggers do not care about being fair or accurate. Instead, Shaw argued, "[t]hey just want to get their opinions—and their 'scoops'—out there as fast as they pop into their brains."[324]

Shaw's suggestion that bloggers should not be permitted to invoke the reporter's privilege has some facial appeal because it allows us to side-step the issue entirely. As explained above, many state statutes explicitly apply only to traditional media entities. Unfortunately, this sort of distinction is clearly outdated.

Shaw's approach reveals a misplaced hostility toward the new citizen journalists. Shaw claimed that bloggers are not entitled to the privilege because they are not trained, they do not work as journalists full-time, and they are not sufficiently dedicated to contributing to the public debate.[325] This criticism rings particularly hollow at a time when the mainstream media

321. Gastman v. N. Jersey Newspapers Co., 603 A.2d 111, 133 (N.J. Super. Ct. App. Div. 1992).

322. David Shaw, *Media Matters: Do Bloggers Deserve Basic Journalistic Protections?*, L.A. TIMES, Mar. 27, 2005, at E14.

323. *Id.*

324. *Id.*

325. *Id.*

organizations have substantially eroded their own credibility with the Jayson Blair, Steven Glass, and Dan Rather scandals, while bloggers have been breaking stories and driving the national conversation. In addition, it fails to recognize that citizen journalists have every incentive to be accurate and dedicated in order to gain credibility with their readers. As is the case with traditional communication media, some enterprises are more successful than others in obtaining the trust and loyalty of their audience.

Online communications are going to gain influence in the future. The number of adults obtaining their news online has been dramatically increasing and shows no signs of stopping as more Americans gain Internet access, especially through high-speed Internet connections. In 2000, eighteen percent of adults received political news online; in 2004, the percentage had climbed to twenty-nine percent.[326] In 2005, seventy-six percent of teens received their news online.[327]

Making distinctions based on the medium of communication also runs into severe equal protection problems that have largely been ignored by the courts[328] and have been mentioned only in passing by commentators. As one rare court to recognize this problem stated,

> [I]t would be difficult to rationalize a rule that would create special constitutional rights for those possessing credentials as news gatherers which would not conflict with the equal-privileges and equal-protection concepts also found in the Constitution. Freedom of the press is a right which belongs to the public; it is not the private preserve of those who possess the implements of publishing.[329]

Some have suggested that the person asserting the right should have to demonstrate some sort of "bona fides," such as membership in a group or organization (whose function is to

326. *See* PEW INTERNET & AM. LIFE PROJECT, THE INTERNET AND CAMPAIGN 2004, at 2 (2005), http://www.pewinternet.org/pdfs/PIP_2004_campaign.pdf ("The online political news consumer population grew dramatically from previous election years (up from 18% of the U.S. population in 2000 to 29% in 2004).").

327. Journalism.org, Project for Excellence in Journalism, *State of the News Media 2006: Audience*, http://www.stateofthenewsmedia.org/2006/narrative_online_audience.asp?cat=3&media=4 (last visited Nov. 30, 2006).

328. *But see* Storer Commc'ns, Inc. v. Giovan (*In re* Grand Jury Proceedings), 810 F.2d 580, 586–88 (6th Cir. 1987) (rejecting an equal protection challenge to the Michigan shield law that applied to print media but not broadcast media and holding that such a distinction was "rational").

329. State v. Buchanan, 436 P.2d 729, 731 (Or. 1967) (footnote omitted).

obtain information for the purpose of public dissemination), or perhaps formal training, experience, or credentials.[330] Although this approach may have some facial appeal as a means of dividing the "real" journalists from the armchair diarists, it is much too close to "licensing" of journalists to pass constitutional muster.

Another way of limiting the privilege might be to require a certain level of circulation or to require any individual claiming the privilege to show that she was paid money for her publication. Although these requirements may also seem like reasonable ways of limiting the privilege, they are also inconsistent with fundamental First Amendment principles. No state currently conditions the privilege on circulation levels, but some used to do so. For example, Indiana's shield law required a reporter to be "connected with a weekly, semiweekly, triweekly, or daily newspaper . . . which shall have been published for five . . . consecutive years in the same city or town and which has a paid circulation of two percent (2%) of the population of the county in which it is published."[331] This circulation requirement meant that only older, established newspapers could receive the privilege, and any publications that published less than once a week were excluded. In 1998, Indiana amended its law to cover all newspapers and periodicals "issued at regular intervals and having a general circulation."[332]

Predicating the privilege on raw circulation numbers cannot be the determining factor; requiring that the content be available to the general public, however, is essential. After all, the purpose of providing a privilege is to preserve more open, free debate. The Federal Election Commission's "press exception" relies on this requirement: in order to qualify for an exemption from campaign finance laws, an entity's materials must be available to the general public.[333]

330. *See, e.g.*, Barry P. MacDonald, *The First Amendment and the Free Flow of Information*, 65 OHIO ST. L.J. 249, 250 (2004) ("Probably the most reliable indicator that a person seeking information was doing so for the purpose of disseminating it to the public would be their membership in a group or organization whose recognized function was to obtain information for the purpose of public dissemination.").

331. IND. CODE ANN. § 2-1733 (LexisNexis 1968) (repealed 1971).

332. IND. CODE ANN. § 34-46-4-1 (LexisNexis 1998).

333. Fed. Election Comm'n, Advisory Op. 2005-16, at 7–8 (Nov. 18, 2005), *available at* http://www.fec.gov/aos/2005/ao2005-16final.pdf (citing Fed. Election Comm'n v. Mass. Citizens for Life, 479 U.S. 238, 251 (1986)); Fed. Elec-

Conditioning the privilege upon proof that the individual earns money from her publications is also unjustified.[334] An essential tenet of the First Amendment is that publications are not entitled to—nor deprived of—First Amendment protection simply because they make—or do not make—money.[335] The more unpopular the speaker, the less likely that speaker is able to make any money, much less a substantial sum of money, from her publications. Many legitimate publications, such as college newspapers and underground publications, often make no money at all, or make money only through advertisements and have reporters and editors who work for free.[336]

One tempting possibility would be to condition the privilege on the record of accuracy that the individual or entity claiming the privilege has demonstrated. But in modern First Amendment jurisprudence, accuracy is relevant only in defamation actions, and even then there is no strict liability for falsehoods. Under *New York Times Co. v. Sullivan*, false defamatory speech about a public official receives some protection under the "actual malice" standard: unless the defendant publishes the alleged defamation with knowledge of its falsity, or with reckless indifference to its truth or falsity, the defamation is not actionable.[337] In granting protection to such speech, the Court noted that "erroneous statement[s are] inevitable in free debate, and that [they] must be protected if the freedoms of expression are to have the 'breathing space' that they 'need to survive.'"[338] The Court quoted its prior decision in *Cantwell v. Connecticut*, in which it protected the right of a Jehovah's Witness to play religious records on a public street, even if some people found the records offensive:

> In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have

tion Comm'n, Advisory Op. 2000-13 (June 23, 2000), *available at* http://ao.nictusa.com/ao/no/200013.html).

334. Sherman, *supra* note 319, at 131.

335. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 761 (1976).

336. The author was a reporter and editor for the *Yale Daily News*, and the only reimbursement she ever received was in the form of free pizza.

337. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

338. *Id.* at 271–72 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).

> ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.[339]

Making the privilege depend upon the publication's reputation for accuracy would be contrary to the fundamental principles set forth in *New York Times v. Sullivan*. An accuracy requirement would be particularly troubling in the context of blogging, where the benefits of the medium do not come from complete accuracy of each posting but rather its interactive nature with readers and critics.

Furthermore, although some have argued that society has more carefully screened other professionals entitled to invoke testimonial privileges, such as attorneys and doctors, there are others—most notably the clergy—whose testimonial privilege invokes constitutional concerns that render government screening virtually impossible.[340] Over the years states have taken a broader view of who constitutes a clergy member and what services constitute spiritual advising; this expansion is partly due to a growing respect for a greater diversity of religions.[341] Accordingly, the mere fact that greater numbers of people are now able to claim the protection of the reporter's privilege should not warrant its demise.

339. *Id.* at 271 (quoting Cantwell v. Connecticut, 310 U.S. 296, 310 (1940)).

340. *See* D'Alemberte, *supra* note 122123, at 325. (noting that government screening for the clergy/penitent privilege would raise "serious constitutional questions").

341. *See* R. Michael Cassidy, *Sharing Sacred Secrets: Is It (Past) Time for a Dangerous Person Exception to the Clergy-Penitent Privilege?*, 44 WM. & MARY L. REV. 1627, 1630–31 (2003). The expansion of the penitent/cleric privilege is also partly due to respect for the Free Exercise and Establishment Clauses of the First Amendment. *Id.* States have a wide variety of definitions concerning who constitutes a cleric for purposes of their statutes. Although some simply privilege confidential communications with priests or members of the clergy without defining those terms, others are based on the bona fides of the minister or the church. *Id.* at 1653–56. Some states require an "established" or "legally recognizable" religion; others protect designated clergy including priests, rabbis, ministers, nuns, and other "similar functionar[ies]." *Id.* at 1654–57. The broadest statutes protect communications with persons "reasonably believed" by the congregant to be religious clerics. *Id.* at 1656. As with the reporter's privilege, states have struggled to limit the cleric/penitent privilege so that cult leaders or self-proclaimed ministers of "sham" religions cannot benefit from it. *Id.* at 1654–58.

2. Limit Privilege to Publications on Matters of Public Concern

Some scholars have suggested that the reporter's privilege should be available only to those who publish information involving matters of public concern, typically of a governmental or political nature.[342] While this approach initially seems appealing, the administrative and theoretical difficulties of such a rule are insurmountable.

Professor Laurence Alexander proposed that the privilege should not be available "to persons who gather information for entertainment or non-dissemination purposes, including hobby, recreation, sport, personal use, promotion or sale of a product or service."[343] Alexander would define "journalist" to include "any person who is engaged in gathering news for public presentation or dissemination by the news media."[344] "News" is defined as "information of public interest or concern relating to local, statewide, national or worldwide issues or events," and "news media" is defined as "newspapers, magazines, television, and radio stations, online news services, or any other regularly published news outlet used for the public dissemination of news."[345] Alexander's suggestion finds its roots in several state statutes that take a similar approach.[346]

Making legal distinctions based on whether the content is a matter of public concern or newsworthy has posed significant

342. *See, e.g.*, Kraig L. Baker, *Are Oliver Stone and Tom Clancy Journalists? Determining Who Has Standing to Claim the Journalist's Privilege*, 69 WASH. L. REV. 739, 750 (1994) (noting that courts seem to require a public interest in the material); MacDonald, *supra* note 330, at 251.

343. Alexander, *supra* note 141, at 130.

344. *Id.*

345. *Id.*

346. FLA. STAT. § 90.5015(1)(a)–(b) (2005) (limiting the privilege to those who are "regularly engaged in collecting, photographing, recording, writing, editing, reporting, or publishing news" and defining "news" as "information of public concern relating to local, statewide, national, or worldwide issues or events"); LA. REV. STAT. ANN. § 45:1459(a) (1999) (defining "news" as "any written, oral, pictorial, photographic, electronic, or other information or communication, whether or not recorded, concerning local, national, or worldwide events or other matters of public concern or public interest or affecting the public welfare"); N.Y. CIV. RIGHTS LAW § 79-h(a)(8) (McKinney 1992) (defining "news" as "written, oral, pictorial, photographic, or electronically recorded information or communication concerning local, national or worldwide events or other matters of public concern or public interest or affecting the public welfare").

difficulties in a number of different areas of media law. In the context of defamation law, the Supreme Court spent over fifteen years attempting to resolve whether it is appropriate to rest the applicability of the actual malice standard on an inquiry into whether the challenged statements involve a matter of public concern. Ultimately, the Court decided that whether the case involved a matter of public concern is an important consideration, at least in cases involving private figures.[347] Throughout the series of cases in which the Court discussed this issue—from the fractured *Rosenbloom v. Metromedia, Inc.*[348] to *Gertz v. Robert Welch, Inc.*[349] and *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*[350]—various Justices expressed concern that such an inquiry would put the Court in the dangerous position of deciding "what information is relevant to self-government,"[351] and would subject "the press to judicial second-guessing of the newsworthiness of each item they print."[352] As Justice Douglas noted in his dissenting opinion in *Gertz*, determining what constitutes a matter of public concern is no easy task. Justice Douglas explained that "'public affairs' includes a great deal more than merely political affairs. Matters of science, economics, business, art, literature, etc., are all matters of interest to the general public. Indeed, any matter of sufficient general interest to prompt media coverage may be said to be a public affair."[353]

The difficulty of determining what constitutes a matter of public concern was apparent in *Dun & Bradstreet*.[354] In that

347. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1985); Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974) (holding that the actual malice standard applied to presumed and punitive damages claims in private figure cases involving matters of public concern).

348. 403 U.S. 29 (1971).

349. 418 U.S. 323.

350. 472 U.S. 749.

351. *Rosenbloom*, 403 U.S. at 79 (Marshall, J., dissenting).

352. *Id.* at 63 (Harlan, J., dissenting).

353. 418 U.S. at 357 n.6 (Douglas, J., dissenting).

354. A majority of the Justices also held that the applicable fault standard did not depend on whether the defendant was part of the institutional press. *Dun & Bradstreet*, 472 U.S. at 773 (White, J., concurring in judgment); *id.* at 781–84 (Brennan, J., dissenting). Although the Court's decision in *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), cast some doubt on this holding by making a distinction between media and nonmedia defendants with respect to the burden of proving truth or falsity, lower courts have consistently applied the actual malice standard without regard to the status of the

particular case, a plurality of the Court held that the defamatory statements at issue, a credit report falsely stating that a business was bankrupt, was not a matter of public concern.[355] Justice Brennan's dissenting opinion, joined by three other members of the Court, expressed dismay with the Court's conclusion that a business's credit report is not a matter of public concern, noting that even if a credit report is not "at 'the essence of self-government,'" economic issues are still important for the public welfare.[356] Justice Brennan also criticized Justice Powell's determination that the report was a not a matter of public concern because it was not widely disseminated.[357] As one scholar has noted, it makes little sense to say that a false report that a company is bankrupt is not a matter of public concern when published to a small percentage of subscribers but that it would be a matter of public concern if published in a newspaper with a broader circulation.[358]

The *Dun & Bradstreet* court failed to give any guidance on how to determine whether a statement is a matter of public concern, and, perhaps as a result, the distinction between matters of public and private concern has not proven particularly useful. Since *Dun & Bradstreet* was decided, very few published statements have been held to be matters of private concern.[359] It would seem unwise to adopt a "public concern" standard in the context of the reporter's privilege as part of an effort to limit the scope of the privilege when that standard has proven to be ineffective in defamation actions.

A newsworthiness standard would prove equally unworkable because it involves essentially the same inquiry as a "public concern" test. A newsworthiness inquiry is common in the

defendant. *See* SACK, *supra* note 223, § 5.3.10.

355. *Dun & Bradstreet*, 472 U.S. at 757–63. Justice Powell's opinion was joined by two other Justices. Chief Justice Burger and Justice White wrote separate concurring opinions in which they both agreed that the credit report was not a matter of public concern. *See id.* at 764 (Burger, J., concurring); *id.* at 774 (White, J., concurring).

356. *Id.* at 794 (Brennan, J., dissenting) (quoting Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964)).

357. *Id.* at 786 n.6.

358. *See* SACK, *supra* note 223, § 1.2.7 & n.125; *see also* Albert v. Loksen, 239 F.3d 256, 269 (2d Cir. 2001) (noting how rare it is for New York courts to determine that something is not a matter of public concern).

359. *See* SACK, *supra* note 223, § 1.2.7 & n.123. Instead, the more important distinction in actual litigation is whether the plaintiff is a public, quasi-public, or private figure.

context of privacy tort actions.[360] As with the public concern inquiry in defamation actions, the newsworthiness inquiry in privacy claims has been equally ineffectual. For example, in one famous California state case, the court held that a woman injured in a car accident had no claim for publication of private facts against the television studio that filmed her rescue. The court explained,

> Automobiles are by their nature of interest to that great portion of the public that travels frequently by automobile. The rescue and medical treatment of accident victims is also of legitimate concern to much of the public, involving as it does a critical service that any member of the public may someday need.[361]

Even under this test, matters of public concern are not limited to publications that involved public affairs; they include "any matter of public concern, including the accomplishments, everyday lives, and romantic involvements of famous people."[362] The category of speech that could be positively excluded from the category of public concern or newsworthy would be so small as to be inconsequential in the effort to reign in the reporter's privilege.

Indeed, in the recent Apple Computer case, a California appellate court rejected any attempts to declare information about new home recording software as not newsworthy.[363] In that case, the court was particularly concerned with attempts to label technological disclosures newsworthy or non-newsworthy, noting that "[i]t is often impossible to predict with confidence which technological changes will affect individual and collective life dramatically, and which will come and go without lasting effects."[364]

3. Various Functional Approaches

Some scholars have advocated more "functional" approaches to the privilege, similar to the *von Bulow* test discussed in Part III.B that several courts of appeals have

360. *See, e.g.*, Shulman v. Group W Prods., Inc., 955 P.2d 469, 478 (Cal. 1998).

361. *Id.* at 488.

362. Michaels v. Internet Entm't Group, Inc., 5 F. Supp. 2d 823, 839 (C.D. Cal. 1998) (discussing the definition of "newsworthy" in the context of privacy tort actions).

363. *See* O'Grady v. Superior Court, 139 Cal. App. 4th 1423, 1478 (Ct. App. 2006).

364. *Id.* at 1479.

adopted. The obvious appeal of these approaches is that they attempt to identify the underlying purpose of the reporter's privilege and avoid limiting the privilege to those who are employed by mainstream media or who publish information on matters of public concern.

Professor Geoffrey Stone has suggested that the identity of a source should be protected "whenever [the source] makes a confidential disclosure to an individual, reasonably believing that that individual regularly disseminates information to the general public, when the source's purpose is to enable that individual to disseminate the information to the general public."[365] This test resembles the approach several states have taken for defining the cleric/penitent privilege by focusing on whether a person is "reasonably believed" by the parishioner to be a religious cleric.[366]

Professor Stone's approach appropriately rejects the need for professional association with a mainstream media organization and instead would extend the privilege to many citizen journalists. The downfall of this approach, however, is its practical application. Such an approach depends entirely on the subjective views of the confidential source, but Professor Stone does not explain how a court would determine the beliefs of a source whose identity is unknown. The journalist would have to identify the source in order for a judge to question the source—presumably in secret in camera proceedings. This practical problem does not exist when trying to determine whether a parishioner "reasonably believed" a person was a religious cleric for purposes of the cleric/penitent privilege. In such a case, only the communications are claimed to be confidential, not the identity of the parishioner.

Other scholars have suggested more workable functional approaches that essentially ask whether the individual claiming the privilege acts like a journalist. The most attractive approach is one suggested by Professor Linda Berger, who has argued that the privilege should be afforded to anyone who is engaged in the "journalistic work process."[367] Berger identifies

365. GEOFFREY R. STONE, THE MERITS OF THE PROPOSED JOURNALIST-SOURCE PRIVILEGE 10 (2005), http://www.acslaw.org/files/2005%20programs_Stone_white%20paper.pdf.

366. *See* Cassidy, *supra* note 341, at 1656 (explaining that Nebraska, North Dakota, Oklahoma, South Dakota, Texas, and Wisconsin define the cleric/penitent privilege in this way).

367. Linda L. Berger, *Shielding the Unmedia: Using the Process of Journal-*

three essential elements of that process: regular and public dissemination; the presence of internal verification measures; and transparency regarding the owner or sponsor of the publication and the editorial standards that are followed.[368] This approach is based on a desire to expand the category of those eligible to invoke the privilege beyond mainstream journalists, while keeping the courts out of difficult and subjective questions such as those discussed above.[369]

Functional approaches like the one Professor Berger has proposed face three criticisms. First, they are based on the assumption that in order to maintain the reporter's privilege, it is necessary to continue to protect only those whose contribution to the public debate resemble those of the "ideal" journalist who is part of traditional, mainstream media. Although it is desirable for all of those who contribute to public debate to have verification procedures, regular dissemination (rather than the haphazard publication of many online contributors), and transparency of ownership, motives, and editorial standards, regrettably even some professional journalists eschew these guidelines. In addition, it is often impossible to know what those editorial standards or biases are. Some mainstream media outlets do not have any published editorial guidelines and depend instead on vague ideas of the appropriate editorial process and on informal training of reporters.[370] Many others who have been held eligible to invoke the privilege—such as book authors, documentary filmmakers, and scholars—do not have editorial guidelines and would be hard-pressed to articulate them if asked to do so. Even more fundamentally, it is not clear whether a court applying a functional test would ask whether the subpoenaed reporter generally follows editorial guidelines, or whether any such guidelines were followed in a particular case.

Second, functional approaches like the one Professor Berger suggests unconstitutionally interfere with the editorial process. The Supreme Court has repeatedly rejected requests to interfere with the editorial control and judgment over the

ism to Protect the Journalist's Privilege in an Infinite Universe of Publication, 39 HOUS. L. REV. 1371, 1411–12 (2003).

368. *Id.*

369. *Id.* at 1406.

370. *See* Randall P. Bezanson & Gilbert Cranberg, *Institutional Reckless Disregard for Truth in Public Defamation Actions Against the Press*, 90 IOWA L. REV. 887, 898–99 (2005).

"choice of material to go into a newspaper . . . [and] the treatment of public issues and public officials—whether fair or unfair."[371] Requiring publishers to have certain procedures in place in order to invoke the reporter's privilege would constitute that very same sort of interference.

The third problem with these functional approaches is that they expand the universe of persons and entities that are entitled to invoke the reporter's privilege without addressing the underlying scope of any such privilege. In order to assess the impact of broadening the category of those entitled to invoke the privilege, one must consider when the privilege is most likely to be invoked and when it is in most direct competition with the public interest.

IV. A NEW COMPREHENSIVE APPROACH

Although throughout the last sixty years legislatures and courts have been expanding the types of media covered by the reporter's privilege to include new technologies such as radio, television, magazines, and films, the development of the Internet requires more than simply adding "electronic communications" to the list of covered forms of communication. The development of the Internet has challenged traditional journalism—for better and for worse—by encouraging and supporting the flourishing of citizen journalism. It is time to rethink the reporter's privilege in light of all of the changes and challenges this new medium brings.

This Article proposes a rather radical approach to the reporter's privilege issue: let everyone who disseminates information to the public have a presumptive qualified right to refuse to testify in any judicial or administrative proceeding concerning the identity of their sources and any other published or unpublished information they have gathered, received, or processed. A qualified privilege can be overcome by showing (1) the desired information is critical to the maintenance of a party's claim, defense, or proof of an issue; (2) the information sought cannot be obtained by alternative means; and (3) there is a compelling interest in the information that outweighs the public's interest in the free flow of information.

371. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974) (holding that a right-of-reply statute unconstitutionally "intrud[es] into the function of editors").

Although this standard would protect confidential and nonconfidential sources as well as published and unpublished information, the public's interest in protecting nonconfidential sources and published information should be given less weight.[372] Forcing the unmasking of a nonconfidential source is less likely to discourage that source from speaking to a journalist in the future; similarly, giving less protection to published information often simply requires the writer to authenticate her publication.

In addition to recognizing a qualified, rather than absolute privilege, to soften the blow of an expansive definition of those persons and entities entitled to invoke it, the privilege should be defeated if a party seeking the information proves that the case falls within one of the following exceptions: (1) the subpoena is directed to someone who witnessed or participated in criminal or tortious activity (excluding the crime of leaks of classified or national security information); (2) compelling testimony is warranted by a direct and imminent threat to national security; (3) the subpoena is directed to a person or entity that is a defendant in a defamation or invasion of privacy action, provided that the plaintiff makes a certain showing of necessity and likelihood of success; or (4) the subpoena is directed at an individual who engaged in publication solely in an effort to avoid a subpoena.

This approach embraces a broad view of the privilege's purpose: to encourage sources to come forward with information for public debate while, at the same time, preventing both professional and nonprofessional journalists from becoming agents of the government, criminal defendants, or civil litigants.

(1) The privilege applies to any individual who disseminates information to the general public

This Article proposes that anyone who disseminates information to the public should be presumptively entitled to the privilege. Because the privilege is intended to protect those who are contributing information to the public debate, those who are not participating in this debate are not entitled to the privilege's protection.

372. This standard is consistent with the approach many states and federal courts have taken. *See supra* Parts II.B–C.

Although this approach would allow a broad category of individuals to assert a privilege, it would by no means permit everyone to claim its protection. The important limitation is that the individual must communicate information "to the public." Admittedly, this limitation is not significant; anyone contributing information to a public chat room, Wikipedia, an online magazine or newspaper, youtube.com, or a blog open to all readers—and intended to be read by the general public—would be entitled to invoke the presumptive privilege.

(2) Special treatment of defamation and invasion of privacy actions where the subpoenaed party is the defendant

This Article proposes that the individuals who disseminate information to the public should have qualified immunity from subpoenas in civil actions. An extra layer of protection should apply in defamation actions where the reporter or citizen journalist (or a media entity) is a defendant.

Many state shield laws either exempt or treat separately defamation actions, and there is good reason for this distinction. Without being able to learn about the newsgathering process or the identity of an unnamed source, a plaintiff may find it impossible to demonstrate the necessary level of fault (typically actual malice or negligence).[373]

That said, an extra level of protection should apply in defamation cases. Allowing plaintiffs to force journalists to reveal their sources based on a mere allegation of defamation would unduly chill publication. It is very easy for a plaintiff to allege a claim for defamation; however, given all the constitutional and common law protections free speech enjoys, it is much harder for a plaintiff to survive a motion to dismiss or a motion for summary judgment. If the courts apply a low standard for obtaining the identity of an anonymous source, a plaintiff who would have difficulty proving the elements of his or her case would still be in a position to obtain some form of relief by unmasking the source and engaging in various forms of extra-judicial retribution. Furthermore, defamation cases are very often dismissed based on the application of various privilege doctrines (such as the fair report privilege) or the truth of

373. *See, e.g.*, Price v. Time, Inc., 416 F.3d 1327, 1343–45 (11th Cir. 2005) (discussing how the balance shifts towards disclosure in defamation cases against parties claiming privilege).

the published statements, neither of which require the court to determine whether the publisher acted with the requisite fault.

Many states concerned about these issues require a journalist (or publisher) to reveal the identity of a source for an allegedly defamatory article only if: (1) the case has survived a motion to dismiss (or the state procedural equivalent); (2) the requested information goes to the heart of the litigant's case; and (3) the litigant has exhausted all other means of obtaining the information.[374] This approach adequately protects a plaintiff's right to receive information essential to her case while protecting journalists from frivolous litigation brought solely to uncover their sources.

(3) Witness to or participant in a crime

Under this exception, journalists who are witnesses to or participate in criminal or tortious activity are ineligible to invoke the privilege.[375] Many courts have held that a reporter's privilege does not protect a reporter who observes or participates in criminal or tortious conduct, or that even if a privilege does apply, the public's interests in the testimony outweigh the reporter's interest in the privilege.[376] Thus, under this exception, reporter Paul Branzburg (from the eponymous case[377]), who interviewed and took pictures of individuals using drugs, would not be eligible to invoke the reporter's privilege when subpoenaed to testify in any proceeding about what he had seen. This exception would also apply in cases involving a subpoenaed party who witnessed a crime or tortious activity, and to people who are engaged in criminal activity themselves.[378] This exception would do no damage to the underlying purpose of the privilege because there is no value in encouraging sources to commit crimes in front of journalists.

The crime exception should not apply, however, to individuals who witness the "crime" of leaking classified or national

374. *See supra* note 172.

375. *See supra* notes 186, 197 and accompanying text; *see also* Eugene Volokh, *You Can Blog, but You Can't Hide*, N.Y. TIMES, Dec. 2, 2004, at A39 (suggesting a crime/fraud exception to the privilege).

376. *See supra* Part II.B.2.

377. Branzburg v. Hayes, 408 U.S. 665 (1972).

378. *See, e.g.*, Daniel Henninger, *When Blogs Rule We Will All Talk Like - - - -*, WALL ST. J., Apr. 21, 2006, at A14 (noting that Oklahoma cannibal Kevin Ray Underwood kept a blog detailing his compulsions before killing a ten-year-old neighbor).

security information.[379] As discussed in Part II.A.2, leaks of government information, whether classified or not, have become an essential means by which the public learns about government activities. Currently, protections for whistleblowers are inadequate, and as a result, leaking information to the press is often the only realistic means of shedding light on questionable or illegal government practices. Although not all leaks serve the public interest, many leaks do. Protecting the identity of the small minority who leak information that does not serve the public interest is a minor price to pay to encourage the majority of government whistleblowers to come forward, especially when so often the information is improperly classified in the first place.

In any event, the government does not necessarily need to abolish the reporter's privilege to retain the ability to prevent leaks and to prosecute past or present government employees who leak national security or other classified information. The government can hardly blame the reporter's privilege for the leaks concerning its secret actions. It is only recently that the federal government has begun subpoenaing reporters in leak investigations, and there is no credible evidence that the reporter's privilege has undermined national security in any significant way. If the leaks have been increasing in the last few years, it is more likely due to the fact that this administration has been engaging in questionable practices and because it has not tolerated criticism of those practices through official government channels. Restricting the government's ability to subpoena journalists simply forces the prosecutors to work a bit harder to identify the leakers.

(4) Exception for direct and imminent threat to national security or the reasonably certain death or substantial bodily harm of another human being

In congressional hearings on proposed federal shield laws, some legislators and government officials have expressed concern that a federal shield law would undermine national secu-

379. This limitation is the major difference between the crime/fraud exception this Article proposes and the one Eugene Volokh suggested in his editorial *You Can Blog, but You Can't Hide*. *Supra* note 375. Professor Volokh did not grapple with the problem of excessive government secrecy and inadequate protection for national security whistleblowers; instead, he merely suggested that Congress could pass laws to protect those who "lawfully reveal information." *Id.*

rity.[380] As discussed above, such concerns are largely misplaced. To the extent, however, that a reporter's testimony would help prevent a direct and imminent threat to national security or the threat of reasonably certain death or serious bodily harm to another human being, the privilege should give way. The first prong of this exception for imminent threat to national security is in keeping with the exception to the prior restraint doctrine articulated in the *Pentagon Papers* case, *New York Times v. United States*.[381] Although the *Pentagon Papers* decision is marked by several separate opinions, the conclusion of a majority of the Justices was that a presumption against prior restraints could not be overridden absent an immediate and serious threat to national security.[382] The same standard should apply to this exception, especially given the government's propensity to exaggerate or manufacture a threat to national security. In the context of the reporter's privilege, this exception might come into play if a reporter has knowledge of the location and timing of a ticking bomb.[383]

An exception for preventing death or serious bodily harm to another human being applies to other testimonial privileges, including the attorney/client privilege.[384] It is sensible to ex-

380. *See Reporters' Privilege Legislation: Preserving Effective Federal Law Enforcement: Hearing on S. 2831 Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Paul McNaulty, United States Attorney for the Eastern District of Virginia).

381. 403 U.S. 713, 714 (1971) (per curiam).

382. *See id.* at 714 (holding that the government did not meet its "heavy burden" of showing that enjoining publication was justified); *id.* at 714–18 (Black J., concurring) (opining that prior restraints are never justified); *id.* at 726–27 (Brennan, J., concurring) ("[O]nly governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order."); *id.* at 730 (Stewart J., concurring) (concluding that the government had failed to show that publication of the Pentagon Papers would lead to "direct, immediate, and irreparable damage to the Nation or its people").

383. In reality, it is hard to imagine that a reporter would not reveal the location of a ticking time bomb, but this is the sort of scenario presented by those opposing a federal shield law.

384. CAL. EVID. CODE § 956.5 (West 1995) (permitting lawyers to make disclosures to prevent criminal acts that may result in death or bodily harm); MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2006) ("A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: (1) to prevent reasonably certain death or substantial bodily harm."). This exception often overlaps with the crime/fraud ex-

tend this exception to the reporter's privilege because in such cases the public's interest in the information far outweighs the public's interest in encouraging anonymous sources from coming forward.

(5) No privilege for persons who publish information for the purpose of avoiding a subpoena

One of the biggest red herrings raised by those concerned about "pajama-clad bloggers" is that people who are subpoenaed—or who think they will be subpoenaed—will simply create a blog in order to invoke the reporter's privilege. The first response to this claim is to note how misleading it is. As discussed above, witnesses to or participants in criminal or tortious activity—the people most likely to create a "sham" website to avoid testifying—would not be able to avoid testifying by creating a blog or by talking to another blogger or citizen journalist.

To the extent that expanding the reporter's privilege to include anyone who disseminates information to the public might lead to abuse of the privilege, states and courts should simply recognize an exception to the privilege that would take care of this situation. Anyone who suddenly publishes information on the Internet for the first time soon before or after receiving a subpoena and who cannot convince a court that he or she would have published the information absent a subpoena threat would be subject to this exception.

CONCLUSION

The reporter's privilege developed during the last century in attempts to preserve the free-flow of information to the public. With the evolution of the Internet and other technologies, the universe of people who can contribute information to the public debate has greatly expanded. The line between traditional media and citizen journalists continues to blur as both take advantage of all the possibilities the Internet has to offer. Americans increasingly obtain their information and insights into important issues through the Internet and through bloggers in particular, pajama-clad or otherwise. To continue to limit the reporter's privilege to traditional media outlets and

ception, at least when the future crime or fraud at issue threatens to cause death or substantial bodily harm.

professional journalists would unrealistically ignore how the public obtains its information today.

This Article suggests that any articulation of the reporter's privilege must account for this changing nature of journalism. Given that the institutional press no longer has a monopoly over the dissemination of information to the public, all those who disseminate information to the public must be presumptively entitled to invoke the privilege's protections. In turn, the privilege itself must adapt so as to lessen the dangers posed by an expansive definition of who is considered a journalist. By providing only a qualified privilege, any privilege claim can be overcome if a sufficient showing is made. At the same time, the existence of the privilege will deter prosecutors, defendants, and litigants from subpoenaing those contributing to the public debate unless it is necessary to do so. Remaining concerns that an expansive category of citizen journalists would wreak havoc on our judicial system can be alleviated through recognizing limited exceptions to a qualified privilege. Such an approach appropriately reconciles our society's fundamental interest in vigorous, informed public debate with our equally fundamental interests in fairness and justice.